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February 22, 2005 – *VIA ELECTRONIC MAIL*

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. 041170-TP
Complaint Against Verizon Florida Inc. and Request for Declaratory Ruling
By Bright House Networks Information Services, LLC (Florida)

Dear Ms. Bayó:

Enclosed is Verizon Florida Inc.'s Initial Brief In Support of Abeyance for filing in the above matter. 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,

/s Richard A. Chapkis

Richard A. Chapkis

RAC:tas
Enclosures

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Initial Brief In Support of Abeyance in Docket No. 041170-TP were sent via electronic mail and/or U.S. mail on February 22, 2005 to the parties on the attached list.

/s Richard A. Chapkis

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| In re: Complaint against Verizon Florida Inc. and request for declaratory ruling by Bright House Networks Information Services, LLC (Florida) | ) ) ) ) ) | Docket No. 041170-TP<br>Filed: February 22, 2005 |

# VERIZON FLORIDA INC.'S INITIAL BRIEF IN SUPPORT OF ABEYANCE

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This proceeding should be held in abeyance until the FCC determines whether states have the authority to require LECs to provide DSL service where they are not the voice provider on a line. Bright House claims that Verizon Florida Inc. – and its affiliate, Verizon Internet Services Inc. – should be required to keep DSL service on customer lines when they switch voice providers. *See* Compl. ¶ 2. Bright House "seeks an order directing Verizon to immediately cease its practice," of requiring customers to disconnect DSL before changing to a third party voice provider, *id.* ¶ 5, and asks the Commission to require Verizon immediately to port numbers to Bright House, even though that may harm third-party data and Internet access providers and cause end-users to lose Internet access without notice, *see id.* ¶¶ 5-6.

A threshold question in this case is whether this Commission has authority to do what Bright House is asking – *i.e.*, to establish the terms and conditions under which Verizon or its affiliate provides DSL-based services. That question is currently pending before the FCC in a matter that is fully briefed and awaiting decision.[1] Because the FCC's decision could well be dispositive of this issue, federal courts reviewing analogous matters have held proceedings in abeyance pending the FCC's determination.[2]

This Commission should do likewise. At a minimum, it should hold this proceeding in abeyance for at least a short period (say, 90 days) to obtain guidance from the FCC. That course of action is likely to avoid the needless expenditure of resources that proceeding in this matter will place on the Commission and the parties – a burden that includes the resource-intensive process of investigating and ruling on Bright House's factual allegations.

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[1] *See* Emergency Request for Declaratory Ruling, *Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth To Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, WC Docket No. 03-251 (FCC filed Dec. 9, 2003).

[2] *See* Order Staying Proceedings and Requiring Status Reports, *BellSouth Telecomms., Inc. v. Florida Digital Network, Inc.*, No. 4:03cv212 (N.D. Fla. Feb. 24, 2004); Order Granting Motion To Stay, *BellSouth Telecomms., Inc. v. Supra Telecomm. and Info. Sys., Inc.*, No. 4:02cv325 (N.D. Fla. Mar. 16, 2004); Letter Order, *BellSouth Telecomms., Inc. v. Cinergy*, No. 04-5128 (6th Cir. Mar. 1, 2004); Order, *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs. LLC*, No. 1:03-CV-3946 (N.D. Ga. Mar. 8, 2004); Ruling on Motion for Stay, *BellSouth Telecomms., Inc. v. Louisiana Pub. Servs. Comm'n*, No. 03-CV-372 (M.D. La. Apr. 6, 2004).

Abeyance is particularly appropriate here for three reasons.

*First*, prior to and since Bright House filed this complaint, Verizon had been working toward implementing the functionalities necessary to provide DSL-based Internet access without voice service, and *it will continue to do so if the Commission grants an abeyance*. As Verizon Executive Vice President Tom Tauke announced publicly just weeks ago, Verizon expects "'that in the not-too-distant future that you will be able to get Verizon DSL without getting Verizon phone service.'"[3] The concern now, as Mr. Tauke explains, is addressing all the requirements of such a service configuration: "'It's a technological issue, it's not a marketing issue.'"[4]

The technical and administrative requirements of such a service configuration are significant, largely because there are a number of different potential service configurations and interested parties, including independent data providers that may be providing service on a Verizon line through line-sharing arrangements and independent ISPs that may be using Verizon's federally tariffed DSL transmission service. To resolve the various permutations of these issues, Verizon is consulting with, and obtaining input from, interested parties through its CLEC User Forum, which has held monthly meetings on these issues. Thus, wholly independent of this litigation, there is an existing forum in which Bright House could voice its views on how these matters should be handled. To date, however, Bright House has declined to do so.

*Second*, under its current policy, Verizon does not refuse to port any number and will work with Bright House to address any atypical delays. Verizon merely seeks to ensure that the end-user customer (wholesale or retail) understands that the DSL service will be terminated with the port. Once the customer has been informed of that fact and the DSL service has been disconnected, Verizon promptly ports the number. To the extent Bright House is concerned that

[3] *Verizon Plans DSL Broadband Stand-Alone Offering*, Reuters (quoting Tom Tauke, Verizon Exec. VP for Public Affairs and Communications), *at* http://www.reuters.com/financeQuoteCompanyNewsArticle.jhtml?duid=MTFH96657_2005-02-05_02-08-23_N04168950_NEWSML (Feb. 4, 2005).

[4] *Id.* (quoting Tom Tauke).

there may be atypical instances where it experiences delays, Verizon stands ready to work with Bright House through ordinary business channels to resolve any specific difficulty. Moreover, were Verizon to attempt to implement what Bright House is proposing before its systems and processes are developed and tested, customers could inadvertently lose their DSL service by porting their number or, if they don't, the underlying data provider could inadvertently be subject to higher rates associated with using a stand-alone rather than shared loop for DSL.

*Third*, there is substantial reason to believe that the FCC will agree with Verizon and BellSouth that state commissions do not have jurisdiction to determine when and on what terms and conditions ILECs and their affiliates must offer DSL-based special access. BellSouth's petition, which Verizon supports, makes two arguments of relevance here: (a) the FCC has exclusive authority to regulate interstate special-access services such as DSL transmission, and (b) the FCC has preempted state commissions from applying public-utility or common-carrier regulation to information services, including DSL-based Internet access. Both arguments are strongly grounded in settled law.

First, consistent case law establishes that state commissions cannot regulate interstate special access services offered under a federal tariff because allowing states to exercise authority would undermine the uniformity that a federal tariff is intended to create. "The published tariff rate will not be uniform if the service for which a given rate is charged varies from state to state according to differing state requirements."[5] Accordingly, in this context, "[f]ederal law does not merely create a right; it occupies the whole field, displacing state law."[6]

This analysis applies directly here because the FCC held in its *GTE Tariff Order* that DSL transmission, when used for Internet access, is a form of *interstate* special access service

[5] *Ivy Broad. Co. v. AT&T*, 391 F.2d 486, 491 (2d Cir. 1968).

[6] *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-89 (7th Cir. 1998); *see AT&T v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) (filed tariff determines terms and conditions as well as rates, and neither may be altered by state law).

subject to federal tariffing and "federal regulation."[7] The Communications Act grants the FCC exclusive authority over such services, and state commissions have no authority here.[8] Indeed, in its recent *Vonage* decision,[9] the FCC used the *GTE Tariff Order* as a primary example demonstrating that it often has "*exclusive* jurisdiction" despite "the fact that a particular service enables communication within a state does not necessarily subject it to state economic regulation." *Vonage* ¶ 22 & n.85 (emphasis added). Just as clearly, the FCC reiterated in its recent *Order on Remand*[10] in the *Triennial Review* docket that if a service is provided under a federal tariff, that means that the "states have no jurisdiction." *Order on Remand* ¶ 53.

Any Commission assertion of authority here would be particularly offensive to exclusive federal authority because Verizon's federally filed tariff provides that Verizon will offer DSL service only so long as Verizon provides the underlying dial tone for voice service. *See* FCC Tariff No. 20, Part III, § 5.1.2(F) ("Verizon Infospeed DSL Solutions will be provided subject to the availability and limitations of Company facilities, including the availability of line sharing."). Any attempt to change that tariff should be raised at the FCC, not before this Commission.

As Bright House notes, *see* Compl. ¶ 9, this Commission has sought to avoid this issue in the past by claiming that it is not regulating DSL transmission, but rather local voice service. That argument ignores the substance of what the Commission would be doing – telling Verizon to whom it must provide DSL service (voice customers of Bright House) and in what circumstances (whether or not Verizon offers them voice service). As a federal court of appeals has held in a directly analogous context, prescribing to whom a party must offer service plainly

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[7] Memorandum Opinion and Order, *GTE Telephone Operating Cos.*, 13 FCC Rcd 22466, 22480, ¶ 25 (1998).

[8] *See Petitions of MCI Telecomms. & GTE Sprint*, 1 FCC Rcd 270, 275, ¶ 23 (1986) (noting the FCC's "exclusive jurisdiction over interstate communications"); *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) (state regulation of issuance of securities by natural gas companies "is a regulation of the rates and facilities . . . used in transportation and sale for resale of natural gas in interstate commerce" and therefore preempted).

[9] Memorandum Opinion and Order, *Vonage Holdings Corp. Petition*, 19 FCC Rcd 22404 (2004).

[10] Order on Remand, *Unbundled Access to Network Elements*, WC Docket No. 04-313, 2005 WL 289015, ¶ 53 (FCC rel. Feb. 4, 2005).

constitutes regulation of the relevant service (here, Verizon's DSL service), regardless of the Commission's choice of terminology or its motivation.[11]

The BellSouth Petition also establishes that this Commission cannot grant the relief that Bright House seeks as to Verizon's "DSL/Internet access service," Compl. ¶ 1, because Internet access service is an information service that, as a matter of federal law, must remain unregulated. Indeed, in *FDN*, this Commission expressly "*agree[d]*" with BellSouth that Internet access is an "enhanced, *nonregulated*, nontelecommunications Internet access service."[12] The Commission thus tried to justify its decision on the ground that it was *not* in fact regulating FastAccess. As discussed above, however, any attempt to tell Verizon to whom it must provide Internet access is *necessarily* a regulation of that information service – regardless of how the Commission attempts to characterize that decision.

In sum, this Commission should not address the Bright House complaint until the FCC resolves closely related issues regarding state commission jurisdiction to regulate DSL-based Internet access services such as those at issue here.

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[11] *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 421-22 (5th Cir. 1999) (preventing the disconnection of service was necessarily a "regulation," because it dictates the circumstances under which the service must be maintained).

[12] Final Order on Arbitration, *Petition by Florida Digital Network Inc. for Arbitration*, No. 010098-TP, at 8 & n.3 (Fla. P.S.C. June 5, 2002) (emphases added; internal quotation marks omitted).