Diamond Williams 090501-TP

From: beth.keating@akerman.com
Sent: Friday, July 09, 2010 4:21 PM
To: Filings@psc.state.fl.us
Subject: Docket NO. 090501-TP
Attachments: 20100709161724530.pdf; Bright House Initial Post-Hearing Brief and Positions (TL242535).DOC

Attached for electronic filing in the referenced docket, please find Bright House Networks Information Services (Florida), LLC's Initial Brief and Post-Hearing Statements of Positions. A copy of the filing in Word format is also included. Please don't hesitate to let me know if you have any questions.

Sincerely,
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B. 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.

C. On behalf of Bright House Networks Information Services (Florida), LLC

D. Number of Pages: Word file: 51
PDF file: 52 (includes cover letter)

E: BHNIS's Initial Brief and Post-Hearing Statement of Positions

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July 9, 2010

VIA ELECTRONIC FILING

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

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:

Attached for electronic filing, please find Bright House Networks Information Services (Florida), LLC's Post Hearing Brief and Post-Hearing Statements of Position. Included with this filing is a copy of the Brief in Word format. If you have any questions whatsoever, please do not hesitate to contact me.

Thank you for your assistance with this filing.

Sincerely,

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Enclosures
cc: Parties of Record
Staff Counsel

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Arbitration of Terms and Conditions of An Interconnection Agreement with Verizon Florida, LLC by Bright House Networks Information Services (Florida), LLC	**Docket No. 090501-TP** Filed: July 9, 2010

BRIGHT HOUSE'S INITIAL POST-HEARING BRIEF AND POST-HEARING STATEMENTS OF POSITION

I. INTRODUCTION AND SUMMARY.

Bright House Networks Information Services (Florida) LLC ("Bright House") is a competitive local exchange carrier ("CLEC"). We provide wholesale telephone exchange service to our cable affiliate in support of its retail Voice-over-Internet-Protocol ("VoIP") operations.[1] We also provide exchange access service to long distance carriers who send long distance calls to, and receive such calls from, those end users.[2] In addition, we provide a variety of ancillary services and functions such as local number portability and local call termination.

Bright House is growing rapidly, and presently provides network connectivity (indirectly) to hundreds of thousands of end users in the Tampa/St. Petersburg area, where we compete with Verizon Florida, LLC ("Verizon"), the incumbent local exchange carrier ("ILEC"). While Verizon is much larger than we are in the Tampa area, we believe that the level of success we have achieved thus far is attributable to the technologically advanced retail services our cable affiliate provides (with our support in the background), combined with our (and our affiliate's) consistent focus on providing high-quality, reliable service to end users.[3]

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1 Transcript of Proceedings at page 85, line 15, through page 85, line 19 (Gates Direct). (Citations to the transcript will be presented as: Tr. 85:15-19). *See also* Tr. 88:10-12 (Gates Direct).

2 *See, e.g.,* Gates Deposition Transcript at 64:6-13; 106:21-108:3 (Exhibit 9, included in Transcript, Volume 4). ("Deposition Transcript" will be abbreviated as "Depo. Tr." in this brief.)

3 *See* Tr. 361:19-366:3 (Johnson Direct).

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In order for Bright House end users to call Verizon's customers and vice versa, we have to physically connect our network with Verizon's. In addition, while we have direct connections to many long distance carriers, we do not have direct connections to all of them.[4] Calls coming in from the long distance carriers with which we lack direct connections still have to reach our customers, and our customers have to reach those same long distance carriers for certain outbound calls.[5] As a result, in addition to connecting with Verizon to send local traffic back and forth, we also connect with Verizon to handle this "exchange access" traffic.

Sections 251 and 252 of the Communications Act establish the legal framework governing these matters.[6] Those provisions, along with associated court and Federal Communications Commission ("FCC") rulings, control the physical interconnection arrangements for traffic exchange; the prices for those physical arrangements; and the prices for carrying traffic the parties exchange. The key requirements are summarized below.

Technically feasible physical interconnection. Verizon must interconnect with Bright House for "the transmission and routing" of "telephone exchange service" (local traffic) and "exchange access" traffic (originating or terminating third party toll calls).[7] Verizon must interconnect for these purposes "at any technically feasible point" on Verizon's network, using any technically feasible method of interconnection Bright House requests.[8] Finally, the "terms and conditions" of interconnection must be "just, reasonable, and non-discriminatory."[9] This

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[4] *See* Johnson Depo. Tr. at 27:4-6 (Exhibit 10, included in Transcript, Volume 4).

[5] *Id.* at 24:17-22.

[6] 47 U.S.C. §§ 251, 252. The Commission is expected, and expressly authorized, to implement the requirements of state law as well. *See, e.g.,* 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(b), and 261(c).

[7] 47 U.S.C. § 251(c)(2).

[8] 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.321(a). (Verizon must provide "any technically feasible method of obtaining interconnection ... at a particular point").

[9] 47 U.S.C. § 251(c)(2)(D).

latter standard empowers the Commission to set fair and sensible contract terms on a case-by-case basis even where no rule or previous case specifically addresses the situation at hand.

TELRIC pricing for interconnection arrangements. Verizon may charge for the physical arrangements needed to meet Bright House's interconnection requests, but those charges are strictly limited by the "TELRIC" standard.[10] Under TELRIC, Verizon may charge what it costs to provide the requested arrangements using the most efficient currently available technology. If Verizon actually is efficient (that is, if it uses the most efficient current technology), then the TELRIC rates will cover its costs. But if not (for example, if it uses older equipment), Verizon cannot charge higher prices based on its less efficient technology. This is true even if the higher prices are included in Verizon's tariffs, and even if those prices were set using the more lenient "just and reasonable" standard that applies to tariffed rates.

TELRIC – or lower – prices for all non-access traffic. Different prices apply to different types of traffic the parties may exchange. For exchange access traffic – that is, traffic going to or from long distance carriers – Bright House and Verizon don't charge each other anything; they charge the long distance carrier for the functions each performs.[11] For toll calls one carrier makes to the other's end users, the originating carrier pays the terminating carrier's intrastate access rates.[12] For all other calls, a TELRIC-based rate applies – unless the parties

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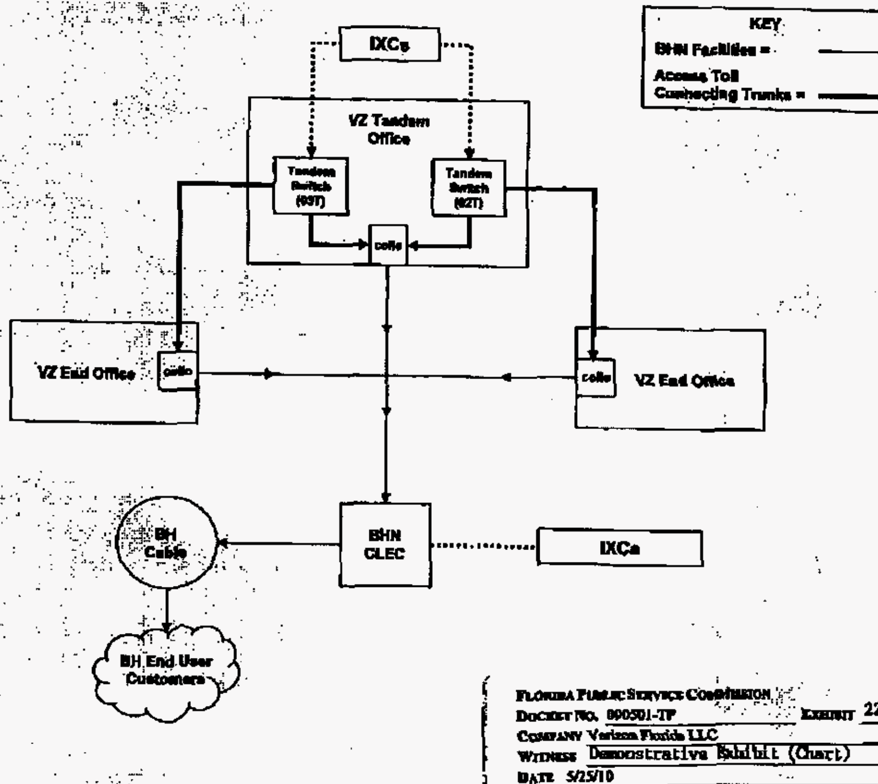
[10] 47 C.F.R. § 51.501(b) *et seq.*. TELRIC stands for "Total Element Long Run Incremental Cost," and is based on 47 U.S.C. § 252(d)(1), under which interconnection prices must be based on "cost," but "without reference to a rate-of-return or other rate-based proceeding." *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") at ¶¶ 618-758. *See also* Tr. 101:1-24, 103:3-107:6 (Gates Direct) (explaining TELRIC standard). Challenges to the legality of the TELRIC standard were rejected by the Supreme Court in 2002. *See Verizon v. FCC,* 535 U.S. 467 (2002).

[11] *See* Tr. 131:3-132:5 (Gates Direct) (describing meet-point billing traffic).

[12] Access charges apply in this case because for this traffic, the originating LEC is essentially acting as a toll carrier. *See Local Competition Order* at ¶¶ 191-192 (interexchange carriers are not entitled to Section 251(c)(2) interconnection solely to carry their own toll traffic).

agree, as they have in this case, to an even ***lower*** rate under a regime set up by the FCC.[13] Under this regime, an integrated rate of $0.0007/minute applies to the entire process of "transport and termination," *i.e.*, getting the call from the point of interconnection all the way to the customer.[14]

To help see how these principles apply here, we reproduce below Hearing Exhibit 22:



[13] The obligation to pay "reciprocal compensation" for "transport and termination" is set out in 47 U.S.C. § 251(b)(5). "Transport" and "termination" are defined in 47 C.F.R. §§ 51.701(c) and 51.701(d), respectively. Rates for these functions are governed by 47 U.S.C. § 252(d)(2), which embodies the TELRIC standard, *see Local Competition Order* at ¶¶ 1055-59. These rates apply to all traffic that is not "exchange access" or "information access." 47 C.F.R. § 51.701(b)(1); *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 (2008) ("*2008 Reciprocal Compensation Order*") at ¶¶ 7, 15-16, 22.

[14] The special regime was established in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") at ¶¶ 77-89. It was re-affirmed in the *2008 Reciprocal Compensation Order*.

As shown in the chart, Bright House has fiber optic facilities linking its network to two Verizon end offices and a Verizon tandem. Bright House and Verizon exchange their own local traffic at all three locations. Bright House also directly connects to many long distance carriers, shown to the right of "BHN CLEC" in the diagram. Other long distance carriers connect to Verizon's tandem, shown at the top center. Bright House and Verizon exchange traffic bound to and from these long distance carriers using facilities between Verizon's tandem and Bright House's two end office collocations. These are shown as dark lines from Verizon's tandem switches to Bright House's end office collocations.[15] Of the eight major issues that remain open in this case, five are focused on the physical interconnection arrangements between the parties, and the traffic they exchange using those arrangements. The remaining three issues are focused on contractual and operational concerns.

This initial brief is organized as follows:

First, the remainder of this introduction provides a summary of Bright House's position on each of the open issues, including (where we understand Verizon's position) a brief explanation of why Bright House is right and Verizon is wrong.

Second, Section II provides the competitive, regulatory, and statutory context within which the dispute between Verizon and Bright House has arisen. We briefly review relevant aspects of the history of competition in the industry and regulatory actions taken to promote that

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15 These lines are misidentified on the diagram as "access toll connecting trunks." As explained at the hearing, they represent physical ***facilities***, not "trunks." "Trunks" are circuits ***carried on*** physical facilities. A ***facility*** is like a length of unmarked highway, while a ***trunk*** is like a traffic lane painted onto the highway. *See* Tr. 23:19-24:20 (remarks of Mr. Savage). *See also* Tr. 156:1-10 (Gates Direct); Tr. 233 footnote 30 (Gates Rebuttal).

competition, and then review certain key features of the Telecommunications Act of 1996,[16] and how competition has developed since the Act was passed.

Third, in Section III, we address the remaining open issues in detail, explaining why Bright House's position should prevail and Verizon's position should be rejected.

Summary of Bright House's Positions on the Issues

Issue No. 24

Issue No. 24 asks whether the FCC's TELRIC pricing standard applies to facilities that Verizon provides to link points on Bright House's network with a point of interconnection on Verizon's network. This issue has two parts. First is the question just posed – does the TELRIC standard apply to any Verizon charges for facilities used to interconnect the two networks? The answer to that question is clearly "yes." The FCC's rules state that the TELRIC standard applies to both "interconnection" and to "methods of obtaining interconnection."[17] Those rules also require that an ILEC like Verizon "shall provide … any technically feasible method of obtaining interconnection" to a requesting carrier like Bright House.[18] Since a facility linking Bright House's network to Verizon's to exchange traffic is clearly a "method of obtaining interconnection," it follows that Verizon must provide such facilities at TELRIC rates.[19]

The second part of this issue is whether the specific facilities that Verizon now provides that link Bright House's end office collocations to Verizon's tandem, used to carry third-party long distance carrier traffic, are subject to this rule. The answer to this is also clearly "yes."

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16 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 *codified at* 47 U.S.C. §§ 151 *et. seq.* In this brief we will refer to this law as the "1996 Act."

17 47 C.F.R. § 51.501(a), (b). Section 51.501(a) says that the rules setting out the TELRIC standard (47 C.F.R. §§ 51.501 *et seq.*) apply to "network elements" as well as to "interconnection." Section 51.501(b), however, clarifies that when the TELRIC rules talk about TELRIC pricing of "elements," that term "includes … interconnection and methods of obtaining interconnection."

18 47 C.F.R. § 51.321(a).

19 This position has been affirmed and upheld by the 7th, 8th, and 9th Circuits. *See infra.*

Verizon is obliged by Section 251(c)(2) to interconnect at any technically feasible point for the "transmission and routing of … exchange access." Verizon has implied that it does not think that traffic to and from third-party long distance carriers is subject to Section 251(c)(2), but it has never explained why. In fact, the FCC has specifically ruled that a carrier is entitled to interconnection with an ILEC even if the only service it provides is exchange access for third party long distance carriers.[20] If Verizon seriously argues in its own initial brief that this traffic is ***not*** subject to Section 251(c)(2), we will address that claim in more detail in our reply brief.

Issue No. 36

This issue generally relates to "meet-point billing" arrangements, which refers to situations like the one just discussed, where a third-party long distance carrier sends traffic to, or receives traffic from, the end users of one local exchange carrier ("LEC") by means of the facilities of a second LEC.[21] In this situation the long distance carrier is receiving exchange access services from two LECs at once. The general rule in such situations is not (as far as we know) in dispute: in a meet-point billing situation, neither LEC bills the other for providing their portion of the exchange access service; instead, each one bills the long distance carrier.

Today, Bright House and Verizon jointly provide exchange access to third party long distance carriers by means of an interconnection point at Verizon's tandem switch. To reach that tandem switch, Bright House buys the facilities discussed above linking its end office collocations with the tandem. The discussion under Issue No. 24 shows that because the traffic at issue is "exchange access" subject to Section 251(c)(2), those facilities should be priced using the TELRIC standard. Here the point is slightly different: because the traffic is subject to

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20 *Local Competition Order* at ¶ 184.

21 A minor aspect of Issue No. 36 relates to the provision of local tandem transit service by Bright House to third-party carriers with local traffic to deliver to Verizon.

Section 251(c)(2), Bright House has the right to decide at which "technically feasible" point on Verizon's network the traffic will be exchanged. This means that Bright House may, if it chooses, designate its end office collocations, rather than Verizon's tandem, as the interconnection point for such traffic. In that scenario, the facilities whose pricing is at issue under Issue No. 24 would not be billed to Bright House at all. Instead, those facilities would now lie on Verizon's side of the interconnection point, so Verizon would bill long distance carriers for their use. Verizon disputes that Bright House has the right to designate the point of interconnection for this traffic.

The second issue within Issue No. 36 relates to Bright House competing with Verizon in delivering long distance traffic from third-party carriers to Verizon's end users. This traffic is simply another form of "exchange access" subject to Section 251(c)(2), so Bright House may designate any technically feasible point on Verizon's network to exchange it (at which point, again, the normal meet point billing rules would apply). Verizon disagrees, claiming that Bright House's only option in this regard is to buy certain interconnection arrangements out of its tariffs. Verizon is wrong, however. The FCC expressly considered whether tariffs like Verizon's were sufficient to meet the requirements of Section 251(c)(2) and concluded that the answer was "no." To the contrary, it held that Section 251(c)(2) interconnection rights were broader than those under the regime under which Verizon's tariffs were filed, and indicated that it expected the broader Section 251(c)(2) interconnection regime to supersede the tariffing regime.[22]

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22 *Local Competition Order* at ¶¶ 610-612.

Issue No. 37

The main focus of Issue No. 37 is to identify what portion (if any) of the traffic Bright House sends to Verizon from Bright House's own customers should be subject to access charges rather than lower reciprocal compensation rates. Bright House contends that none of its traffic is properly subject to access charges. FCC rules state clearly that reciprocal compensation applies to all traffic the two carriers might send each other, except for traffic that constitutes "exchange access."[23] Under applicable statutory definitions, the only time terminating a call from another LEC can be "exchange access" is if the originating LEC charges its customers a toll to make the call. All of Bright House's calls to Verizon are rated as local calls, not toll calls. Therefore, access charges should never apply to them. Verizon disputes this conclusion. It also asserts that it would be administratively difficult to handle Bright House's proposal, but its own witness recognized that a simple billing "factor" can be used when Verizon's systems cannot handle individual, call-by-call rating for some reason.[24]

A second issue under Issue No. 37 is the scope of the functions that are embraced within the specific intercarrier compensation rate ($0.0007/minute) that the parties have agreed to use in their new contract. Bright House contends that the $0.0007 rate covers all of the activities included within the "transport" and "termination" functions as defined in the FCC's rules.[25] The Commission should expressly so rule, so that Bright House is not erroneously subject to separate charges for activities that are part of the "transport" function.

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[23] 47 C.F.R. § 51.701(b).

[24] *See* Munsell Depo. Tr. at 206:15-207:1 (Exhibit 14, included in Transcript, Volume 4)

[25] 47 C.F.R. §§ 51.701(c), (d).

Issue No. 49

Issue No. 49 relates to the scope of Verizon's obligation under Section 251(c)(4) of the Act to provide a discount, for resale, on the telecommunications services that it provides to non-carrier customers. The FCC's rules state that this discount obligation does not apply to "exchange access services as defined in section 3 of the Act."[26] The only Verizon service that Bright House might have an interest in reselling is point-to-point data circuits sold to small and medium-sized business customers. These are clearly not "exchange access services" – they have nothing to do with the origination or termination of toll calls. However, Verizon offers these business private line data services out of its "special access" tariff. On the basis of the arrangement of its tariffs – not the nature of the service – Verizon contends that the discount obligation does not apply. Bright House seeks a Commission order enforcing the FCC's actual rule, so that Bright House may obtain the data services at discounted rates if it so chooses.

Issue No. 32

Issue No. 32 relates to the specific technical arrangements used to hand off traffic at the interconnection points. Verizon insists on receiving traffic at a low data rate (the DS-1 level) for delivery to its switches. However, the "native" data rate on Bright House's network is DS-3, OC-3 and higher levels. Verizon must provide "any technically feasible method of obtaining interconnection,"[27] which clearly includes higher-data-rate connections.[28] Also, as discussed in connection with Issue No. 24, methods of obtaining interconnection are subject to TELRIC pricing, so Verizon can only charge Bright House the costs that an efficient carrier would incur –

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[26] 47 C.F.R. § 51.605(b).

[27] 47 C.F.R. § 51.321(a).

[28] Bright House's proposed contract language only calls for higher-date-rate connections where traffic levels justify them. *See* Exhibit TJG-3, page 69 of 152 (included in Transcript Volume 4).

meaning that, since an efficient carrier would operate at higher data rates, like Bright House, multiplexing and demultiplexing charges may not be imposed on Bright House at all.[29]

Issue No. 7

Issue No. 7 concerns a Verizon proposal that would allow it to stop providing any service under the contract, on 30 days' notice, any time that Verizon, in its sole discretion, decides it is not obliged by law to provide the service. This provision is unjust and unreasonable in that it gives Verizon the right to unilaterally decide that it can walk away from its duties, triggering a storm of litigation and possibly serious disruption of the other party's business.[30] This is particularly problematic for Bright House because Verizon has not conceded that Bright House is entitled to interconnection with Verizon at all.[31] The Commission should reject Verizon's proposed language, and declare that Bright House is entitled to interconnect with Verizon.

Issue No. 13

Issue No. 13 involves the parties' obligation to send bills, or raise protests to bills that have been paid, within a reasonable time. Under Verizon's language, either party can render a bill for previously unbilled services or raise a protest against a bill that was already paid, subject only to the state statute of limitations. This is unreasonable because parties need to close their accounting books within a reasonable time.[32] Bright House proposes that parties be given a year

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[29] The parties have a limited settlement regarding multiplexing charges under which Bright House will pay a portion of Verizon's normal tariffed charges, as long as the parties' present physical interconnection arrangements remain materially unchanged. *See* Tr. 99:5-14 (Gates Direct); Tr. 342:20-343:13 (Gates Re-Direct). Bright House will, of course, honor that settlement, but during the term of the new interconnection agreement those arrangements may well change.

[30] *See* Tr. 546:6-357:13 (Johnson Direct); Tr. 371:10-372:17 (Johnson Direct); Tr. 421:2-423:6 (Johnson discussion with Commissioner Skop).

[31] *See, e.g.*, Tr. 570:19-571:2 (Munsell Direct); Tr. 626 at n.1 (Munsell Rebuttal); Munsell Depo. Tr. at 85:8-86:18 (included as Exhibit 14 in Transcript Volume 4).

[32] *See* Tr. 79:16-81:17 (Gates Direct); Tr. 265:9-267:20 (Gates Rebuttal); Tr. 379:20-381:16 (Johnson Direct).

from the time a service is rendered to bill for it, and a year from the time a bill is paid to reconsider and raise a protest to it. The Commission should adopt this reasonable proposal.

Issue No. 41

The only remaining open portion of Issue No. 41 relates to the provision of "coordination" with respect to number porting when a customer with a large number of lines transfers from one party to the other. Most of the time, handling number ports for large customers goes smoothly,[33] but it is important that the carriers be ready to manually handle any problems that might arise – which is what coordination refers to. Bright House proposes that where coordination is requested for such large customers, the parties provide it to each other at no charge. Verizon seeks to impose a charge for this function. We believe that our proposal is more reasonable and should be adopted.

II. A BRIEF HISTORY OF TELECOMMUNICATIONS COMPETITION.

A brief summary of how competition developed in the telecommunications industry – including industry developments and regulatory changes – will help put the disputes between Verizon and Bright House into context.

A. The Break-Up Of The Old Bell System.

For decades, telephone service was assumed to be a natural monopoly, so that the most efficient way to operate was to have a single, regulated firm providing all services within a given area.[34] This legacy of monopoly thinking is echoed in the fact the each ILEC typically still has a specific, franchised service territory in many states. In Florida, for example, Verizon serves the Tampa/St. Petersburg area.

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33 Tr. 328:11-13 (Gates Cross-Examination).

34 *See Local Competition Order* at ¶ 11.

Over time technological developments made it possible for competitors to enter different segments of the industry. Both long distance and telephone equipment markets were early areas where competition emerged. The old Bell System, however, resisted the efforts of competitors, leading to the federal government's antitrust case, filed in 1974, alleging that the Bell System used its monopoly control over local services to exclude competition in long distance and equipment markets.[35] That antitrust case was settled in 1982 with an agreement to break up the Bell System, effective on January 1, 1984.[36] The local Bell Operating Companies – now ILECs – were divested from AT&T.[37] They were restricted to providing local services – including access services to long distance carriers – under tariff.[38] AT&T, created as an independent company from the divested ILECs, was free to operate in competitive lines of business such as long distance, equipment, information services, etc.[39] AT&T thus engaged in competition with other independent long distance providers, such as Sprint and MCI.[40]

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35 *United States v. AT&T*, 552 F. Supp. 131, 139 (D.D.C. 1982).

36 *See United States v. AT&T*, 524 F. Supp. 1336 (D.D.C. 1981) (rejecting AT&T's motion to dismiss antitrust case); *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) (accepting, with modifications, proffered consent decree breaking up the Bell System)..

37 The then-current term for the divested individual local carriers was "Bell Operating Companies," or "BOCs." The various individual BOCs were grouped into holding companies known as "Regional Bell Operating Companies," or RBOCs. All of the BOCs/RBOCs (along with local telephone companies that had not been part of the Bell System) became classified as ILECs under the 1996 Act. For ease of reference, we will simply refer to the monopoly local carriers that existed after divesture as ILECs

38 *United States v. AT&T*, 552 F. Supp. at 227-28 (line of business restrictions on BOCs).

39 *United States v. AT&T*, 552 F. Supp. at 170. The names of the companies can get confusing. Before 1984, "AT&T" was the parent company of the integrated Bell System. From 1984 until the early 2000s, "AT&T" was a competitive long distance provider that, after the 1996 Act, also entered local markets as a CLEC. But ***that*** "AT&T" was bought by Southwestern Bell, an ILEC, which promptly renamed itself "AT&T" – which is now an integrated firm that provides local service in many areas of the country (including parts of Florida), as well as nationwide long distance and wireless services.

40 Until the late 1990s, MCI was an independent long distance carrier. It was then purchased, first by the ill-fated WorldCom, then by Verizon.

B. Competitive Access Providers.

Soon after divestiture, a form of local competition emerged from "competitive access providers," or "CAPs." As Mr. Gates explained, these entities were:

> specialized competitors in some large markets that owned their own telephone switches (used to route traffic among other switches, and to and from individual customers) and sometimes extensive networks of optical fiber connected to large carrier and business customers. ... Generally speaking, the business focus of these entities was to provide connections between large business customers and independent long distance carriers (such as, at the time, AT&T and MCI) that were cheaper and more efficient than the connections available from ILECs.

Tr. 42:5-13 (Gates Direct). The direct connections the CAPs provided were "special access" services.[41] As Mr. Gates noted, this market niche existed because the ILECs' special access charges were relatively high, and because the development of fiber optic and other technology made it possible to provide high-capacity point-to-point circuits more efficiently than the available ILEC special access services.[42]

Initially, the only competition CAPs could offer was for a finished, end-to-end connection between a long distance carrier and a large customer. This limited the scope of competition, because only the very largest customers generated enough traffic to make such direct connections economical. Greater competition was technically possible, however, because ILEC special access services are actually comprised of three different elements – a "channel termination" linking the customer's premises to the nearest ILEC central office; another channel

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[41] "Special access" refers to direct, point-to-point, unswitched connections between designated points. A key use for these special access connections, particularly in the early days after divestiture, was to connect large business customers, with high levels on long distance traffic, directly to long distance carriers. It is to be distinguished from "switched access," in which individual long distance calls are individually routed through an ILEC's switch to or from a long distance carrier.

[42] *See* Tr. 42:5-13 (Gates Direct). *See also Expanded Interconnection with Local Telephone Company Facilities,* Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7639 (1992) ("*Expanded Interconnection R&O*") at ¶¶ 1-5.

termination linking the long distance carrier's point-of-presence ("POP") to the ILEC central office nearest to the POP; and "channel mileage" connecting the two central offices.[43]

More vigorous competition was particularly feasible in ILEC central offices serving a number of customers who might want direct connections to the same long distance carrier. At least in theory, the ILEC could provide channel terminations from the premises of each of those smaller customers, back to the central office, at which point the CAP would aggregate the traffic from many customers onto a single, high-capacity facility to the long distance carrier. With such an arrangement, a long distance carrier would gain a competitive choice for how it obtains access to its customers – at least for the part of the circuit that runs from the carrier's POP to the end office. Either it could buy that part of the circuit from the ILEC, as part of an end-to-end service, or it could buy that part of the circuit from a CAP. Moreover, allowing CAPs to pick up traffic from multiple end users at the same end office would lower the overall cost of establishing direct connections to long distance carriers, benefitting end users as well.[44]

In 1992, the FCC enabled these competitive arrangements by establishing a regime known as "expanded interconnection." Under this regime, CAPs were granted the right to physically collocate their equipment in an ILEC central office in order to cross-connect to, and pick up traffic from, any number of channel terminations extending from that central office. This new regime vastly expanded the range of end users whose traffic might economically be carried by a CAP at least part of the way to or from the long distance carrier.[45]

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[43] *See* D'Amico Deposition at 23:6-24:9 (included as Exhibit 13 in Transcript Volume 4); *Expanded Interconnection R&O* at ¶ 5.

[44] *Expanded Interconnection R&O, passim; id.* at ¶ 103 (noting that LEC central offices provide "aggregated access to end user premises).

[45] *Id.*

Once CAPs could collocate in an end office and connect to unswitched channel terminations, it seemed reasonable to extend CAP interconnection rights to include ***switched*** access traffic as well. So, in 1993, the FCC extended the expanded interconnection regime to include interconnection for the exchange of switched access traffic.[46] Under this arrangement, as with competition for special access services, a long distance carrier with a lot of switched traffic bound for a large number of customers served out of a single ILEC central office now had a competitive choice – it could buy "switched transport" service from the ILEC to get from its POP to the end office, or it could use a CAP for the same functions.[47]

Thus, in the years leading up to the 1996 Act, the FCC was actively working to promote competition in the provision of access services to long distance carriers and their larger customers. In fact, during this time frame, competition in the provision of access services to long distance carriers was really the only ***local*** competition that existed at all.

A key element of the *Expanded Interconnection* regime – both for special access competition and switched access competition – was the right of CAPs to physically collocate their equipment in ILEC central offices. Unfortunately for the FCC and the CAPs, in 1994 the federal courts ruled that the Communications Act – as then written – did not contain any language that authorized the FCC to require the ILECs to accommodate the physical occupation of their property by third parties. The court therefore construed the Act not to authorize the FCC

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[46] *Expanded Interconnection with Local Telephone Company Facilities*, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993) ("*Expanded Interconnection Switched Transport Order*").

[47] This would only work, of course, because the CAPs were also given the right to actually interconnect their own transmission facilities into the ILEC's switch, so that the calls bound for individual end users would be properly routed.

to require physical collocation.[48] This ruling put the competitive benefits of the *Expanded Interconnection* regime in jeopardy.

In this same time frame, however, Congress concluded that continuing changes in the telecommunications industry (including the proliferation of CAPs) had created an environment in which the development of full-blown local competition was possible. As a result, Congress passed the landmark Telecommunications Act of 1996, which fundamentally remade the industry landscape by opening all telecommunications markets to competition.[49]

C. Competition Under The 1996 Act.

The 1996 Act was the first major re-write of the Communications Act since its initial enactment in 1934, and reflects Congress's new judgment that all telecommunications markets should be open to competition. Enabling that competition entailed, first, crafting a set of statutory definitions applicable to the new competitive landscape and, second, enacting substantive legal provisions – relying on those definitions – to lay out the ground rules under which competition would take place.

1. New Statutory Definitions.

Building from the ground up, the 1996 Act defined "telecommunications" as transmitting information as directed by the customer.[50] A "telecommunications service" is offering that function to the public for a fee.[51] A "telecommunications carrier" is any provider of telecommunications service.[52] Thus, when Congress established the rights and duties of

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[48] *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). To undo the effects of this court ruling, in the 1996 Act, Congress specifically mandated that ILECs provide for "physical collocation of equipment necessary for interconnection." 47 U.S.C. § 251(c)(6).

[49] *See Local Competition Order* at ¶¶ 1, 10-15.

[50] 47 U.S.C. § 153(43).

[51] 47 U.S.C. § 153(46).

[52] 47 U.S.C. § 153(44).

"telecommunications carriers," it was referring to the entire industry – long distance providers, ILECs, CAPs, CLECs, and essentially any other entity selling telecommunications services.

Of course, at the time of the passage of the 1996 Act, long distance markets were already competitive; the real question was how to promote and encourage competition in ***local*** markets. This meant that Congress, for the first time, had to define what a "local exchange carrier" was. Considering that the ILECs provided local service to end users, as well as access service to long distance carriers, Congress used those two functions to create a new statutory definition. A "local exchange carrier" was defined as any provider of ***either*** "telephone exchange service" ***or*** "exchange access."[53]

So far so good – but those terms were also in need of definition and clarification. With respect to "exchange access," Congress settled on a simple statement: "The term 'exchange access' means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[54] The crucial language in this definition – at least in the context of this case – is the "purpose" language. A service is only "exchange access" if it is provided "for the purpose of the origination or termination of telephone toll services." In this regard, "telephone toll service" was already defined.[55] In order to be a "telephone toll service," a call has to meet two criteria: first, it has to go between different exchanges – that is, it has to be, physically, a "long distance" call. Second, there has to be a "separate charge" for the call, over and above charges for local service. If the underlying call is not a "toll call" in this sense, then it simply does not constitute "exchange access" service for a

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53 47 U.S.C. § 153(26) (defining "local exchange carrier").

54 47 U.S.C. § 153(16) (defining "exchange access").

55 47 U.S.C. § 153(48) ("The term 'telephone toll service' means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service").

local carrier to originate or terminate it.[56]

With respect to the second prong of the definition of "local exchange carrier" – being a provider of "telephone exchange service" – the original 1934 Act contained a definition, but one that was somewhat dated. Congress chose to retain the old definition, but also to add to it to reflect changes in technology. It designated the original definition as sub-part (A), and added a new sub-part (B) that reflected modern technological developments:

> The term "telephone exchange service means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, ***or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.***

47 U.S.C. § 153(47) (emphasis added). The new language encompasses a wide array of options within "telephone exchange service" that were not envisioned by the original 1934 Act. The obvious purpose of this expanded definition was to be sure to include not only the traditional service offered by ILECs, but also any "comparable service" that might arise once competition was unleashed, irrespective of the precise technologies that new competitors might use.[57]

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[56] Congress thus chose a different approach to defining "exchange access" than had been used by the court handling the break-up of the old Bell System in 1984, or by the FCC in establishing its rules for access tariffs. The court's decree contained a lengthy definition of "exchange access," the first sentence of which was that "'Exchange access' means the provision of exchange services for the purpose of originating or terminating ***interexchange telecommunications.***" *United States v. AT&T*, 552 F. Supp. at 229 (emphasis added). The FCC crafted a slightly different definition, stating that "*access service* includes services and facilities provided for the origination or termination of ***any interstate or foreign telecommunication***." 47 C.F.R. § 69.2 (emphasis added). Congress chose to limit the new statutory definition of "exchange access" to services involving toll calls.

[57] Notably, even back in 1996, Congress knew that cable operators, with their entirely separate physical distribution networks, were a potential source of real competition against the ILECs. In the House report on the bill that became the 1996 Act, Congress noted that "meaningful facilities-based competition is possible, given that cable services are available to more than 95 percent of United States homes. Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated."

2. The New Pro-Competitive Regime.

With the key definitions in hand, Congress laid out the rules to promote and encourage competition. The key substantive provisions relating to local competition are Sections 251, 252, and 253. Section 253 states the new national policy of competition, by expressly preempting any state or local statute, regulation, or legal requirement that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[58] Sections 251 and 252 focus on how to make competition – particularly competition in local markets – a reality.[59]

Sections 251(a), (b), and (c) define the rights and duties of three classes of carriers – "telecommunications carriers" in Section 251(a), "local exchange carriers" in Section 251(b), and "***incumbent*** local exchange carriers" in Section 251(c).[60]

Under Section 251(a), all "telecommunications carriers" – that is, essentially, anyone selling telecommunications services – must provide for direct or indirect interconnection, and must meet certain requirements for maintaining an interoperable network.

Under Section 251(b), all "local exchange carriers" – whether an incumbent or a competitor – must comply certain basic duties towards other carriers. These include offering number portability, providing directory listings, and establishing reciprocal compensation arrangements.

House Rept. 104-458, 104th Cong., 2d Sess. (1996) at 148. *See also Local Competition Order* at ¶ 13 (noting potential facilities-based competition from cable operators).

[58] 47 U.S.C. § 253(a). *See Local Competition Order* at ¶ 11.

[59] Section 252 deals mainly with procedures for setting interconnection terms when the carriers themselves cannot agree, but it also includes (in Section 252(d)) the pricing standards applicable to traffic exchanged between carriers, interconnection facilities and arrangements, and unbundled elements.

[60] "Incumbent local exchange carrier" is defined in Section 251(h) and essentially means the preexisting, established local carrier in an area, as of the date of enactment of the 1996 Act.

Finally, Section 251(c) lays out some special duties that apply ***only*** to ILECs. These are the key requirements applicable to actually opening up local markets to competition; they reflect the things that ILECs will have to do – even though they probably won't want to – in order to allow competitors to enter and flourish in local markets.

Broadly speaking, Section 251(c) lays out three different potential ways a competitor might enter the local market. As the FCC explained:

> The Act contemplates three paths of entry into the local market – the construction of new networks, the use of unbundled elements of the incumbent's network, and resale. ... We anticipate that some new entrants will follow multiple paths of entry as market conditions and access to capital permit. Some may enter by relying at first entirely on resale of the incumbent's services and then gradually deploying their own facilities. This strategy was employed successfully by MCI and Sprint in the interexchange market during the 1970's and 1980's. Others may use a combination of entry strategies simultaneously – whether in the same geographic market or in different ones. Some competitors may use unbundled network elements in combination with their own facilities to serve densely populated sections of an incumbent LEC's service territory, while using resold services to reach customers in less densely populated areas. Still other new entrants may pursue a single entry strategy that does not vary by geographic region or over time. ... [Our] obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may be explored. As to success or failure, we look to the market, not to regulation, for the answer.

Local Competition Order at ¶ 12.

Congress, of course, was fully aware of the CAPs, the FCC's *Expanded Interconnection* proceeding, and the court defeat for the key right of physical collocation.[61] Thus, it is no surprise that Congress enshrined the key principles of that proceeding – the idea that competitors have a right to directly interconnect with the ILEC's local network, including by means of physical collocation – *into* the Act. It is also no surprise that Congress clarified and expanded upon those principles. Thus, where the *Expanded Interconnection* regime applied only to access services, Section 251(c)(2) applies to competition for, and interconnection for, traditional local services as

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[61] Congress is presumed to be aware of existing law and regulation when it legislates in an area. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184 (1988).

well. Under the *Expanded Interconnection Regime,* interconnection was limited to ILEC central offices, and was limited to the exchange of either switched access traffic or linking together special access circuits. But under Section 251(c)(2), ILECs must interconnect "at any technically feasible point" – not just central offices – and for the purpose of exchanging ***either*** "exchange access" traffic (essentially what was covered by the *Expanded Interconnection* regime) ***or*** "telephone exchange service" traffic – that is, traditional local traffic of the sort that had not been subject to any previous competition at all.[62]

As the FCC observed, the new law did not express any preference to any particular market entry strategy. Long distance carriers without any local facilities could enter local markets via resale. CAPs could continue to compete in the provision of access services using their existing facilities, but supplement them via the purchase of unbundled network elements to offer local services to end users as well.[63] And entities such a cable operators – if they could find a technical way to offer local voice services using their networks – could compete for both local service to end users, and access services provided to long distance carriers.[64] At the time of the

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[62] The FCC has noted the overlap between the *Expanded Interconnection* regime and the interconnection obligations under Section 251(c). *See Local Competition Order* at ¶¶ 610-612. The FCC stated that "we expect that, over time, sections 251 and 252 and our implementing rules may replace our *Expanded Interconnection* rules as the primary regulations governing interconnection for carriers" and that "section 251 is broader than our *Expanded Interconnection* requirements in certain respects." The FCC also found that Section 251(c)(2) interconnection rights extend to entities, such as CAPs that might ***only*** seek to provide exchange access services to long distance carriers in competition with ILECs – that is, entities that would not provide any "telephone exchange services" to end users at all. *Id.* at ¶ 184 ("Congress made clear that [ILECs] must provide interconnection to carriers that seek to offer telephone exchange service ***and*** to carriers that seek to offer exchange access") (emphasis in original).

[63] *See id.* at ¶ 185 (holding that a requirement that a potential Section 251(c)(2) interconnector must offer telephone exchange service would impede entry by CAPs, which "often enter the telecommunications market as exchange access providers prior to offering telephone exchange services").

[64] At one point in the *Local Competition Order,* the FCC identifies "the vast majority of potential local competitors" as comprising "interexchange carriers" – who would build on their base of end users and intercity networks to enter local markets – "competitive access providers (CAPs)" – who would build on their existing local access facilities to expand to serve end users – and "cable operators" – who would

passage of the Act, the field seemed wide open – anyone ***could*** enter the market, using any of a number of entry strategies. The key unknown was which entry strategies might succeed.

3. The Actual Development Of Competition Under The 1996 Act.

As Mr. Gates explains, the different entry strategies have met with different levels of success over the years.[65] Although entry via resale of the ILEC's services is relatively easy – the new competitor doesn't have to build any network facilities – it is extremely difficult to survive on thin discounts off retail rates, especially when the only services the new competitor can offer are ones that the incumbent already sells. Thus, while numerous resellers still exist, they are not generally regarded as being significant competitors in the market.[66]

Entry by means of UNEs is both a more expensive and a more viable strategy. This is essentially what the CAPs did: they had some local facilities in place (mainly switches and transmission gear to provide their high-capacity access services), and could supplement those facilities with unbundled elements from the ILEC – notably, unbundled local loops – to provide competition for telephone exchange service as well as access services.[67]

Entry by means of constructing an entirely new network to interconnect with, and compete with, the ILEC is very expensive, but also – evidently – the most effective in the long run. While it took many years for cable operators to begin to effectively use their cable networks to provide voice services (via unregulated VoIP service) and to link those voice services to the telephone network at large (via wholesale CLECs like Bright House), clearly the hundreds of

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find ways to use their extensive local distribution networks to compete with the ILECs. *Local Competition Order* at ¶ 46.

65 *See* Tr. 37:1-50:13 (Gates Direct).

66 Tr. 40:9-42:2 (Gates Direct).

67 *See* Tr. 42:5-44:10 (Gates Direct).

thousands of end users Bright House (indirectly) serves shows that this approach is viable.[68] The upshot of this history of competition under the 1996 Act is that Bright House is offering, in the Tampa area, precisely the kind of full facilities-based competition that Congress envisioned back when it was deliberating over the bills that became the new law,[69] and that the FCC envisioned when it first determined how to implement the new law in 1996.[70]

III. DISCUSSION OF THE REMAINING OPEN ISSUES.

BRIGHT HOUSE'S BASIC POSITION:

BRIGHT HOUSE'S SPECIFIC POSITIONS ARE LAID OUT BELOW. MOST OPEN ISSUES INVOLVE DISAGREEMENTS ABOUT GOVERNING LAW. BRIGHT HOUSE'S POSITIONS ACCORD WITH GOVERNING LAW; VERIZON'S DO NOT. WHERE NEITHER PARTY'S PROPOSAL IS COMPELLED BY GOVERNING LAW, BRIGHT HOUSE'S PROPOSALS ARE PREFERABLE BECAUSE THEY WILL RESULT IN MORE ROBUST COMPETITION.

As of the date of this brief, there are eight open issues. These are: Issue Nos. 7, 13, 24, 32, 36 (which is comprised of two main sub-issues), 37 (which is also comprised of two sub-issues), 41 (which has been substantially narrowed by post-hearing settlement discussions) and 49. We discuss those issues below in the order discussed in the introduction.

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68 Tr. 44:11-50:13 (Gates Direct).

69 *See* House Rept. 104-458, 104th Cong., 2d Sess. (1996) at 148.

70 *See Local Competition Order* at ¶ 13.

ISSUE NO. 24: IS VERIZON OBLIGED TO PROVIDE FACILITIES FROM BRIGHT HOUSE'S NETWORK TO THE POINT OF INTERCONNECTION AT TOTAL ELEMENT LONG RUN INCREMENTAL COST ("TELRIC") RATES?

BRIGHT HOUSE POSITION:[71]

VERIZON MUST PROVIDE FACILITIES FROM BRIGHT HOUSE'S NETWORK TO THE TECHNICALLY FEASIBLE INTERCONNECTION POINTS SELECTED BY BRIGHT HOUSE, AT TELRIC RATES, INCLUDING FACILITIES USED TO CARRY "EXCHANGE ACCESS" TRAFFIC BETWEEN BRIGHT HOUSE'S COLLOCATION FACILITIES AND THE NETWORKS OF LONG DISTANCE CARRIERS.

Issue No. 24 relates to the pricing standard that applies to facilities that run from points on Bright House's network to a point of interconnection with Verizon's network, established under Section 251(c)(2). The specific facilities in dispute under the current network configuration are certain dedicated facilities connecting Bright House's end office collocations with Verizon's tandem office, where Bright House picks up traffic coming from, and hands off traffic going to, long distance carriers. In this configuration, Verizon's tandem is the technically feasible point where the parties interconnect for the transmission and routing of this exchange access traffic.[72] So, these facilities are used to obtain interconnection under Section 251(c)(2), which means that, under the FCC's rules, they are to be priced at TELRIC rates. Verizon, however, wants to apply tariffed rates. This is the dispute underlying Issue No. 24.

Verizon appears to assert that facilities that are used to exchange access traffic with third-party long distance carriers are not subject to Section 251(c)(2) at all. We will address this claim in detail in our reply brief if Verizon in fact makes it. That said, the discussion in Section II above shows that any such claim is absurd. Section 251(c)(2) expressly states that it applies to

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[71] Bright House addressed Issue No. 24 through the testimony of Mr. Gates. *See* Tr. 98:16-113:4 (Gates Direct); Tr. 217:3-231:10 (Gates Rebuttal). In addition, we addressed matters relating to the TELRIC standard in response to Staff Interrogatory Nos. 5 & 33, included in the record as part of composite Exhibit 3 (included in Transcript, Volume 4). We incorporate all of that discussion here by reference, and respectfully refer the Commission to that additional material regarding Issue No. 24.

[72] *See* Tr. 337:9-339:20 (Gates Redirect).

interconnection "for the transmission and routing of ... exchange access" traffic. Moreover, there can be no serious dispute that calls that are going out to, or coming in from, third party long distance carriers, indeed constitute "exchange access" traffic.[73] As a result, interconnection for the "transmission and routing" of this traffic plainly falls under Section 251(c)(2).[74]

Verizon's second, but equally unavailing, claim is that the TELRIC pricing standard does not apply to facilities it provides to connect Bright House's network with Verizon's network for purposes of interconnecting to exchange traffic. In fact, Verizon is required by long-standing FCC rules to provide such facilities at TELRIC rates.

The pricing standard that applies to facilities used for interconnection is laid out in Subpart F of the FCC's interconnection rules, 47 C.F.R. §§ 51.501 *et seq.* These rules explain the operation of the FCC's TELRIC standard. Rule 51.501(a) expressly states that "the rules in this subpart apply to the pricing of network elements, ***interconnection,*** and methods of obtaining access to unbundled elements ..." (emphasis added). Moreover, though most of the language in Subpart F speaks in terms of network "elements," the rules make clear that the pricing standards established there also apply to interconnection arrangements: "As used in this subpart, the term 'element' includes network elements, ***interconnection, and methods of obtaining interconnection*** and access to unbundled elements."[75]

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[73] Even Verizon's witness Mr. Vasington was compelled to acknowledge this fact at the hearing. *See* Tr. 508:12-14, 509:22-510:7 (Vasington Cross-Examination).

[74] *See* Gates Depo. Tr. at 64:6-13; 106:21-108:3 (Exhibit 9, included in Transcript, Volume 4). As discussed in Section II above, the entire business model of the CAPs, under the *Expanded Interconnection* regime, was to interconnect with the ILECs in such a way that the CAPs provided part of the access services being provided to long distance carriers. The FCC, of course, was keenly aware of the CAPs and their operations when it fashioned its rules under the 1996 Act; the *Local Competition Order* is replete with references to the CAPs and their operations. And, as noted above, the FCC expressly found in that order that interconnection rights extended to CAPs providing only exchange access services. *Local Competition Order* at ¶ 184. Any Verizon claim that connections between Bright House and Verizon for handling exchange access traffic are ***not*** subject to Section 251(c)(2) is, as noted, absurd.

[75] 47 C.F.R. § 51.501(b) (emphasis added).

As we understand it, Verizon is relying on a 2005 FCC order dealing with UNEs to say that TELRIC does not apply to facilities used for interconnection.[76] However, the legal regime for interconnection facilities is governed by Section 251(c)(2). UNEs – the subject of the *TRRO* – are subject to a very different legal regime, governed by Sections 251(c)(3) and 251(d)(2). So, while Verizon is correct that the FCC ruled that ILECs do not have to provide facilities at TELRIC rates to allow CLECs to access UNEs (such as unbundled loops or interoffice transport), as discussed below, that ruling has no bearing on the pricing standard applicable to interconnection facilities.

At a high level, a CLEC may obtain a UNE only if lack of access to it would "impair" the CLEC's ability to provide its services.[77] The standard for obtaining interconnection arrangements is entirely different: a CLEC is entitled to interconnect at "any technically feasible point" within the ILEC's network.[78] No "impairment" analysis applies. If a proposed point or method of interconnection is "technically feasible," Verizon must provide it.[79]

In the *TRRO*, the FCC concluded that a CLEC is not "impaired" in its ability to offer services if it does not have access to "entrance facilities" to connect the CLEC's switch to an ILEC's network for purposes of obtaining access to other UNEs, such as unbundled loops.[80] The FCC, however, expressly stated in the *TRRO* that "our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and

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76 *Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 20 FCC Rcd 2533 (2005) ("*TRRO*").

77 47 U.S.C. § 251(d)(2).

78 47 U.S.C. § 251(c)(2).

79 *See* 47 C.F.R. § 51.5 (defining "technically feasible").

80 *TRRO* at ¶¶ 138-141.

exchange access service."[81] The footnote to this sentence references an earlier FCC order, in which the FCC flatly stated that "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent LEC's] network,' ***section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation.***"[82] Indeed, as noted, in the *TRRO* the FCC expressly states that its ruling is limited to UNEs, and has no effect on facilities provided to enable interconnection.[83] In other words, long before the *TRRO* concluded that CLECs seeking access to UNEs would not be "impaired," the FCC had established that ILECs are obliged to provide CLECs with facilities needed for "interconnection" at TELRIC rates. Nothing in the *TRRO* changed that result.

The analysis just discussed shows that: (1) ILEC facilities used to connect a CLEC's network with the ILEC's network for the transmission and routing of traffic are either "interconnection," or "methods of obtaining interconnection," within the purview of Section 251(c)(2); (2) such facilities are, therefore, to be made available to CLECs at TELRIC rates; and that (3) this conclusion is completely unaffected by the fact that the FCC has ruled that the same facilities might not be available at TELRIC rates to a CLEC that wants to use those facilities to access unbundled network elements. This analysis has been expressly affirmed by unanimous

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81 *TRRO* at ¶ 141.

82 *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2005) ("*TRO*") at ¶ 366 (emphasis added). Verizon may try to claim that the "do not alter" language means that the *TRO* and the *TRRO* did not establish any new obligation to provide interconnection facilities at TELRIC rates, so no such obligation exists. The problem with this claim is that Verizon's obligation to provide facilities used for interconnection at TELRIC rates goes back to the *Local Competition Order* itself, which promulgated the FCC's TELRIC rules. Specifically, Rule 51.501 – which clearly states that TELRIC pricing applies to interconnection and methods to obtain interconnection – was established at that time. *See Local Competition Order* at Appendix B, page B-29 (showing text of rules being adopted at that time).

83 *TRRO* at ¶ 141.

panels of three of the four courts of appeal that have considered the question.[84] This Commission, therefore, should adopt it as well.

The discussion above shows that Verizon is required to provide facilities between Bright House's network and the points of interconnection within Verizon's network at TELRIC rates, and that this pricing rule fully applies to the facilities that are presently being charged at special access rates connecting Bright House's end office collocations with Verizon's tandem. As a result, the Commission should rule in Bright House's favor with respect to Issue No. 24.

ISSUE NO. 36: WHAT TERMS SHOULD APPLY TO MEET-POINT BILLING, INCLUDING BRIGHT HOUSE'S PROVISION OF TANDEM FUNCTIONALITY FOR EXCHANGE ACCESS SERVICES?

BRIGHT HOUSE POSITION:[85]

SECTION 251(c)(2) GOVERNS INTERCONNECTION FOR MEET POINT TRAFFIC, SO BRIGHT HOUSE SELECTS THE INTERCONNECTION POINTS. BRIGHT HOUSE SHOULD PAY TELRIC RATES FOR VERIZON-SUPPLIED FACILITIES ON BRIGHT HOUSE'S SIDE OF THE INTERCONNECTION, BUT THE LONG DISTANCE CARRIERS SHOULD PAY FOR FACILITIES ON VERIZON'S SIDE.

(A) SHOULD BRIGHT HOUSE REMAIN FINANCIALLY RESPONSIBLE FOR THE TRAFFIC OF ITS AFFILIATES OR OTHER THIRD PARTIES WHEN IT DELIVERS THAT TRAFFIC FOR TERMINATION BY VERIZON?

BRIGHT HOUSE POSITION:

WHEN BRIGHT HOUSE DELIVERS ACCESS TRAFFIC TO VERIZON FROM A LONG DISTANCE CARRIER, THAT CARRIER SHOULD BE BILLED. WHEN BRIGHT HOUSE DELIVERS INBOUND LOCAL TRAFFIC TO VERIZON FROM A THIRD PARTY LEC, THAT LEC SHOULD BE BILLED.

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[84] *Pacific Bell v. California Public Utilities Commission*, 597 F.3d 958 (9th Cir. 2010); *Southwestern Bell v. Missouri PSC*, 530 F.3d 676 (8th Cir. 2008); *Illinois Bell v. Box*, 526 F.3d 1069 (7th Cir. 2008). In a somewhat tortured opinion, two judges of a three-judge panel of the 6th Circuit held that the *TRRO*'s determination that "entrance facilities" were not available as UNEs meant that tariffed rates applied to interconnection facilities as well. This ruling drew a well-reasoned and persuasive dissent from the third judge on the panel. *See Michigan Bell v. Covad*, 597 F.3d 370 (6th Cir. 2010); 597 F.3d at 387 *ff.* (dissent). As the dissent there, the FCC filed an *amicus* brief urging the court to hold that interconnection facilities remained available at TELRIC rates even though such facilities were not available at such rates to access UNEs. *See* 597 F.3d at 391-92. Clearly, the 6th Circuit is an "outlier" here.

[85] Bright House addressed Issue No. 36 through the testimony of Mr. Gates. *See* Tr. 131:3-133:11; 165:9-170:19 (Gates Direct); Tr. 218:19-244:19 (Gates Rebuttal). We incorporate that discussion here by reference, and respectfully refer the Commission to that additional material regarding Issue No. 36.

(B) TO WHAT EXTENT, IF ANY, SHOULD THE ICA REQUIRE BRIGHT HOUSE TO PAY VERIZON FOR VERIZON-PROVIDED FACILITIES USED TO CARRY TRAFFIC BETWEEN INTEREXCHANGE CARRIERS AND BRIGHT HOUSE'S NETWORK?

BRIGHT HOUSE POSITION:

SECTION 251(c)(2) GOVERNS INTERCONNECTION FOR MEET POINT TRAFFIC, SO BRIGHT HOUSE SELECTS THE INTERCONNECTION POINTS. VERIZON MAY CHARGE LONG DISTANCE CARRIERS, NOT BRIGHT HOUSE, FOR FACILITIES ON VERIZON'S SIDE OF THE INTERCONNECTION USED FOR SUCH TRAFFIC. SECTION 251(c)(2) ALSO FULLY APPLIES TO INTERCONNECTION WHEN BRIGHT HOUSE PROVIDES TANDEM FUNCTIONALITY.

Issue No. 36 involves two main issues, and a more minor sub-issue.

The first main issue is whether Verizon can require Bright House to interconnect with Verizon to hand off traffic to and from third-party long distance carriers at Verizon's access tandem (the current arrangement). Largely for the reasons discussed in connection with Issue No. 24, while Bright House may ***choose*** to interconnect for these purposes at Verizon's tandem, Verizon may not ***require*** Bright House to do so.

Briefly, the traffic in question – traffic inbound from or outbound to, third party long distance carriers – is clearly "exchange access" traffic subject to Section 251(c)(2).[86] As a result, under that statutory provision, ***Bright House*** may select the "technically feasible point" within Verizon's network at which the traffic will be exchanged. So, Bright House may designate its end office collocations as the technically feasible points for the exchange of this traffic.[87]

Verizon disagrees that Bright House has the right to make this designation. However, it does not appear that there is any disagreement about what happens, if in fact Bright House has

[86] *See* Gates Depo. Tr. at 64:6-13; 106:21-108:3 (Exhibit 9, included in Transcript, Volume 4); Tr. 508:12-14, 509:22-510:7 (Vasington Cross-Examination).

[87] *See* Tr. 302:10-20; Tr. 303:8-15 (Gates Cross-examination).

that right.[88] In that case, the normal industry rules for meet-point billing long distance carriers would apply. Under those rules, each LEC bills the long distance carrier for the portions of access service that each respective LEC provides. Where – as in this scenario – the two LECs each provide a portion of the "switched transport" function, they will determine a "billing percentage" that each will use to calculate their share of transport charges to bill to the long distance carrier.[89] As Mr. Gates explains, these arrangements are spelled out in the industry-standard MECAB and MECOD documents.[90] The only variation from those documents that would apply is the fact that Bright House, by virtue of Section 251(c)(2), is entitled to designate the interconnection point, which, under the meet point billing rules, would also be the "meet point."

Assuming that Bright House has the right to designate the interconnection point for this meet-point billing traffic, Bright House would be financially responsible (at TELRIC rates, per Issue No. 24) for any Verizon-supplied facilities that Bright House uses on Bright House's side of the interconnection point. That would include the current facilities linking Bright House's end office collocations to Verizon's tandem, if the interconnection point for this traffic remains there. On the other hand, any facilities on Verizon's side of the interconnection point – wherever it is – may not be billed to Bright House. Instead, Verizon is entitled to charge the long distance carriers for the use of those facilities.[91]

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[88] If Verizon's initial brief indicates that there is a disagreement on this point, we will address it in our reply brief.

[89] *See* Munsell Depo. Tr. at 160:19-161:7; 184:8-17 (Exhibit 15, included in Transcript, Volume 4). *See also* the "MECAB" document, Exhibit TJG-5 (included in Transcript, Volume 4) for a discussion of billing percentages.

[90] Tr. 131:17-132:5 (Gates Direct); Tr. 230 note 29 (Gates Rebuttal).

[91] *See* Tr. 312:11-18 (Gates Cross-Examination).

The second major issue under Issue No. 36 involves the question of Bright House providing tandem functionality in competition with Verizon. At a high level, under this arrangement, long distance carriers with traffic to deliver to Verizon's end user customers would not be required to deliver that traffic directly to Verizon. Instead, they would have the option of delivering it to Bright House, which would interconnect with Verizon at an appropriate location, and Verizon would then deliver it to the end users. In this scenario, Bright House and Verizon would compete for the business of the long distance carrier.

Verizon's position on this issue was somewhat confused as the case progressed, but finally appears to have stabilized. Initially, Verizon seemed to think that Bright House would not be permitted to provide competing tandem functionality at all.[92] However, Verizon eventually realized that this is precisely the arrangement established for switched access competition in the FCC's *Expanded Interconnection* proceeding, discussed in Section II.B above. Its fallback position then became that Bright House can compete with Verizon in this way, but only on the terms and conditions contained in its so-called "Tandem Switched Signaling" or "TSS" tariff – that is, the Verizon tariff filed to conform with the FCC's *Expanded Interconnection* regime.[93]

This is where the parties disagree. Bright House certainly has the option to take service under the terms of Verizon's TSS tariff, but there are several respects in which that tariff does not meet the requirements of the 1996 Act. And the FCC has expressly held that Section 251(c)(2) interconnection rights – the rights that are at issue in this proceeding – are broader than the pre-existing interconnection rights that the FCC established under the *Expanded*

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92 *See* Tr. 592:17-593:17 (Munsell Direct).

93 Tr. 693:2-694:16 (Munsell Cross-Examination)

Interconnection regime.[94] For example, Verizon's tariff does not recognize Bright House's right to interconnect at any technically feasible point, and instead requires Bright House to interconnect at the specific end offices where traffic originates or terminates.[95] In addition, even if Bright House agreed to interconnect at each end office, assuming it wanted to use Verizon's facilities to do so, the tariff contemplates that it will purchase connections to those end offices at tariffed rates, rather than the TELRIC rates applicable to interconnection under the Act.[96] In light of these important differences between Verizon's TSS tariff and Bright House's interconnection rights under Section 251(c)(2), the Commission should clarify three points.

First, the Commission should clarify that for traffic where Bright House is acting as a competing tandem/transport provider, Verizon must interconnect with Bright House to exchange that traffic at any technically feasible point – not just Verizon's end offices. This would include, without limitation, the current end office collocations.

Second, the Commission should clarify that once Bright House has established the technically feasible interconnection points for this traffic, the normal meet point billing rules would apply, as described above. That is, Bright House would bill the long distance carriers for the services it provides on its side of the interconnection points, and Verizon would bill the long distance carriers – and not bill Bright House – for the services Verizon provides on its side of the interconnection point.

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94 *See Local Competition Order* at ¶¶ 610-612.

95 *See* Verizon's TSS Tariff – FCC Tariff No. 14, Section 4.5.2(H)(7). This is included in the record as Exhibit 10 to Deposition of Mr. Munsell. The referenced section appears as numbered pages 428-429 of Mr. Munsell's Deposition, which is, itself, Exhibit 14 in the case (included in Transcript Volume 4). It indicates that in order to take advantage of the TSS service, Bright House would need to purchase tariffed entrance facilities or direct-trunked transport.

96 *Id. See also* Tr. 694:5-18 (Munsell Cross-Examination) (Bright House would need to buy Feature Group D access trunks to make use of TSS service).

Third, to the extent that Bright House uses Verizon facilities to connect its network to the interconnection points, as discussed in connection with Issue No. 24, any such facilities would be priced at TELRIC rates rather than tariffed rates.[97]

Finally, the third, relatively minor issue under Issue No. 36 relates to situations in which Bright House might provide local tandem transit service to deliver local traffic to Verizon from third-party carriers.[98] Bright House should not be responsible for third-party traffic that it delivers to Verizon, any more than Verizon is responsible for third party transit traffic it delivers to Bright House. To the contrary, if a third-party carrier wants to "transit" traffic to Verizon by means of Bright House's network, Bright House's proposal is that the same terms that Verizon imposes on Bright House also be imposed on Verizon. That is, Verizon should be required to bill the third party carrier directly for any traffic that Verizon terminates for such carrier. Bright House will, of course, cooperate with Verizon in providing available information regarding which third-party carrier is providing which traffic.

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[97] This specific scenario might arise if Bright House concludes that it is most administratively convenient to accede to the interconnection architecture embodied in Verizon's TSS tariff, which envisions interconnection points at each Verizon end office to which Bright House would be delivering inbound long distance traffic. In that scenario, Bright House would likely not construct its own separate physical facilities to each of the dozens of Verizon end offices in the Tampa LATA; we would instead rely on Verizon to establish connections to many if not most of them. In order for this to be a competitively effective option for Bright House, it is necessary that the Commission clearly rule that TELRIC rates, not tariffed rates, would apply to any such facilities.

[98] This addresses part (A) of Issue No. 36: "Should Bright House remain financially responsible for the traffic of its affiliates or other third parties when it delivers that traffic for termination by Verizon?" When the "affiliates or other third parties" are long distance carriers with inbound long distance traffic to get to Verizon, the normal meet point billing rules should apply, as described above. So, the remaining issue is limited to local transit traffic, rather than meet-point billing traffic.

ISSUE NO. 37:	HOW SHOULD THE TYPES OF TRAFFIC (E.G. LOCAL, ISP, ACCESS) THAT ARE EXCHANGED BE DEFINED AND WHAT RATES SHOULD APPLY?

BRIGHT HOUSE POSITION:[99]

ALL TRAFFIC THAT IS NOT EXCHANGE ACCESS IS SUBJECT TO RECIPROCAL COMPENSATION. NO BRIGHT-HOUSE-ORIGINATED TRAFFIC IS TOLL TRAFFIC, SO VERIZON MAY NOT CHARGE ACCESS CHARGES ON ANY SUCH TRAFFIC. THE $0.0007 RATE FOR RECIPROCAL COMPENSATION TRAFFIC COVERS ALL "TRANSPORT" FUNCTIONS.

Issue No. 37 relates to charges for the transport and termination of traffic exchanged between the two parties. Today, Verizon charges Bright House access charges on some traffic to which such charges do not apply.

The fact Verizon's access charges should not apply to the calls in question can be seen by following, step-by-step, the legal and regulatory definitions that govern this issue. First, the FCC has ruled that reciprocal compensation applies to all traffic two local carriers exchange that is not "exchange access."[100] "Exchange access" is defined as the use of local facilities to originate or terminate toll calls.[101] A call is not a toll call if it falls under a mandatory minimum local calling plan, because a toll call, by definition, has to have a separate "toll" charge associated with it.[102] All of the calls that Bright House sends to Verizon are part of a mandatory minimum plan that

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[99] Bright House addressed Issue No. 37 through the testimony of Mr. Gates and Ms. Johnson. *See* Tr. 122:17-131:2, 133:12-145:28 (Gates Direct); Tr. 244:20-252:20 (Gates Rebuttal); Tr. 385:4-387:19 (Johnson Direct). In addition, we addressed matters relating to the definition of local calling areas, and the classification of traffic for intercarrier compensation purposes, in response to Staff Interrogatory Nos. 26-29, included in the record as part of composite Exhibit 3 (Transcript, Volume 4). We incorporate all of that discussion here by reference, and respectfully refer the Commission to that additional material regarding Issue No. 37.

[100] 47 C.F.R. § 51.701(b)(1). A species of traffic called "information access" is also excluded from reciprocal compensation, but that has no bearing on this case. *See also 2008 Reciprocal Compensation Order, supra.*

[101] 47 U.S.C. § 153(16) (defining exchange access).

[102] 47 U.S.C. § 153(48) (defining "telephone toll service" as calls subject to a "separate charge" that is not included as part of the "contracts with subscribers for exchange service").

includes the entire Tampa LATA.[103] As a result, none of those calls are "telephone toll service." Because "exchange access" is ***limited*** to the process of originating and terminating toll calls, when Verizon terminates the calls from Bright House – which are not toll calls – it is not providing "exchange access." It follows that reciprocal compensation, not access, is the only proper intercarrier compensation regime to apply to these calls.

Verizon claims that it would be administratively complicated to stop charging access charges on this traffic, but its own witness explained that for the last 25 years, the practice has been that if a carrier's billing computers cannot properly rate traffic on an individual, call-by-call basis, the solution is to bill based on agreed billing factors.[104] In this case the billing "factor" would simply be to apply reciprocal compensation rather than access rates to all traffic.[105]

Verizon also argues (through the testimony of Mr. Munsell) that numerous states have considered and rejected proposals similar to that advanced by Bright House here.[106] We will reply in detail to whatever arguments Verizon makes in its initial brief with regard to these state decisions. At this juncture, however, we would note the following two key points which distinguish our proposal here, from the situations addressed in the Verizon's cases.

First, our proposal relates to how much money Bright House should have to pay Verizon to terminate local calls that our end users make to Verizon end users, within the bounds of our local calling plan. By contrast, we believe that all of the cases Verizon cites deal with an entirely different situation, which is the proper intercarrier compensation treatment of so-called "virtual

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103 Tr. 317:7-10 (Gates Cross-Examination).

104 Tr. 702:9-703:6 (Munsell Cross-Examination); Munsell Deposition at 206:15-207:1 (included as Exhibit 14 in Transcript, Volume 4).

105 Tr. 336:7-13 (Gates Redirect).

106 *See* Tr. 671:7-674:4 (Munsell Rebuttal).

NXX" calls from the ILEC's end users to a dial-up ISP served by the CLEC.[107] In our case, we are competing head-to-head with Verizon for the business of end users, and Verizon's imposition of access charges on calls that we treat as local impedes our ability to compete.[108] In the "virtual NXX" case, the CLEC is not seeking to compete for end users; it is simply seeking to collect reciprocal compensation for calls to ISPs made by ILEC end users. The situation addressed in Verizon's cases, therefore, raises entirely different competitive and market considerations than does our proposal.

Second, all of Verizon's cases were decided prior to the FCC's most recent statement regarding the scope of the application of reciprocal compensation, rather than access charges.[109] As a result of continuing industry controversy surrounding dial-up calls to ISPs, the FCC was directed by the D.C. Circuit to provide a coherent legal rationale for the special $0.0007/minute charging regime that it had established in 2001 but that had been subject to legal challenge since that time. The FCC finally did so in November 2008.[110] In that ruling, the FCC frankly acknowledged that it had initially ruled that the application of reciprocal compensation was to be based largely if not entirely on geographic considerations, *i.e.*, on whether a call crosses the

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[107] In the "virtual NXX" situation, a CLEC will assign telephone numbers to an ISP's modems, located in one physical exchange, that "look like" numbers that are "local" to ILEC customers in distant exchanges, including exchanges from which customers would normally have to dial a toll call to reach the physical location of the ISP. As a matter of network dialing arrangements, this allows the distant ILEC customers to call the ISP on a "local" basis. The question in such cases is whether the CLEC receiving the inbound calls is entitled to receive reciprocal compensation for them even though in geographic terms, from the perspective of the ILEC's local calling plan, they "look like" long distance or toll calls. Whatever the proper resolution of intercarrier compensation for "virtual NXX" calls to ISPs, that situation obviously has nothing to do with Bright House's effort to compete head-to-head with Verizon by means of (among other things) offering customers a larger and more convenient local calling area for end users' normal outbound calls.

[108] *See, e.g.*, Tr. 126:8-23 (Gates Direct).

[109] *See 2008 Reciprocal Compensation Order, supra.*

[110] *See id.* at ¶¶ 2-5 (describing background of controversy).

boundary of a local calling zone (typically, the ILEC's local calling zone).[111] The *2008 Reciprocal Compensation Ruling*, however, reaffirmed the FCC's express rejection of that approach, and instead confirmed the conclusion, presently embodied in the FCC's rules, that reciprocal compensation applies to all traffic that is not "exchange access" or "information access."[112] In assessing Bright House's proposal, therefore, the Commission must consider the FCC's most recent, and clearest, statement that reciprocal compensation applies to all traffic two LECs exchange that does not fall into the two exceptions. Earlier rulings made without the benefit of the FCC's most recent statements on these issues are of limited, if any, guidance on the matter as it sits before the Commission today.

Also included within Issue No. 37 is the question of how to apply the term "transport," in the context of intercarrier compensation for "transport and termination" of calls. "Transport" is defined as getting a call from the point of physical hand-off between the carriers to the terminating carrier's switch serving the called party.[113] In the abstract it would be appropriate to charge separate rates for multiplexing, tandem switching, etc., based on the functions the terminating carrier performs.[114] However, the FCC has given ILECs the right to limit their exposure to high payments to CLECs by establishing a special, integrated rate of

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[111] *Id.* at ¶¶ 7, 9

[112] 47 C.F.R. § 51.701(b); *2008 Reciprocal Compensation Order* at ¶¶ 7-22. Bright House's outbound traffic to Verizon is obviously not "information access." That term is not defined in the Communications Act, but instead dates back to the decree breaking up the Bell System in 1984. In that context it referred to special telephone service arrangements provided to what were then known as "enhanced service providers" who had special needs for handling their data traffic. *See United States v. AT&T, supra,* 552 F. Supp. at 229.

[113] 47 C.F.R. § 51.701(c) states that transport is "the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC." The FCC's rules also provide – and Verizon agrees – that "the point of interconnection is the place where our networks physically link." Tr. at 18:18-19 (remarks of Mr. O'Roark). *See also* 47 C.F.R. § 51.5 (definition of "interconnection").

[114] *See* 47 C.F.R. § 51.709.

$0.0007/minute, to which Verizon and Bright House have agreed in this case. That rate is a *quid pro quo*: The ILEC gets assurance that it will only have to ***pay*** the low rate, but in return it is obliged to ***accept*** the low rate as full payment for both transport ***and*** termination functions.[115] As a result, the parties' contract needs to clearly state that no additional charges for "transport" functions – such as multiplexing, direct trunking, etc. – are to be imposed, over and above the $0.0007/minute rate. Verizon seeks to improperly obtain the benefit of the $0.0007 rate for traffic it sends to Bright House, while still imposing separate charges for multiplexing. The Commission should require that the parties' new contract expressly state that no charges for transport or termination functions may be assessed beyond the $0.0007 rate.

ISSUE NO. 32: MAY BRIGHT HOUSE REQUIRE VERIZON TO ACCEPT TRUNKING AT DS-3 LEVEL OR ABOVE?

BRIGHT HOUSE POSITION:[116]

VERIZON MUST PROVIDE INTERCONNECTION USING ANY TECHNICALLY FEASIBLE METHOD BRIGHT HOUSE REQUESTS, AT TELRIC RATES. DS-3 AND ABOVE TRUNKING IS FEASIBLE, SO VERIZON MUST PROVIDE IT IF SO REQUESTED. BRIGHT HOUSE HAS REASONABLY PROPOSED THAT THE TRUNKING LEVEL BE ESTABLISHED BASED ON THE AMOUNT OF TRAFFIC THE PARTIES EXCHANGE.

Issue No. 32 relates to the technical arrangements used to hand off traffic at the network interconnection points. Verizon insists on receiving traffic at a low data rate – the DS-1 level – for delivery to Verizon's switches. However, the "native" data rates on Bright House's network are DS-3, OC-3 and higher levels.[117] The FCC's rules require Verizon to provide "any

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[115] *ISP Remand Order* at ¶ 89 (ILEC may only obtain benefit of paying special low rate if it offers "to exchange all traffic subject to Section 251(b)(5) at the same rate") (footnote omitted).

[116] Bright House addressed Issue No. 32 through the testimony of Mr. Gates. *See* Tr. 157:20-163:7 (Gates Direct); Tr. 210:18-217:2 (Gates Rebuttal). In addition, we addressed matters relating to Verizon's obligation to interconnect in any technically feasible manner in response to Staff Interrogatory Nos. 15, 16, 17, 22, 32 & 33, included in the record as part of composite Exhibit 3 (Transcript, Volume 4). We incorporate all of that discussion here by reference, and respectfully refer the Commission to that additional material regarding Issue No. 32.

[117] *See* Tr. 213:18 (Gates Rebuttal).

technically feasible method of obtaining interconnection,"[118] and Verizon has not suggested that the higher data rates are infeasible. So, it must honor a reasonable Bright House request for higher-level interconnection.[119] Moreover, as described under Issue No. 24, methods of obtaining interconnection are priced at TELRIC, so Verizon can only charge Bright House for costs that an efficient carrier would incur. This mean that, since an efficient carrier would operate at higher data rates, multiplexing and demultiplexing charges may not be imposed on Bright House.[120]

This same conclusion is supported by the language of Section 251(c)(2). Bright House may interconnect with Verizon at "any technically feasible point" within Verizon's network. Verizon's "network" is not limited to its switches. To the contrary, its "network" includes (among other things) its fiber optic terminals and its multiplexing gear – both of which can and do accept traffic at very high data rates. There is, simply, nothing technically infeasible about requiring Verizon to accept traffic from Bright House at DS-3, OC-3 or higher data rates.

From this perspective, the real dispute seems to center on the fact that most Verizon switches today can only accept DS-1 inputs. Even if that is true, it is beside the point. That just means that Verizon has to take on the task (at its expense) of demultiplexing the higher speed signals it receives from Bright House down to the DS-1 level and multiplexing its own outbound traffic up to the higher data rates used in Bright House's network.

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[118] 47 C.F.R. § 51.321(a).

[119] Bright House's proposed contract language only calls for higher-date-rate connections where traffic levels justify them. *See* Exhibit TJG-3, page 69 of 152 (included in Transcript Volume 4).

[120] The parties have a limited settlement regarding multiplexing charges under which Bright House will pay a portion of Verizon's normal tariffed charges, as long as the parties' present physical interconnection arrangements remain materially unchanged. *See* Tr. 99:5-14 (Gates Direct); Tr. 342:20-343:13 (Gates Re-Direct). Bright House will, of course, honor that settlement, but during the term of the new interconnection agreement those arrangements may well change.

Bright House does not believe that Verizon contends that it cannot accept traffic from Bright House at higher data rates; we believe that Verizon contends that Bright House should pay Verizon for any necessary demultiplexing. Subject to the discussion regarding the scope of the "transport" function in connection with Issue No. 37, Bright House agrees – with the extremely important caveat that the relevant pricing standard for any such charges is TELRIC.[121] As Mr. Gates explained, even though it may well be that Verizon still uses switches that only accept DS-1-level traffic, an ***efficient*** carrier using the most efficient currently available equipment would be able to directly accept DS-3 and higher level inputs without separate multiplexing activities.[122] As a result, the applicable TELRIC rate for multiplexing Bright House's high-data-rate signals down to the DS-1 level to accommodate Verizon's switches is actually zero.[123]

As noted above, Bright House and Verizon have a settlement regarding charges for multiplexing that applies as long as the parties' current physical interconnection arrangements are not materially changed.[124] Bright House will honor that settlement. However, Bright House is considering a variety of possible rearrangements in order to optimize its interconnections with Verizon.[125] It is therefore highly possible that the current arrangements will change, so the parties need to know how to handle this issue.

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[121] This conclusion is the same whether one views the multiplexing as being part of the "transport" function addressed by 47 C.F.R. § 51.701, or as being an "interconnection arrangement" established for purposes of Section 251(c)(2). The same TELRIC standard applies in either case.

[122] Tr. 343:21-344:8 (Gates Cross-Examination); Tr. 161:7-11 (Gates Direct).

[123] *Id.*

[124] Tr. 99:5-14 (Gates Direct); Tr. 342:24-343:13 (Gates Redirect).

[125] Tr. 409:3-14 (Johnson Cross-Examination) (Bright House is considering "network optimization opportunities"); Tr. 343:21-24 (Gates Cross-Examination) (Bright House needs to know pricing of different options in order to determine how and whether to reconfigure its interconnections with Verizon).

Bright House, therefore, requests that the Commission rule that (a) Verizon must accept interconnection with Bright House at DS-3 or higher data rates, as contemplated by Bright House's specific contract proposal; and (b) in such a case (and subject to the parties' settlement), any necessary multiplexing would be priced at a TELRIC price of zero, to the extent that such functions were not already covered as part of the "transport" function (as discussed in connection with Issue No. 37). Under no circumstances is it appropriate for Verizon to impose its non-TELRIC, tariffed multiplexing rates for these functions.

ISSUE NO. 49: ARE SPECIAL ACCESS CIRCUITS THAT VERIZON SELLS TO END USERS AT RETAIL SUBJECT TO RESALE AT A DISCOUNTED RATE?

BRIGHT HOUSE POSITION:[126]

ALL VERIZON RETAIL SERVICES SOLD TO END USERS ARE SUBJECT TO THE DISCOUNT. THE ONLY EXCEPTION IS "EXCHANGE ACCESS" SERVICES. SPECIAL ACCESS SERVICES SOLD TO RETAIL BUSINESS CUSTOMERS FOR POINT-TO-POINT DATA SERVICES ARE NOT "EXCHANGE ACCESS," SO THE DISCOUNT APPLIES TO THEM.

In some respects like Issue No. 37, resolving Issue No. 49 requires correctly applying the definition of "exchange access." In general, Verizon must provide a discount (to CLECs) on "any telecommunications service [it] provides at retail to subscribers who are not telecommunications carriers."[127] Direct point-to-point private line services used for data transmission fall within this category – they are sold at retail to businesses to help those business construct their internal data networks.[128] These retail private line services, however, are offered

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[126] Bright House addressed Issue No. 49 through the testimony of Mr. Gates. *See* Tr. 181:15-184:7 (Gates Direct); Tr. 288:1-289:6:10 (Gates Rebuttal). In addition, we addressed matters relating to the resale of dedicated data circuits in response to Staff Interrogatory No. 30, included in the record as part of composite Exhibit 3 (Transcript, Volume 4). We incorporate all of that discussion here by reference, and respectfully refer the Commission to that additional material regarding Issue No. 49.

[127] 47 U.S.C. § 251(c)(4).

[128] Gates Depo. Tr. at 84:1-9 (included as Exhibit 9 in Transcript, Volume 4).

out of Verizon's "special access" tariff.[129] In certain rulings, the FCC has said that in general "access" services are not retail services, and thus not subject to the discount. But in formulating its actual ***rule*** on this issue, the FCC was more careful. It did not carve out every service that the ILEC might include within its "access" tariffs. Instead, it specifically limited the carve-out to "exchange access services, as defined in section 3 of the Act."[130]

As explained above, "exchange access" means using local facilities to originate and terminate toll calls, which clearly does not apply to point-to-point data circuits sold to business customers. So, such circuits are subject to discounted pricing from Verizon. Bright House wants the parties' contract to follow the FCC's rule, so that Bright House may, if it needs to, obtain these circuits for resale at a discount. Verizon, to the contrary, wants to follow the FCC's *dicta* rather than its actual, formal rule.

ISSUE NO. 7: SHOULD VERIZON BE ALLOWED TO CEASE PERFORMING DUTIES PROVIDED FOR IN THIS AGREEMENT THAT ARE NOT REQUIRED BY APPLICABLE LAW?

BRIGHT HOUSE POSITION:[131]

VERIZON SHOULD NOT BE ALLOWED TO CEASE PERFORMING DUTIES IT CONCLUDES ARE NOT REQUIRED BY APPLICABLE LAW. VERIZON'S PROPOSAL IS UNFAIR, DISRUPTIVE, AND CREATES UNCERTAINTY. THE CONTRACT'S "CHANGE IN LAW" PROVISION PROTECTS VERIZON FROM PERFORMING SERVICES THE LAW NO LONGER REQUIRES IT TO PERFORM.

Issue No. 7 concerns proposed Verizon language that would allow it to stop providing any service under the parties' new contract, on 30 days' notice, any time that it concludes, in its

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129 Tr. 500:22-501:8 (Vasington Cross-Examination).

130 47 C.F.R. § 51.605(b).

131 Bright House addressed Issue No. 7 through the testimony of Mr. Gates and Ms. Johnson. *See* Tr. 57:28-63:3 (Gates Direct); Tr. 252:21-256:16 (Gates Rebuttal); Tr. 366:8-373:13 (Johnson Direct); 392:1-393:9 (Johnson Rebuttal). In addition, we addressed matters relating to Verizon's proposal to be able to walk away from its contractual commitments in response to Staff Interrogatory No. 35, included in the record as part of composite Exhibit 3 (included in Transcript, Volume 4). We incorporate all of that discussion here by reference, and respectfully refer the Commission to that additional material regarding Issue No. 7.

own sole discretion, that it is not obliged by law to provide the service. This is a bad idea for many reasons. Why should one party to a contract be able to unilaterally decide that it can walk away from its duties, triggering a storm of litigation and possibly serious disruption of the other party's business, with no regard for the actual term of the contract?[132] This is a particularly bad idea for a contract between Verizon and Bright House, because Verizon has chosen to strategically avoid saying whether it believes that Bright House is entitled to ***any*** interconnection rights ***at all***.[133] As Verizon's own witness admitted, this means Verizon can walk away from the agreement – and precipitate immediate emergency litigation – just by having its lawyers "discover" a legal theory under which it is not obliged to interconnect with Bright House.[134] The Commission should both reject this language and expressly declare that Bright House is entitled to interconnection rights from Verizon.

Once the terms of the parties' new contract are established, those terms should be fully binding on both parties for the full term of the agreement, unless there is a material change in law. Without a change in law, Verizon should not be permitted to cease performing any of its duties established under the contract, even if Verizon privately believes that it agreed to perform certain obligations that it was not clearly required, or not required at all, to perform by applicable law. Any other conclusion would deprive Bright House of the benefit of the "binding" agreement it is entitled to negotiate with Verizon under the terms of 47 U.S.C. § 252(a)(1).

It bears repeating that Verizon's proposal is ***not*** based on the need to accommodate ***changes*** in applicable law: the parties have agreed that if applicable law changes, they will

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[132] *See* Tr. 546:6-357:13 (Johnson Direct); Tr. 371:10-372:17 (Johnson Direct); Tr. 421:2-423:6 (Johnson discussion with Commissioner Skop).

[133] *See, e.g.*, Tr. 570:19-571:2 (Munsell Direct); Tr. 626 at n.1 (Munsell Rebuttal); Munsell Depo. Tr. at 85:8-86:18 (included as Exhibit 14 in Transcript Volume 4).

[134] *See* Munsell Depo. Tr. at 85:8-86:18 (included as Exhibit 14 in Transcript, Volume 4).

discuss the matter and amend the contract accordingly, with recourse to the Commission if they cannot agree on what the new legal regime requires.[135] Verizon's proposed language would allow it to unilaterally cease providing its contractual commitments, whether there is any change in law or not. Moreover, the provision applies "***notwithstanding anything else***" in the Agreement. This means that (a) it applies to all of Verizon's contractual obligations, and (b) the usual terms obliging Verizon to negotiate regarding disputes, etc. do not limit the operation of this provision.

Putting this all together, Verizon is asserting a unilateral right to decide what it does and does not have to do under the contract. This is unjust and unreasonable, and, therefore, should be rejected by the Commission under Sections 251(c) and 252(c) of the Act.[136] It makes a mockery of the entire negotiation and arbitration process in which Bright House and Verizon have been engaged, and indeed of the Commission's expenditure of time and effort to resolve this matter. Verizon cannot simultaneously negotiate and agree to various provisions with Bright

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[135] Proposed agreement, General Terms & Conditions, § 4.6 (contained in Exhibit TJG-3, which was an effort to present a draft of the parties' interconnection agreement showing what was agreed to as of the date of its filing. There is no disagreement between the parties as to the terms of Section 4.6 of the General Terms and Conditions.)

[136] Under Sections 251 and 252 of the federal Communications Act, the Commission must establish "just and reasonable" interconnection terms and conditions. Judicial discussion of this legal standard has mainly occurred in the context of setting rates, where courts hold that an agency has wide discretion to choose how to do so, as long as the end result falls within a "zone of reasonableness." *See Verizon Communications, Inc. v. Federal Communications Commission,* 535 U.S. 467, 499-500 (2002) (noting regulators' "ample discretion to choose methodology"); *id.* at 501 (citation omitted) ("responsibility for 'just and reasonable' rates leaves methodology largely subject to discretion"). *See also Duquesne Light Co. v. Barasch,* 488 U.S. 299, 310 (1989) (*quoting FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end"). This logic applies to the terms and conditions in an interconnection agreement. The Commission must conform its decision to applicable requirements of federal law, 47 U.S.C. § 252(c)(4). But where – as in the case of Bright House's proposed one-year limitation on back-billing and bill protests – no provision of federal law speaks directly to the question, the Commission has "ample discretion," *Verizon Communications,* 535 U.S. at 499, to establish whatever contractual terms are just and reasonable, considering all the circumstances.

House and then simultaneously assert that those provisions are "binding" only so long as Verizon declares them to be.

Moreover, on matters as to which the parties cannot agree, Section 252(c) requires the Commission to "impos[e] conditions" on the parties that implement the requirements of Section 251. Verizon, therefore, may not hide behind a generic statement that it "reserves its right" to object at some future time to Bright House's entitlement to interconnection with Bright House. Bright House has asserted that it is entitled to interconnection with Verizon; Verizon has not denied it. As a precondition to resolving the open issues between the parties, and approving the contract, as required by Section 252(c), the Commission must find that Bright House is entitled to interconnection with Verizon, under Section 251.[137]

ISSUE NO. 13: WHAT TIME LIMITS SHOULD APPLY TO THE PARTIES' RIGHT TO BILL FOR SERVICES AND DISPUTE CHARGES FOR BILLED SERVICES?

BRIGHT HOUSE POSITION:[138]

IT IS JUST, REASONABLE AND PRACTICAL TO IMPOSE A ONE-YEAR TIME LIMIT BOTH ON BACK-BILLING FOR SERVICES RENDERED BUT NOT BILLED, AND FOR RETROACTIVELY PROTESTING BILLS ALREADY PAID.

Issue No. 13 involves the parties' obligation to send bills, or raise protests to bills that have been received and paid, within a reasonable time. Under Verizon's language, either party at

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[137] We note two additional points regarding Bright House's interconnection rights. First, as the Commission is aware, Bright House was found to be a carrier – against a Verizon challenge to its carrier status – in connection with the FCC and federal court dispute regarding Verizon's retention marketing practices. *See Verizon California v. FCC*, 555 F.3d 270 (D.C. Cir. 2009). Second, the Florida Legislature recently passed a statute clearly intended to ensure that wholesale CLECs like Bright House are accorded full and complete interconnection rights. Florida Statutes, § 364.13. In light of these authorities, the Commission should have no hesitation in ruling that Bright House is a CLEC and that Verizon has no valid basis to challenge Bright House's interconnection rights.

[138] Bright House addressed Issue No. 13 through the testimony of Mr. Gates and Ms. Johnson. *See* Tr. 79:16-81:17 (Gates Direct); Tr. 265:9-267:20 (Gates Rebuttal); Tr. 379:20-381:16 (Johnson Direct). In addition, we addressed matters relating to the need for reasonable limits on bill protests and back-billing in response to Staff Interrogatory No. 9, included in the record as part of composite Exhibit 3 (Transcript, Volume 4). We incorporate all of that discussion here by reference, and respectfully refer the Commission to that additional material regarding Issue No. 13.

any time – literally for years after services are rendered – can either render a bill for previously unbilled services or raise a protest against a bill that was paid long ago. That is poor contractual and business "hygiene" – parties need to close their accounting books on transactions within a reasonable time. Thus, Bright House proposes that parties have a year from the time a service is rendered to bill for it, and a year from the time a bill is paid to reconsider and raise a protest to it. This proposal will not harm Verizon – indeed, its own witness suggests that Verizon will be a net beneficiary of this language – and it will assist Bright House (and any other CLEC that adopts the agreement) in maintaining reasonable accounting records.

The parties should be required to render a bill one year of providing a service, and to protest any bill within one year of receiving it. This provision would provide both parties with certainty, after a reasonable time, regarding their own financial position as regards the other party. In addition, it would lower both parties' business risk, and therefore lowers their overall cost of operations. It would also create a healthy incentive on both parties to ensure that their bills to the other party, as well as bills received from the other party, are accurate.

There is no evidence that either party has needed to back-bill for services rendered more than a year ago, or to protest a bill paid more than a year ago. In fact, Verizon is more typically subject to late billing or late protests from interconnected carriers than vice versa.[139] As a result, on balance Verizon will be better off with this provision in place, as a practical business matter.

It seems that, in a manner similar to its position regarding Issue No. 7, Verizon wants to be able to concoct new legal theories, long after the fact, to try to negate its obligations to pay Bright House (and thus protest bills long after they were paid), or claim additional payments from Bright House (and thus back-bill long after the supposedly billable function was

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[139] *See* Munsell Depo. Tr. 47:12-48:4 (included in Transcript, Volume 4).

performed). As with Verizon's proposal to be able to walk away from its contractual obligations, addressed under Issue No. 7, this is unjust and unreasonable and, should be rejected by the Commission under Sections 251(c) and 252(c) of the Act.[140]

In this regard, an interconnection agreement established under the auspices of federal law need not conform to the generic Florida statute of limitations. That generic statute of limitations was established to apply to the general run of individual and commercial contracts. Interconnection agreements, however, are established and supervised by regulators such as the Commission precisely because they are intended to serve not merely the private interests of the parties, but also the public interest in establishing and maintaining competition in telecommunications markets.[141] The different legal and policy context in which interconnection agreements are established authorizes and justifies a different, and shorter, limitations period than applies under generic Florida law.

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[140] *See* note 136, *supra.*

[141] A key purpose of establishing interconnection agreements is to have "secure the public benefit of competition." *WorldNet Telecommunications, Inc. v. Puerto Rico Telephone Company, Inc.*, 497 F.3d 1, 12 (1st Cir. 2007).

ISSUE NO. 41: SHOULD THE ICA CONTAIN SPECIFIC PROCEDURES TO GOVERN THE PROCESS OF TRANSFERRING A CUSTOMER BETWEEN THE PARTIES AND THE PROCESS OF LOCAL NUMBER PORTABILITY ("LNP") PROVISIONING? IF SO, WHAT SHOULD THOSE PROCEDURES BE?

BRIGHT HOUSE POSITION:[142]

IT IS JUST, REASONABLE AND FAIR TO REQUIRE THE PARTIES TO PROVIDE COORDINATION TO EACH OTHER, AT NO CHARGE, IN THE CASE OF THE PORTING OF TELEPHONE NUMBERS OF CUSTOMERS WITH TEN OR MORE DIFFERENT NUMBERS TO BE PORTED.

All aspects of this issue have been settled, except for the narrow question of whether the new ICA should provide that parties must "coordinate" their efforts when a single customer has a large number of numbers/lines being ported, in order to ensure that the transfer occurs smoothly, with no charge by either party for such coordination.

Most of the time, handling number ports for these large customers goes smoothly,[143] but it is important that the carriers be ready to manually handle any problems that might arise – which is what we refer to when we say the parties should "coordinate" in this regard. Bright House proposes that where coordination appears needed for such large customers, the parties provide it to each other at no charge. Verizon seeks to impose a charge for this function. We believe that our proposal is more reasonable and should be adopted.

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[142] Bright House addressed Issue No. 41 through the testimony of Mr. Gates. *See* Tr. 175:18-176:5; (Gates Direct); 193:18-194:2; 196:15-208:21 (Gates Rebuttal). In addition, we addressed matters relating to the need for coordination for ports involving large numbers of lines in response to Staff Interrogatory No. 34, included in the record as part of composite Exhibit 3 (Transcript, Volume 4). We incorporate all of that discussion here by reference, and respectfully refer the Commission to that additional material regarding Issue No. 41.

[143] Tr. 328:11-13 (Gates Cross-Examination).

IV. CONCLUSION.

For the reasons stated herein, and based on the entire record of this case, Bright House respectfully requests that the Commission issue an order adopting its position on all of the disputed issues in this arbitration proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been served via Electronic Mail, U.S. Mail First Class, or Hand Delivery this 9th day of July, 2010, to the persons listed below:

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