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Sent: Thursday, March 13, 2008 1:43 PM
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Cc: Adam Teitzman; Beth Keating; Beth Salak; chrissavage@dwt.com; David Christian; de.oroark@verizon.com; demetria.g.clark@verizon.com
Subject: Docket No. 080110-TP - Verizon Florida LLC's Motion to Dismiss Complaint
Attachments: 080110 VZ FL Motion to dismiss 3-13-08.pdf



The attached filing is submitted in Docket No. 080110-TP on behalf of Verizon Florida LLC by

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The attached document consists of a total of 7 pages (cover letter-1 page, Motion to Dismiss-5 pages, and Certificate of Service-1 page).

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March 13, 2008 – **VIA ELECTRONIC MAIL**

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 080110-TP
Complaint and petition for resolution of interconnection pricing dispute against
Verizon Florida LLC by Bright House Networks Information Services, LLC

Dear Ms. Cole:

Enclosed for filing in the above-referenced matter is Verizon Florida LLC's Motion to Dismiss Complaint. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at (678) 259-1449.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

tas

Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and petition for resolution) Docket No. 080110-TP
of interconnection pricing dispute against) Filed: March 13, 2008
Verizon Florida LLC by Bright House Networks)
Information Services, LLC)
-----)

VERIZON'S MOTION TO DISMISS COMPLAINT

Verizon Florida LLC ("Verizon") moves to dismiss the Complaint and Petition for Resolution of Interconnection Pricing Dispute ("Complaint") filed by Bright House Networks Information Services (Florida), LLC ("Bright House") because it fails to state a claim for which relief can be granted. The Complaint acknowledges the terms in the parties' approved interconnection agreement ("Agreement") that require disputes arising under the Agreement to be resolved in the first instance through negotiation and commercial arbitration, not by this Commission. The Commission has repeatedly held that such provisions will be honored and has dismissed several complaints on that ground. Bright House's Complaint must be dismissed for the same reason.

I. BRIGHT HOUSE'S ALLEGATIONS

The parties' dispute arises from Bright House's failure to pay amounts invoiced by Verizon for the processing of directory listing orders submitted by Bright House for the end user customers of its unregulated affiliate, Bright House Networks, LLC. Bright House alleges that the Agreement requires Verizon to process Bright House's orders for free and that Bright House need not pay the invoiced amounts for those services.¹ Alternatively, Bright House claims that the Agreement entitles it to pay something less than the amounts that have been invoiced.² Bright House further asserts that the Commission should disregard the Agreement's alternative dispute resolution provisions

¹ Complaint ¶¶ 3.

² *Id.* ¶ 5.

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and “simply take direct jurisdiction of this matter and decide this case.”³ Verizon disagrees with Bright House’s interpretation of the pricing provisions of the Agreement and seeks payment of its past-due invoices. Moreover, and more importantly for purposes of this motion, Verizon does not agree that the Commission may or should ignore the alternative dispute process to which the parties agreed.

The Agreement calls for commercial arbitration of disputes in no uncertain terms. The Agreement provides that except for disputes concerning connectivity billing and temporary equitable remedies (neither of which are at issue here), “[a]ll Disputes arising under this Agreement or the breach hereof . . . shall be resolved according to the procedures set forth in Attachment 1,”⁴ entitled “ALTERNATIVE DISPUTE RESOLUTION.” In Attachment 1, the parties agreed that the alternative dispute resolution process would be their exclusive remedy in cases like this one. The key provision 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 Attachment.⁵

The agreed-upon alternative dispute resolution process includes pre-arbitration negotiation, AAA commercial arbitration and the opportunity to appeal the arbitrator’s decision to the Commission, the FCC or state or federal court, as appropriate.⁶ Bright House does not allege that it has complied with this process or that any provision of the

³ *Id.* ¶ 11.

⁴ *Id.*, Exhibit 1, pp. 13-14.

⁵ *Id.*, Exhibit 1, Attachment 1, p. 1.

⁶ *Id.*, Exhibit 1, Attachment 1, pp. 2-6.

Agreement excuses its noncompliance. Indeed, by filing its Complaint with the Commission, Bright House has breached its agreement “not to resort to any . . . agency with respect to” disputes such as this one.

II. THE COMPLAINT FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED

The Commission consistently has held that it will honor commercial arbitration clauses in interconnection agreements. In a case involving a complaint by BellSouth against Supra, for example, where disputes arose under two agreements – one with and the other without an arbitration clause – the Commission found “that the dispute resolution provisions in each of the agreements should be strictly followed” and dismissed the portion of the complaint arising under the agreement with the arbitration clause.⁷ Likewise, the Commission dismissed a complaint by XO Florida against Verizon because the parties’ interconnection agreement had a commercial arbitration clause. The Commission stated it was “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.”⁸ The Commission reached the same conclusion in a case involving a complaint by Intermedia against Verizon’s predecessor, 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.”⁹

⁷ *In re: Request for arbitration concerning complaint of BellSouth Telecommunications, 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).

⁸ *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).

⁹ *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).

The Commission's decisions upholding parties' agreements to resolve disputes through commercial arbitration are plainly correct as a matter of federal and state law. The Federal Arbitration Act requires that commercial arbitration clauses be honored¹⁰ and "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution."¹¹ Likewise, under the Florida Arbitration Code, arbitration clauses "shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy."¹² In applying these statutes, federal and state courts have not hesitated to require commercial arbitration when called for by the parties' contract.¹³

Bright House seeks to avoid commercial arbitration by offering several weak arguments. First, it contends that the dispute concerns "competitive fairness" and is therefore "appropriately subject to this Commission's direct jurisdiction."¹⁴ Bright House points to no "competitive fairness" exception in the Agreement or in the law and Verizon is aware of none. Even if there were such a loophole, moreover, this case would not qualify because despite Bright House's dramatic characterization, this case involves a garden-variety commercial dispute concerning the interpretation of a contract as it relates to the price of a service. Commercial arbitration is not only required, but entirely appropriate here. Second, Bright House asserts that if it is necessary to establish a rate for the processing of directory listing service orders, an arbitrator would not have legal

¹⁰ Federal Arbitration Act, 9 U.S.C. §§ 1-14.

¹¹ *Preston v. Ferrer*, 2008 U.S. Lexis 2011 (Feb. 20, 2008).

¹² Fla. Stat. § 682.02.

¹³ See *Preston v. Ferrer*, *supra* note 11; *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *Old Dominion Insurance Co. v. Dependable Reinsurance*, 472 So. 2d 1365 (Fla. 1st DCA 1985); *Zac Smith & Co. v. Moonspinner Condominium Association, Inc.*, 472 So. 2d 1324 (Fla. 1st DCA 1985); *Physicians Weight Loss Centers of America, Inc. v. Payne*, 461 So. 2d 977 (Fla. 1st DCA 1984); *Miller Construction Co. v. The American Insurance Co.*, 396 So. 2d 281 (Fla. 1st DCA 1981).

¹⁴ Complaint ¶ 10.

authority to establish such a rate.¹⁵ Bright House is mistaken: the Agreement itself provides the legal authority to the arbitrator. Just because an issue ordinarily would be resolved by a state agency does not vitiate an arbitrator's authority to address that issue if the parties have agreed to resolve it through arbitration.¹⁶ In any event, Bright House may appeal the arbitrator's decision to the Commission, and if it does so the arbitrator's decision would not be final if the Commission agrees to hear the case.¹⁷ Third, Bright House states that "without question" if an arbitrator were to rule that it must pay Verizon something for processing its directory listings orders, it would appeal the decision to the Commission.¹⁸ Whatever this statement may say about Bright House's willingness to engage in constructive dispute resolution, it does not change the bargain it has struck. Bright House should be required to honor that bargain.

For the foregoing reasons, Verizon respectfully requests that the Complaint be dismissed.

Respectfully submitted on March 13, 2008.

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¹⁵ *Id.*

¹⁶ *See Preston v. Ferrer, supra* note 11.

¹⁷ Complaint, Exhibit 1, Attachment 1, p. 5.

¹⁸ *Id.* ¶ 11.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail and U. S. mail on March 13, 2008 to:

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