Diamond Williams 090501-TP

From: beth.keating@akerman.com
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Subject: Docket No. 090501-TP
Attachments: 20100730121119376.pdf; Bright House Reply Brief.DOC

Attached for electronic filing in the referenced docket, please find Bright House Networks Information Services (Florida), LLC's Reply Brief. 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: 30 pages + signature block
PDF file: 33 (includes cover letter and certificate of service)

E: BHNIS's Reply Brief

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July 30, 2010

VIA ELECTRONIC MAIL

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 the Post Hearing Reply Brief of Bright House Networks Information Services (Florida), LLC. 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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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Arbitration of Certain Terms and Conditions of An Interconnection Agreement with Verizon Florida, LLC by Bright House Networks Information Services (Florida), LLC.	**Docket No. 090501-TP** Filed: July 30, 2010

BRIGHT HOUSE'S POST-HEARING REPLY BRIEF

Bright House Networks Information Services (Florida) LLC ("Bright House") respectfully files this reply brief, to respond to the arguments made by Verizon Florida, LLC ("Verizon") in its opening brief.[1] As in our opening brief, we first address issues relating to the "technical" disputes with Verizon (Issue Nos. 24, 36, 37, 32, and 49) and then address those relating to the contractual/business aspects of our disputes (Issue Nos. 7, 13, and 41).

REPLY TO VERIZON'S ARGUMENTS

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?**

A. Description of the Dispute Embraced By Issue No. 24.[2]

Issue No. 24 arose from Bright House's proposed Interconnection Attachment § 2.1.1.3. By way of background, in the "General" introductory section (§ 1.1) of the Interconnection Attachment,[3] the parties have agreed that Verizon will provide interconnection:

> at (i) any technically feasible Point(s) of Interconnection on Verizon's network in a LATA and/or (ii) a fiber meet point to which the Parties mutually agree under the terms of this Agreement, for the transmission and routing of Telephone Exchange Service and Exchange Access, and such other Telecommunications traffic as is provided for herein.

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1 Verizon Florida LLC's Post-Hearing Brief ("Verizon Brief") at 1. Our initial brief will be cited as "Bright House Brief." Citations to the transcript will follow the same form as in our opening brief.

2 Verizon devotes nearly a third of its opening brief (pages 8-21) to Issue No. 24. We therefore address it in greatest detail here.

3 *See* Exhibit TJG-3 (marked-up draft ICA) (Hearing Exhibit No. 17) at page 59.

Under § 2.1.1 of the Interconnection Attachment, each party must provide transport facilities from its network to points of interconnection ("POIs") selected by Bright House.[4] A party may provide its own facilities (§ 2.1.1.1), or may obtain them from a third party or the other party (§ 2.1.1.2).[5] Bright House's proposed § 2.1.1.3 adds that Bright House may "obtain facilities from Bright House's network to the POI provided by Verizon at TELRIC rates."[6] This language was transferred essentially verbatim to Issue No. 24, which asks: "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?"

Nothing in § 2.1.1.3 turns on whether the facilities or the POIs are existing or new. If § 2.1.1.3 is in the contract, then Bright House may reach new or existing POIs using TELRIC-rated facilities from Verizon. In addition, any existing Verizon-supplied facilities from Bright House's network to a POI would be re-rated at TELRIC. Similarly, nothing in § 2.1.1.3 suggests that Verizon-supplied interconnection facilities are only available to carry telephone exchange service traffic. Instead, agreed § 1.1 tracks 47 U.S.C. § 251(c)(2) and states that interconnection – the purpose for which these facilities exist in the first place – covers "the transmission and routing of Telephone Exchange Service and Exchange Access … ." And, as noted in our opening brief, the Federal Communications Commission ("FCC") has interpreted the statutory

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4 *Id.*

5 *Id.*

6 *See* Exhibit 2 to Arbitration Petition (Decision Points List, or "DPL") at page 67 (proposed Interconnection Attachment, § 2.1.1.3). *See also* Exhibit TJG-2 (chart relating issues to agreement provisions) at page 6 (Issue No. 24 relates to proposed § 2.1.1.3) (Exhibit 16, including in Transcript, Volume 4). Due to a scrivener's error, § 2.1.1.3 was not included in the draft ICA attached to Mr. Gates' direct testimony. *See* Gates Depo. Tr. at 59:18-61:33 (Exhibit 9, included in Transcript, Volume 4). We made clear in our Arbitration Petition, however, that the DPL was the definitive statement of the specific contractual changes we were seeking. *See* Arbitration Petition at 21 ("Exhibit 2 to this petition is Bright House's DPL, which goes through the entire Verizon template, showing on a side-by-side basis, for each provision where Bright House is proposing a change, (a) Verizon's original language; (b) Bright House's proposed change; and (c) a brief explanation of why that change is justified").

language – which § 1.1 tracks – to require interconnection for the transmission and routing of either telephone exchange service (local) traffic, exchange access (toll) traffic, or both.[7]

In Issue No. 24, therefore, Bright House is seeking the right to obtain new facilities from Verizon linking Bright House's network to a POI at TELRIC rates, and also the right to re-rate any existing Verizon facilities linking Bright House's network to a POI to TELRIC rates. As the Commission is aware, the latter aspect of this issue has received the greatest attention. Both, however, are "live" disputes between Bright House and Verizon.[8]

B. Summary of Bright House's Position On Issue No. 24.

Bright House's basic position on Issue No. 24 is that under Section 251(c)(2), incumbent local exchange carriers ("ILECs") must provide interconnection to competitive local exchange carriers ("CLECs") at any technically feasible point for the transmission and routing of telephone exchange service (basically, local traffic) and/or exchange access (basically, toll traffic to or from third party long distance carriers). The existing facilities in dispute carry "exchange access" traffic, so Bright House has Section 251(c)(2) interconnection rights with respect to that traffic. FCC rules implementing Section 251(c)(2) require ILECs to provide technically feasible methods of interconnection at TELRIC rates.[9] The disputed facilities link our network with

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7 Bright House Brief at 7 n.20 and 22 n.62, *citing 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 ¶ 184.

8 The existing facilities at issue are dedicated links connecting Bright House's network equipment to Verizon's tandem switch. These arrangements are graphically shown in Hearing Exhibit 22, included in both Verizon's and Bright House's initial briefs. Calls from long distance carriers arrive at Verizon's tandem. When they are bound for a Bright House end user, Verizon's switch switches them – that is, routes them onto the disputed facilities – which deliver them to Bright House's network equipment. That equipment, in turn, transmits them via Bright House's fiber network to Bright House's switch. There, they are routed to the Bright House end user being called. This works in reverse for calls that Bright House end users make that are bound for the affected long distance carriers: the call is routed by Bright House's switch to its equipment at one of the collocations, where it is handed off to the disputed facilities and transmitted to Verizon's tandem. The tandem then switches the calls to the long distance carriers.

9 47 C.F.R. §§ 51.501 *et seq.*; 47 C.F.R. § 51.321(a) (ILECs must provide any technically feasible

Verizon's for the exchange of exchange access traffic, and thus constitute a technically feasible method of interconnection. As a result, Verizon must provide these facilities at TELRIC rates. The same logic applies to any new facilities Bright House may want to obtain from Verizon linking Bright House's network to a POI.

C. The Commission Should Deny Verizon's Request To Ignore Issue No. 24.

Verizon first raises an untimely request that the Commission not address Issue No. 24.[10] It notes that we are not (right now) asking for new TELRIC-rated facilities under proposed § 2.1.1.3, so that aspect of Issue No. 24 is supposedly "moot."[11] And it claims that, in seeking to apply TELRIC rates to the existing facilities we obtain from Verizon, we supposedly "changed [our] approach" between our direct and rebuttal testimony.[12]

At the outset, the notion that the Commission should not decide Issue No. 24 prospectively (that is, decide whether TELRIC rates apply to new facilities) because we have not yet ordered any such facilities, is ludicrous. We obviously need to know how much we will have to pay Verizon for new facilities before we can decide whether to order them.[13]

Verizon's request that the Commission disregard the evidence on this issue as it relates to existing facilities also must be denied because it is untimely. As explained below, Verizon missed at least three chances to ask Commission to narrow or delete Issue No. 24, and as such, is barred from now making this untimely request, as clearly set forth in the procedural orders issued

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method of obtaining interconnection).

10 Verizon Brief at 8-12.

11 *Id.* at 9, 9-11.

12 Verizon Brief at 8-12.

13 *See* Tr. 343:22-24 (Gates Redirect) ("Bright House needs to know how that is going be priced in order to determine how it's going to reconfigure, if at all, its network"). *See also Tr.* 226:21-228:2 (Gates Rebuttal); Bright House response to Staff Interrogatory No. 32(a), in composite Exhibit 3 (Transcript, Volume 4). Consider a more prosaic example: a family might know that in their situation it would be nice to have a new minivan, but they are not going to actually *order* one without knowing what it costs.

in this case.

First, Verizon's request amounts to a motion to strike our testimony regarding the application of TELRIC rates to the existing, disputed facilities. The Procedural Order states that motions to strike must be made no later than the Prehearing Conference.[14] Verizon did not move to strike our testimony on this issue, so it cannot obtain the same result, nearly two months late,[15] by asking the Commission to "refuse to consider" that testimony.[16] Second, the Prehearing Order states that prefiled testimony will be accepted into the record "subject to appropriate and timely objections."[17] If Verizon had an objection to Mr. Gates' rebuttal testimony (which is where it says we "changed" Issue No. 24), it was obliged to object to that testimony at the hearing. It did not. This constitutes another waiver of any objection Verizon might have had to the scope of Issue No. 24.[18] Third, Verizon's statement of position on Issue No. 24 (in the Prehearing Order) shows that it knew we wanted TELRIC rates for the disputed facilities, but it opposed us on the merits; it did not claim that Issue No. 24 should be narrowed in the manner it now seeks. If Verizon thought Issue 24 did not encompass our actual claims, it needed to make that assertion in its position statement. Its failure to do so is yet another waiver of any objection to considering all of our claims under Issue No. 24.

Finally, Verizon is simply wrong – we ***never changed our position***. The language of

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14 Procedural Order at page 6, Section IV.D.

15 The Prehearing Conference was held on May 13. Verizon's Brief was filed nearly two months later, on July 9.

16 Verizon does not call its request a motion to strike, but there is no real difference between asking the Commission to "refuse to consider" an issue and asking it to the strike the testimony bearing on it. Of course, Verizon could have filed a motion to strike by the Prehearing Conference if it had wanted to do so. By that time, Verizon had seen all of our prefiled testimony (rebuttal was filed April 16) and had also taken the depositions of our witnesses (Mr. Gates on May 5, and Ms. Johnson on May 6).

17 Prehearing Order at 3.

18 In this same vein, Mr. Gates testified about this issue in his deposition, in response to questions from Verizon. *See* Gates Depo. Tr. at 58:20-75:21 (Exhibit 9, included in Transcript, Volume 4). Verizon stipulated to the admission of the deposition.

Issue No. 24 tracks the language of our original proposed § 2.1.1.3 – which would apply TELRIC pricing to both new and existing facilities. The real problem is that for some reason, Verizon apparently did not focus on how our proposed § 2.1.1.3, and Issue No. 24 that embodies it, applies to existing facilities until we made the issue very explicit in our rebuttal testimony.

Verizon implies that it was confused by Mr. Gates' use of the term "entrance facilities,"[19] but this makes no sense. First, neither § 2.1.1.3 nor Issue No. 24 uses that term.[20] Both refer broadly to applying TELRIC pricing to Verizon-supplied facilities "from Bright House's network to the POI." Moreover, when Mr. Gates used the term in his direct, he tied it back to the *Local Competition Order* at ¶ 1062, where the FCC refers broadly to "facilities that are dedicated to the transmission of traffic between two networks."[21] So, when Mr. Gates used the term, it referred to ***any*** facilities for transmitting traffic between two networks – completely consistent with both Issue No. 24 and the language of § 2.1.1.3. Thus, the disputed existing facilities ***are*** "entrance facilities" as the FCC and the courts – and Mr. Gates – use that term.[22]

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19 *See* Verizon Brief at 8-12 (nearly thirty separate references by Verizon to "entrance facilities").

20 Issue No. 24 was finalized by February 12, 2010 (the date of the Procedural Order) and § 2.1.1.3 was included in our November 3, 2009 arbitration petition.

21 Tr. 109:3-7 (Gates Direct), *quoting Local Competition Order* at ¶ 1062.

22 Verizon is thus flat wrong when it says that we "purchase no entrance facilities." Verizon Brief at 9. Verizon may have some narrow and idiosyncratic understanding of that term, but it is not shared by either the FCC or the courts. To the contrary, the FCC and the courts regularly use the term "entrance facility" in a broad sense similar to Mr. Gates. In the *TRO*, the FCC describes "a circuit generally known as an entrance facility" as one that carries traffic "to the competitor's switch or other equipment, often from an [ILEC's] central office." *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2005) ("*TRO*") at ¶ 361. *See also id.* at ¶ 370 (traffic is "carried to the [CLEC's] switch, or other equipment, from an [ILEC's] central office along an inter-network facility often known as an entrance facility"). In the *TRRO*, the FCC refers to "entrance facilities" as "the facilities that connect [CLEC] networks with [ILEC] networks." *Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*TRRO*") at ¶ 136. The 7th Circuit said that an entrance facility "is a connection between a switch maintained by an ILEC and a switch maintained by a CLEC," *Illinois Bell v. Box*, 526 F.3d 1069, 1071 (7th Cir. 2008), and that such facilities are "designed for the very purpose of linking two carriers' networks." The 9th Circuit characterized entrance facilities as "wires that connect rival telephone systems," *Pacific Bell v. California Public Utilities Commission*, 597 F.3d 958, 961 (9th Cir. 2010), and as

In sum, from the beginning, Issue No. 24 – and proposed Interconnection Attachment § 2.1.1.3, which Issue No. 24 embodies – embraced any and all Verizon-supplied "facilities" linking Bright House's network to a POI. Moreover, agreed-to Interconnection Attachment § 1.1 clearly recognizes that POIs will be used for the "transmission and routing" of "exchange access" traffic. When Mr. Gates used the term "entrance facility" in his testimony he defined it broadly, which is entirely consistent with the FCC's and the courts' usage of the term. Issue No. 24, therefore, has from the beginning embraced the disputed existing facilities Verizon seeks to shield from TELRIC pricing. Therefore – and in addition to the fact that Verizon has waived any right it might have had to object to the Commission's consideration of Issue No. 24 – on the merits, Verizon's claim that we expanded or changed the scope of the issue is simply baseless.[23]

D. Rebuttal of Verizon's Arguments On The Merits of Issue No. 24.

Verizon implies, but does not flatly state, that ILEC-supplied facilities that connect a CLEC's network to the ILEC's network are not subject to TELRIC.[24] This is wrong for the

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a "high capacity wire that links telephone networks." The 8th Circuit called entrance facilities "a connection between a switch maintained by an ILEC and a switch maintained by a CLEC. It is a means of transferring traffic from one carrier's network to another's, and facilitates an ILEC's obligation under the Act to interchange traffic among networks. ... When used to transfer traffic from one network to another, entrance facilities are used for interconnection purposes." *Southwestern Bell v. Missouri PSC,* 530 F.3d 676, 681 (8th Cir. 2008).

23 For these reasons, Verizon's reliance on 47 U.S.C. § 252(b)(4)(A) – which limits the Commission's consideration of issues to those "set forth in" the arbitration petition and the response to it – is misplaced. *See* Verizon Brief at 11. Our petition asked the Commission to include § 2.1.1.3 in the contract, *see* note 6, *supra,* and § 2.1.1.3 would subject the existing disputed facilities to TELRIC pricing. So, this issue was "set forth in the petition" as required by 47 U.S.C. § 252(b)(4)(A). Finally, 47 U.S.C. § 252(b)(5) requires parties to continue negotiating even after an arbitration is filed, and the Commission's Procedural Order – perhaps in recognition of this – states that the scope and definition of issues may evolve and be clarified up until the Prehearing Conference. Procedural Order at 2. So – in addition to everything else – even if Bright House's conception of the scope of Issue No. 24 *did* change to some extent between direct and rebuttal testimony – which it did not – that is permissible under the Commission's procedures for handling arbitrations.

24 Verizon Brief at 12 (advising Commission not to "wade into a legal dispute"); *id.* at 12-20 (arguing that, since the disputed facilities carry access traffic, TELRIC pricing does not apply).

reasons stated in our opening brief.[25] Without repeating that discussion in detail, the FCC ruled that CLECs may not obtain these facilities as unbundled network elements ("UNEs") or to access UNEs.[26] However, it reaffirmed that CLECs can obtain them for interconnection at TELRIC rates.[27] Unanimous panels of three federal circuits confirm that ILECs must supply facilities in support of interconnection at TELRIC rates, because these facilities are technically feasible methods of interconnecting or obtaining interconnection.[28] Verizon also claims that the disputed facilities are not "interconnection facilities" or "entrance facilities" falling within this general rule just stated.[29] Clearly, however, they are. There is no formal definition of "entrance facility" or "interconnection facility." Instead, these terms refer to any high-capacity link used to transmit traffic between an ILEC's network and a CLEC's network.[30] That is just what the disputed

[25] Bright House Brief at 25-29. Verizon argues, somewhat bizarrely, that it should not be required to provide transmission facilities between its network and ours at TELRIC rates because Mr. Gates failed to cite a specific FCC rule requiring that Verizon do so. Verizon Brief at 18-19. But Mr. Gates cited the *TRRO*, where the FCC cited the *TRO*, both of which said that ILECs had to provide these facilities at TELRIC rates. In both of these orders the FCC grounded the ILEC's obligation directly on the language of Section 251(c)(2). If the direct statutory reference is sufficient for the FCC, it is sufficient for purposes of this case. That said, as we noted in our opening brief, the specific FCC rule Verizon is apparently looking for is 47 C.F.R. § 51.321(a). That rule states that an ILEC must provide "any technically feasible method of obtaining interconnection ... upon a request by" a CLEC. *See also Pacific Bell v. California PUC, supra*, 597 F.3d at 966 (specifically relying on 47 C.F.R. § 51.321(a) to uphold the availability of TELRIC-priced interconnection/entrance facilities from ILECs).

[26] *TRRO, supra; TRO, supra.*

[27] *TRRO* at ¶ 140; *TRO* at ¶ 366.

[28] *Pacific Bell v. California PUC, supra*, 597 F.3d 958, 963 (9th Cir. 2010); *Illinois Bell v. Box, supra*, 526 F.3d 1069, 1071-72 (7th Cir. 2008); *Southwestern Bell v. Missouri PSC, supra.* As noted in our brief, a sharply divided panel of the Sixth Circuit reached a different conclusion. *See Michigan Bell v. Covad*, 597 F.3d 370 (6th Cir. 2010). The dissent in that case is better reasoned, and the Commission should follow the clear, sound, view of the 7th, 8th, and 9th Circuits on this point.

[29] *See, e.g.,* Verizon Brief at 9 (denying that the disputed facilities are "entrance facilities").

[30] As to "entrance" facility, *see* note 22, *supra*. As to "interconnection facility," the *Local Competition Order* promulgated 47 C.F.R. § 51.305(a)(3), which requires that an ILEC "design interconnection facilities to meet the same technical criteria and service standards that are used within the [ILEC's] network." Then, in the *TRRO*, the FCC preserved interconnection rights by stating that its determination that entrance facilities were not available as UNEs "does not alter the right of [CLECs] to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access." *TRRO* at ¶ 140. The 8th Circuit used the term

facilities here do: they link Verizon's tandem switch with Bright House's network to exchange traffic (in this case, exchange access traffic) between the two networks. These facilities are, therefore, precisely the type of facilities to which the FCC's TELRIC pricing rules apply.[31]

Verizon's third – and most radical – claim is that Section 251(c)(2) interconnection rights do not apply to "exchange access" traffic ***at all.*** Its theory, apparently, is that Section 251(c)(2) interconnection rights only apply to calls bound to and from the ***retail end users*** of competing local networks – who generate "telephone exchange service" traffic – but do not apply to calls

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"interconnection facilities" to refer to the same inter-network facilities it had earlier characterized as "entrance facilities." *Southwestern Bell v. Missouri PSC, supra,* 530 F.3d at 684 (noting rejection of ILEC claim that "the FCC only requires an ILEC to allow CLECs to interconnect with its network but does not require it to lease the interconnection facilities themselves."). In rejecting the ILEC's claim that entrance facilities were not available for interconnection, the 9th Circuit reasoned that "the specific duty found in 47 U.S.C. § 251(c)(2) of providing interconnection facilities prevails over the general duty of providing network elements at unbundled rates, found in § 251(c)(3) (regardless whether that general unbundling duty exists as to entrance facilities)." *Pacific Bell, supra,* 597 F.3d at 967. In this regard, the court specifically rejected the ILEC's claim that when the FCC said that "interconnection facilities" would remain available at TELRIC rates, it somehow meant to exclude the availability "entrance facilities" (supposedly defined in some unstated, different way). *Pacific Bell, supra,* 597 F.3d at 967-68 (noting that "prior FCC rulings [the *Local Competition Order* and the *TRO*] make clear that the interconnection obligation contained in § 251(c)(2) includes a duty to lease entrance facilities at TELRIC rates when such facilities will be used for the purposes of interconnection"). The court also made clear that entrance facilities are a "method of obtaining interconnection" within the meaning of 47 C.F.R. § 51.321(a). *See Pacific Bell, supra,* 597 F.3d at 965-66.

31 In this regard, Verizon seems to assert that Bright House and Verizon do not use the disputed existing facilities "for the mutual exchange of traffic," evidently because the traffic at issue is either going to or coming from a long distance carrier. *See* Verizon Brief at 13 (disputed facilities "are not used to exchange traffic between Verizon and Bright House end users"); *id.* at 16-17 (disputed facilities "carry no calls between Bright House and Verizon end users"). This is playing word games. First, the ***statute*** says nothing about the "exchange" of traffic. It talks about the "transmission" and "routing" of traffic – including exchange access traffic. Verizon's tandem switch "routes" the traffic in question – that is, switches it – from long distance carriers to Bright House (via the disputed facilities) or vice versa. Similarly, the sole function of the disputed facilities is the "transmission" of the traffic between Verizon's tandem switch and Bright House's network. Second, once the traffic has left the long distance carrier's network and has hit Verizon's tandem switch, without question the traffic is, at that point, "on" Verizon's network. Similarly, once it leaves Verizon's network and hits the disputed facilities, it is "on" Bright House's network, since it is on Bright House's side of the POI. (The same points apply for traffic outbound to the long distance carrier.) Under any normal understanding of the term, therefore, Bright House and Verizon have indeed "exchanged" this traffic. Fundamentally, though, it seems that Verizon's wordplay on this point is an effort to bolster its key claim, which is that Section 251(c)(2) does not apply to the "transmission and routing" of exchange access traffic at all – that is, it does not apply to traffic coming from or bound to a third-party long distance carrier at all. We discuss (and rebut) this claim in the text immediately following this note.

bound to or from the ***access service*** customers of the two networks – long distance carriers – who generate "exchange access" traffic.[32] This is an unfounded attempt to amputate half of Section 251(c)(2). It flies in the face of Congress's specific and unequivocal statement that interconnection rights apply to the "transmission and routing" of ***both*** "telephone exchange service" traffic ***and*** "exchange access" traffic. It is completely absurd in light of the FCC's express finding in the *Local Competition Order* that Competitive Access Providers ("CAPs") have full interconnection rights under Section 251(c)(2), and that a carrier can obtain interconnection under Section 251(c)(2) even if it does not offer ***any local services to end users at all*** – a carrier that ***only*** provides exchange access to long distance carriers has full interconnection rights.[33] Moreover, it is inconsistent with the fact that Section 251(c)(2) interconnection rights were built upon the FCC's *Expanded Interconnection* regime, which related entirely to the competitive provision of ***access*** services – not local end user services.[34] In making this claim, Verizon is inviting the Commission into clear, reversible legal error.

Verizon's sole support for its effort to lop off half of Section 251(c)(2) is a vague, generic reference to Section 251(g) of the Act, which, according to Verizon, is supposed to "preserve" the "pre-existing access regime."[35] But the courts have clearly held that this is not what Section 251(g) says or does. That provision is merely a transitional device that preserves the pre-1996-Act ***obligations*** of LECs to provide access services to long distance carriers (and specialized

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[32] *See* Verizon Brief at 15-17, 35 ("provision of access service to a third party is part of the access regime, not part of the § 252(c)(2) interconnection regime. ... An ILEC's obligation under § 251(c)(2) is to link its network with the [CLEC] so that their respective end users can call each other ... .").

[33] *Local Competition Order* at ¶ 184.

[34] *Local Competition Order* at ¶¶ 610-12; *see Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7639 (1992); *Expanded Interconnection with Local Telephone Company Facilities*, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993); Bright House Brief at 14-17, 22 & nn. 62-64.

[35] Verizon Brief at 19-20.

access arrangements to information service providers) at tariffed rates.[36] It does not address LEC-to-LEC charges ***at all***, and certainly not in the context of whether interconnection facilities are subject to Section 251(c)(2).[37] Moreover, requiring Verizon to charge TELRIC rates for interconnection facilities would not interfere in any way with Verizon's ability to impose access charges on the long distance carriers whose traffic uses those facilities. To the extent that Section 251(g) protects the "pre-existing access regime," therefore, that regime – Verizon's right to impose access charges on long distance carriers – is unaffected by Bright House's proposals.[38]

Finally, not only is Verizon's claim about the scope of Section 251(c)(2) legally unsupportable, it makes no sense in the real world. Interconnection for local traffic and

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[36] *See, e.g., WorldCom v. FCC*, 288 F.3d 429, 432-33 (D.C. Cir. 2002). ***Worldcom reversed*** the FCC for taking a broad view of Section 251(g), under which the FCC appeared to claim that it could "override virtually any provision of the 1996 Act, so long as the rule it adopted were in some way, however remote, linked to [ILECs'] pre-Act obligations." *Id.* at 433. *Accord, Pacific Bell v. Pac-West*, 325 F.3d 1114, 1122, 1131 (9^{th} Cir. 2003). This is precisely what Verizon is arguing for here – relying on an overly broad reading of Section 251(g) to "override" the plain requirements of Section 251(c)(2).

[37] As the *WorldCom* court observed, "§ 251(g) speaks only of services provided 'to interexchange carriers and information service providers'; LECs' services to other LECs ... are not 'to' either an IXC or to an ISP." 288 F.3d at 433-34. In other words, Section 251(g) has no application ***at all*** to what Verizon can and cannot charge Bright House for interconnection facilities. Chastened by *WorldCom*, the FCC now understands that Section 251(g) acts merely as a check on the very broad intercarrier compensation language of Section 251(b)(5) – "preserving" an ILEC's right to impose access charges, not just reciprocal compensation, on "exchange access" traffic. *See 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 ¶ 16.

[38] Verizon also claims that its view is supported by ¶ 176 of the *Local Competition Order*, where the FCC says that "access charges are not affected by our rules implementing section 251(c)(2)." Verizon Brief at 19-20. But that portion of the *Local Competition Order* is merely referring to the distinction between Section 251(c)(2), regarding physical interconnection arrangements, and Section 251(b)(5), regarding intercarrier compensation. It does not suggest that access rates govern the pricing of facilities used for interconnection under Section 251(c)(2). Indeed, using § 251(g) to override other provisions of the act – like § 251(c)(2) – is just what the D.C. Circuit chastised the FCC for in *Worldcom*. But – Verizon's claim notwithstanding – this is clearly not what the FCC intended, in ¶ 176, given its specific ruling that interconnection facilities and arrangements are to be priced at TELRIC rates. *See* 47 C.F.R. § 51.321(a) (ILEC must provide any technically feasible method of interconnection); 47 C.F.R. § 51.501 *et seq.* (TELRIC pricing applies to interconnection and methods of obtaining interconnection).

interconnection for exchange access traffic are two sides of the same coin. A successful, facilities-based competitor like Bright House will obtain a substantial number of end users. Those end users generate large amounts of local traffic to be exchanged. But those same end users make and receive large numbers of long distance calls – and we are responsible for providing long distance carriers with originating and terminating access services to reach our end users to handle those calls. Because not all long distance carriers will directly interconnect with us, we ***must*** interconnect with Verizon to provide these access services. So, while the exchange access traffic at issue here legally falls under our provision of access services to long distance carriers, ultimately it all comes down to meeting the needs of the end users that we win from Verizon in the competitive marketplace. Even if, as Verizon claims, Section 251(c)(2) interconnection rights were somehow limited to facilitating competition for the business of end users, it is traffic ***to and from those end users*** that makes it necessary for us to interconnect with Verizon for the "transmission and routing" of exchange access traffic. It would be nonsensical, therefore, to interpret Section 251(c)(2) interconnection rights as being limited to "local" traffic.

For all these reasons, the Commission should include § 2.1.1.3 in the Interconnection Attachment, and should specifically rule that the existing disputed facilities used to carry exchange access traffic must be re-rated at TELRIC prices.

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

A. Meet Point Billing Traffic Is Subject To Section 251(c)(2).

The first major issue under Issue No. 36 (set out as Issue No. 36(b) above) involves our right to specify the point of interconnection for the hand-off of exchange access traffic that Bright House and Verizon exchange with each other.[39] The dispute is whether Section 251(c)(2) applies to this traffic. If so, then our right to designate the POI is clear.[40] If not, then the selection of the POI is governed by open-ended negotiations under the procedures laid out in MECOD and MECAB documents describing meet point billing procedures.[41]

Verizon argues that Section 251(c)(2) does not apply to this traffic, but as discussed

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39 There is no dispute that Bright House is financially responsible for getting to the point of interconnection where we exchange this traffic. *See, e.g.*, Verizon Brief at 33-34. The discussion under Issue No. 24 addresses whether TELRIC or tariffed rates should apply to any Verizon-supplied facilities we use for this purpose. And there is no dispute that once the interconnection point for this purpose has been established, Verizon will not bill us for facilities or services on its side of that point. Instead, the long distance carriers will be billed, under normal meet point billing rules. *Id.*

40 *See* Verizon Brief at 34 ("A CLEC can, however, unilaterally designate a point of interconnection for purposes of § 251(c)(2) interconnection, as long as that POI is at a technically feasible point on the ILEC's network"). The specific configuration we are considering, as discussed at the hearing, is designating our existing end-office collocations as the POIs for exchanging meet-point billing traffic. In this configuration we would not pay for the existing disputed facilities. Instead, Verizon would recover their costs via charges to long distance carriers. That said, under our proposal, Verizon would have a role in "sizing" those facilities to avoid concerns about underutilization. *See infra.*

41 *Id.*

above in connection with Issue No. 24, it gives essentially no legal reasoning to contradict the plain, obvious meaning of Section 251(c)(2). Traffic coming in from, or going out to, a third party long distance carrier is "exchange access" traffic.[42] Section 251(c)(2) by its express terms applies to "the transmission and routing of ... exchange access." Therefore, Section 251(c)(2) applies to this jointly-provided access traffic.[43]

Verizon says that "there is no law to support" our supposed "conflation of meet-point billing arrangements with the Act's local interconnection regime."[44] That is obviously false. Aside from the unambiguous language of Section 251(c)(2), we have pointed to the equally unambiguous definition of "exchange access" to establish – along with testimony in this case – that the traffic at issue falls within that category.[45] And, we have explained that providing exchange access service to long distance carriers is one of the defining characteristics of a ***local*** exchange carrier under the 1996 Act.[46] We have also shown how the FCC has ruled that the interconnection rights in Section 251(c)(2) fully apply to CAPs – whose business model, under the FCC's *Expanded Interconnection* regime, involved providing some, but not all, of the access services that long distance carriers need to reach particular customers – exactly the situation we have here.[47] That is "law" enough, and more, to establish what is actually obvious from the plain meaning of Section 251(c)(2) – which is that it applies to exchange access traffic, including

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42 Bright House Brief at 25-26; *See* Tr. 508:12-14, 509:22-510:7 (Vasington Cross-Examination); Gates Depo. Tr. 64:12-13, 106:21-107:7 (Exhibit 9, included in Transcript, Volume 4); Tr. 303:8-11 (Gates Cross-Examination).

43 *See* discussion under Issue No. 24, *supra*. *See also* Bright House Brief at 25-29.

44 Verizon Brief at 35.

45 *See* note 42, *supra*. *See also* Bright House Brief at 18 & n.54, 19 & n.56, *discussing* 47 U.S.C. § 153(16) (definition of "exchange access").

46 Bright House Brief at 18 & n.53, *discussing* 47 U.S.C. § 153(26) (definition of "local exchange carrier").

47 Bright House Brief at 7 & n.20, 22 & n.62, 26 & n.74, *citing and discussing Local Competition Order* at ¶¶184, 610-12.

meet-point billing traffic.

It is Verizon, not Bright House, whose position on this issue is utterly without legal support. Given that the traffic at issue is "exchange access" traffic, and given that Section 251(c)(2) expressly applies to "exchange access" traffic, the burden is clearly on Verizon to come up with some case, some FCC rule – ***something*** – to explain why a statutory provision that plainly ***does*** reach "exchange access" traffic, somehow doesn't apply here. Verizon has nothing to say on this point. The only conclusion is that Section 251(c)(2) does apply.[48]

Verizon's only other objection to treating meet point billing traffic as subject to Section 251(c)(2) is that it might be saddled with having to construct and maintain an unreasonably high number of trunks and facilities to handle the traffic on its side of the interconnection point we designate. Its fear is that by letting Bright House specify the interconnection point, we might unilaterally require that there be too many of trunks or facilities in place, leaving Verizon unable to recover the costs of those trunks and facilities through access charges imposed on the third-party long distance carriers.[49] That fear, however, is completely unwarranted in light of our actual proposed contract language for dealing with this issue. That language was provided as Exhibit TJG-7 to Mr. Gates' rebuttal testimony, and is included as Exhibit 21 in the record of the case. With respect to the specific issue of what precise facilities and trunks would handle this traffic, we proposed the following:[50]

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[48] Verizon mentions the MECOD and MECAB industry documents, which, as noted, call for negotiation of the interconnection point, rather than letting the CLEC specify it. *See* Verizon Brief at 35-36. Obviously, industry documents cannot and do not trump the specific language of a statute enacted by Congress, and even Verizon does not argue that those documents can override the law.

[49] Verizon Brief at 36-37.

[50] Exhibit 21 (Exhibit TJG-7 to Mr. Gates' Rebuttal Testimony, included in the Record in Transcript, Volume 4) (emphasis added). *See also* Tr. 241:12-14 and note 34 (Gates Rebuttal) (indicating the inclusion of Exhibit TJG-7 and suggesting that Verizon's objections may have been based on a failure to consider Bright House's actual proposal regarding handling meet point billing traffic in the contract).

> [T]he Parties shall, ***by mutual agreement,*** determine to route Meet Point Billing traffic over (a) interconnection facilities and trunks used to carry Reciprocal Compensation and other traffic; (b) the same interconnection facilities used to carry Reciprocal Compensation and other traffic, but isolate such Meet Point Billing traffic on separate trunk groups; (c) separate facilities and trunks; or (d) some combination of (a), (b) and (c) above. If the Parties are unable, through good faith negotiations undertaken for a commercially reasonable period, to ***determine the facility and trunking arrangements applicable to Meet Point Billing traffic, then the dispute resolution provisions of Section 14 of the General Terms and Conditions shall apply.***

Clearly, while we assert our right to designate the point(s) of interconnection for this traffic, once such a point is designated, "the facility and trunking arrangements" would be established "by mutual agreement," with the contract's normal dispute resolution provisions kicking in if, for some reason, our respective engineers could not agree on how to handle it. In other words, Verizon's fear of being forced to maintain unreasonably large amounts of facilities or trunking for this traffic on its side of a Bright-House-designated POI is completely fanciful.[51]

In these circumstances, we urge the Commission to clearly rule that exchange access traffic to or from third-party long distance carriers – so-called meet-point billing traffic – is fully subject to Section 251(c)(2), and that, as a result, Bright House may specify the technically feasible point(s) at which such traffic will be exchanged. In addition, we urge the Commission to adopt our proposed contractual language dealing with these issues provided in Exhibit 21 (that is, Mr. Gates' Exhibit TJG-7), including, specifically, the language quoted above.

B. Bright House Can Provide Competing Tandem Transport Service, Which Is Also Subject To Section 251(c)(2).

Bright House explained in its initial brief that there appears to be agreement that Bright

[51] Verizon's own witness, Mr. Munsell, agreed in his deposition that there would be no operational concerns about allowing Bright House to move the meet point for the exchange of third-party long distance traffic from the access tandem, where it is currently, to the end office collocations where Bright House now routes that traffic using the facilities in dispute under Issue No. 24, as long as concerns about the sizing of those facilities could be addressed. *See* Munsell Depo. Tr. 183:16-184:17 (Exhibit 14, included in Transcript, Volume 4). Our proposed language fully addresses this concern.

House may provide tandem transport service to compete with Verizon's tandem and transport network.[52] The dispute is that Verizon wants to require Bright House to provide that service within the bounds of Verizon's existing tariff for these functions, which were established under the FCC's 1990s-era *Expanded Interconnection* regime.[53] By contrast – and unlike operations under Verizon's tariff – because this traffic is subject to Section 251(c)(2), Bright House is entitled to determine the technically feasible interconnection points for the exchange of this traffic and to pay TELRIC, not tariffed, rates for any Verizon functions involved.[54] On this issue, we rest on the discussion in our opening brief, and in this brief in connection with Issue Nos. 24 and 36, above, regarding the applicability of Section 251(c)(2) to this traffic and the appropriate contractual terms for dealing with it.

C. Terms For Bright House Acting As A Local Transit Carrier.

This final matter under Issue No. 36 involves Verizon's effort to make Bright House pay for third-party local traffic from carriers that use Bright House as a transit network to reach Verizon. We propose to use the well-established regulatory rule that the originating carrier pays the terminating carrier. Verizon claims that this is not appropriate because it is worried about arbitrage – that we would disguise traffic from a carrier that would have to pay a higher rate if it interconnected directly with Verizon, within our own $0.0007/minute-rated traffic.[55] But this arbitrage would be possible only if Bright House were to deliver substantial amounts of traffic to Verizon without the data needed for Verizon to identify and bill the originating carrier.[56] There

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52 In practical terms, this would entail Bright House acting as a CAP, and seeking to get long distance carriers to agree to send their traffic bound for Verizon's end offices to Bright House, not Verizon's tandem, for delivery to those end offices. Tr. 168:21-170:13 (Gates Direct).

53 *See* Verizon Brief at 27-29.

54 Bright House Brief at 32-34.

55 Verizon Brief at 30-31.

56 There will always be some traffic for which billing or other data become garbled or are otherwise

is no evidence that this would occur. Verizon's baseless speculation is no reason to force Bright House to be a financing service for third parties.[57]

Verizon justifies the added burden it would put on Bright House by noting that it is legally obliged to provide transit service while we are not.[58] That, however, is irrelevant. We are no less exposed to hypothetical arbitrage from Verizon (say, sending us inbound access traffic from a third party on a "local" trunk) because Verizon is legally obliged to provide both transit and terminating access service, and Verizon is no more exposed to hypothetical arbitrage from us because we are, in Verizon's view, not legally obliged to provide transit service. The point is that Verizon's fear of arbitrage (which goes both ways) is entirely speculative. As a result, its proposal to saddle us with inappropriate financing obligations as a condition of being a local transit carrier is unreasonable and should be rejected.

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

Issue 37 involves properly applying reciprocal compensation rates, not access rates, to the traffic Bright House sends from its end users to Verizon. Because we charge our customers no toll charges for any intraLATA traffic, none of the traffic we send Verizon is toll service traffic, and Verizon is not providing "exchange access" service when it terminates this traffic. Because only "exchange access" is excluded from the reciprocal compensation regime, therefore, we should not pay Verizon access charges for any of our traffic – even if it crosses a Verizon local calling area boundary.[59]

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unavailable. Verizon's claim assumes that there would be large and unusual amounts of such traffic.

57 That is, Bright House would have to pay Verizon for the third-party traffic and then collect those fees from the third party.

58 Verizon Brief at 31-32.

59 Bright House Brief at 35-38.

Verizon does not challenge Bright House's legal analysis of this issue. That is, as far as we can tell, Verizon does not dispute that when we send a call to Verizon on which we do not charge our customer a toll, that call is not "exchange access."[60] Moreover, as far as we can tell, Verizon does not dispute that in the FCC's most recent ruling regarding the scope of reciprocal compensation, the agency expressly repudiated (again) any limitation of reciprocal compensation to traditional "local" traffic.[61] As we explained, under that FCC ruling, the only traffic excluded from reciprocal compensation is "exchange access" traffic.[62] So – although it doesn't come right out and say so – Verizon appears to agree that this traffic, at least in theory, ***should*** be subject to reciprocal compensation, not access.[63]

Verizon argues that our proposal would create administrative difficulties, but never actually identifies what those difficulties are, how much expense (if any) would supposedly be involved in dealing with them, or how they could be avoided. Its sole witness on this point apparently based his view that handling Bright House's proposal would create problems on having attended some "requirement sessions 14 years ago." And, even though he is "definitely ... not an IT person," based on that 14-year-old set of meetings, he asserts that implementing our proposal would be "really, really difficult."[64]

Bright House submits that as a matter of law – and certainly as a matter of the

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60 *See* Bright House Brief at 35-36.

61 *See* Bright House Brief at 35 n.100, 37-38, *citing and discussing 2008 Reciprocal Compensation Order, supra.* Verizon's brief does not cite or discuss this most recent FCC ruling on the scope of reciprocal compensation.

62 Bright House Brief at 37-38. As we noted, "information access" is also excluded, but has no bearing on this case. *Id.* at 35 n.100.

63 Verizon does characterize our proposal as "self-interested" and as seeking "to avoid paying access charges on interexchange traffic." Verizon Brief at 38. Our legal analysis shows, however, that we do not ***owe*** access charges on some undefined category of "interexchange traffic." We owe access charges on traffic we send to Verizon that constitutes "exchange access" – a legal conclusion Verizon never addresses. Our proposal is "self-interested" in that we have an interest in not being over-charged.

64 *See* Verizon Brief at 40-41 (quoting Mr. Munsell).

Commission's sound discretion – this kind of vague and unsupported testimony cannot possibly justify a decision to ***ignore*** the FCC's latest ruling on reciprocal compensation (which, again, Verizon never cites, much less discusses) making clear that all traffic between LECs is subject to reciprocal compensation, except for the "exchange access" traffic identified in 47 U.S.C. § 251(g). Verizon's objections to our proposal should be dismissed for this reason alone.

But suppose, hypothetically, that there might be some administrative problem with trying to set up a billing system that would individually rate calls from multiple CLECs with multiple local calling areas. As Mr. Gates explained – and as Verizon's Mr. Munsell admitted – the standard practice for more than two decades has been that, when billing based on individual call information is impractical, the parties establish a factor which determines what portion of traffic is subject to what specific rate.[65] Of course, in the actual case of Bright House and Verizon, this factor would be simplicity itself: apply the agreed-to $0.0007/minute rate to all traffic.[66]

Verizon next claims that our proposal would not be competitively neutral.[67] This claim is simply absurd. As Mr. Gates explained, when a CLEC like Bright House is competing with Verizon for end users, one of the ways it does so is by offering a larger and more convenient local calling area. In so doing, it forgoes any toll charges it might collect if it were a more timid competitor and simply mirrored the ILEC's calling areas. To require the CLEC to pay the same

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[65] Tr. 702:9-703:6 (Munsell Cross-Examination); Munsell Depo. Tr. 206:15-207:1 (included as Exhibit 14 in Transcript, Volume 4); Tr. 336:7-13 (Gates Redirect).

[66] *See* Tr. 336:7-13 (Gates Redirect). Verizon objects to this because it would be "a giant step backwards" from the supposedly "accurate" process in place today. Verizon Brief at 41-42 & n.32. This claim simply assumes what it is trying to prove. Today's process is not "accurate" at all – it erroneously imposes access charges on a great deal of traffic to which those charges do not properly apply. And if billing based on factors is such a step "backwards," why is it still contained in Verizon's access tariffs and considered an industry standard practice, as testified to by Mr. Munsell? Munsell Depo. Tr. 206:15-207:1 (included as Exhibit 14 in Transcript, Volume 4). The truth is that Verizon has no cogent objection to using factors to properly bill reciprocal compensation and (if applicable) access charges to Bright House and other CLECs if, as Mr. Munsell claims, it would be "really, really difficult" to bill calls on an individual basis.

[67] Verizon Brief at 42.

access charges it would have to pay anyway is not competitively neutral – it is an anticompetitive "tax" on CLECs who offer broader calling areas.[68]

Verizon's suggestion that it would be unfair to long distance carriers and other CLECs to adopt Bright House's proposal is also misplaced.[69] Of course long distance carriers would pay access charges – they are not LECs, and have no right to reciprocal compensation rates in the first place. Also, almost by definition, they will have collected toll revenues that make payment of access charges economically understandable. As for other CLECs, they – and Verizon itself – can avoid paying access charges simply by taking the pro-competitive step of offering a large enough local calling zone to their customers.[70] This is neither unfair not anticompetitive. To the contrary, the only competitively neutral approach is Bright House's.

Finally, as we anticipated, Verizon cites a number of regulatory decisions that it claims undermine our proposal, but in fact do not.[71] Our proposal says that where an ILEC and a CLEC are interconnected and competing for the same end users, when one sends a call to the other, access charges will only apply if the originating carrier charges its end user a toll. That is, our proposal relates directly to, and encourages, the competitive dynamic between two LECs in head-to-head competition for the same end users. In stark contrast, Verizon's cases relate to a CLEC that did not compete for end users at all, but instead specialized in serving dial-up ISPs in order to collect reciprocal compensation on the enormous number of calls the ILEC's end users make to the ISPs.[72] Not content to collect such compensation for calls that are within the calling

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68 Tr. 136:16-23 (Gates Direct). *See also* Tr. 136:1-140:2 (Gates Direct); Tr. 247:3-22 (Gates Rebuttal).

69 Verizon Brief at 42.

70 *See* Tr. 317:7-318:16 (Gates Cross-Examination).

71 Verizon Brief at 42-45.

72 *E.g., In the Matter of the Petition of Global NAPs, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North*

area of the ILEC end users, the CLEC established so-called "VNXX" arrangements. Under those arrangements, calls which the ILEC ***would*** treat as long distance if it could, nonetheless slip by the normal billing system by virtue of the CLEC's assignment of a seemingly "local" number to the ISP's lines. So, what would normally be a toll call "looks" local, and the ILEC was being asked to pay reciprocal compensation to the CLEC on traffic where it would normally receive either a toll or access charges. The fact that a large number of state regulators rejected that CLEC's attempt to obtain additional compensation in this situation is simply irrelevant to the Commission's consideration of Bright House's proposal.[73]

Moreover, all of Verizon's cases were decided before the FCC made clarified, in 2008, that the geographic metes and bounds of ILEC local calling zones do not control the scope of reciprocal compensation under Section 251(b)(5).[74] Although the FCC had suggested as much in an earlier ruling from 2001,[75] numerous regulators and courts had taken the view that the FCC's even-earlier discussion of this topic in the *Local Competition Order* was still legally valid.[76] That much earlier discussion had directed states to apply a geographic test to determine whether access charges apply.[77] It is not surprising, considering both the different legal environment in

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Inc., Arbitration Award, Case No. 02-876-TP-ARB, at 8 (Ohio PUC Sept. 5, 2002). All of Verizon's cases involve the same CLEC, during the same general time period, with the same business plan.

73 The CLEC in those cases may well have argued that the ILEC's inability to charge a toll on the calls meant that the traffic was not "exchange access" and that therefore no access charges should apply – an argument in some respects superficially similar to ours. But the actual market situation, with its different policy concerns, is a far cry from ours. We are trying to ensure, in the course of head-to-head competition for end users, that we are not penalized by paying access charges on calls where, as a matter of competitive necessity, we choose to offer our end users the benefit of larger local calling areas and, therefore, forgo the toll revenues that would otherwise make access charges appropriate.

74 *See 2008 Reciprocal Compensation Order* at ¶¶ 9, 14-15.

75 *See id.* at ¶¶ 7, 9, *discussing 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).

76 *See, e.g., Atlas Tel. Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256 (10th Cir. 2005); *Qwest v. Washington State Utils. & Transp. Comm'n*, 484 F. Supp. 2d 1160 (D. Wash. 2007).

77 *Local Competition Order* at ¶ 1035.

which the cases were decided, and the vastly different competitive circumstances between the ILEC and CLEC in those cases, that the regulators in those cases reached the conclusions they did. But, again, this has nothing at all to do with the head-to-head competition for end users that underlies the dispute presented here between Bright House and Verizon.

For all these reasons, we urge the Commission to adopt our proposal on Issue No. 37.

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

Our specific proposed contract language under Issue No. 32 says that we may interconnect at DS-3, OC-3 or higher levels "as traffic levels dictate."[78] Neither Verizon's brief nor its witness has objected to this provision, so the Commission should adopt it.

Verizon correctly notes that the broader issue is which party must pay for demultiplexing high-data-rate traffic that Bright House sends to Verizon.[79] Verizon misses the point. We know that Verizon's current network switches require DS-1 inputs, and that demultiplexing is required to run ***that existing network*** efficiently. But that is irrelevant. Verizon has not disputed that soft switches are the most efficient currently available switching technology, and that they use DS-3 or higher interfaces.[80] TELRIC rates are set assuming that the ILEC is using the most efficient available technology,[81] so if Verizon used soft switches, there would be no demultiplexing. So, the TELRIC cost of demultiplexing is zero, and Verizon cannot charge for it.[82]

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78 *See* Exhibit 17 (Exh. TJG-3) (redlined contract) at page 69 (included in Transcript, Volume 4) (proposed language for Interconnection Attachment, § 2.4.6).

79 Verizon Brief at 24-27.

80 *See* Gates Depo. Tr. 49:18-19 (Exhibit 9, included in Transcript, Volume 4).

81 *See* Tr. 101:1-107:11 (Gates Direct); Gates Depo. Tr. 97:13-98:8 (Exhibit 9, included in Transcript, Volume 4).

82 An automobile analogy might make this clear: if you drive a Hummer you will do many things to keep it running "efficiently." But a Hummer is plainly not the most efficient car on the market. Let's say that would be a Chevy Volt. TELRIC would set the rate for an ILEC's "car services" based on the costs of operating a new, efficient Chevy Volt, even if the ILEC actually owns a Hummer, and even if it is

The definitions of "interconnection" and "transport" also bar multiplexing charges in this case. Verizon's Brief (at 27) shows that Verizon does not understand our argument. Briefly, "interconnection" is where our networks physically meet; everything from that point to the end office is "transport."[83] Verizon is entitled to charge for transport, including any appropriate multiplexing charges.[84] As we explained in our opening brief, however, the $0.0007/minute rate the parties have agreed to ***includes all transport charges.***[85] As a result, for us to get a separate bill for multiplexing is to get billed twice for the same function, which is not permissible.[86]

For these reasons, the Commission should adopt our proposed contract language noted above, and also specifically rule that Verizon may not charge us for multiplexing, subject to the parties' settlement mentioned in our opening briefs.

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

The issue here is whether Verizon must give a discount on point-to-point data services for business customers. As we explained, the FCC's ***regulation*** regarding resale carves out "exchange access services as defined in section 3 of the Act" from this requirement, while some FCC *dicta* refers to "access" or "special access" services.[87] And as we predicted, Verizon wants to rely on the FCC's *dicta* and ignore the actual regulation.[88]

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operating the Hummer in an "efficient" manner.

83 47 C.F.R. § 51.5 (defining interconnection); 47 C.F.R. § 701(c) (defining transport). The fact that the first piece of Verizon equipment our traffic hits on Verizon's network might be dedicated to our use (due to the high volume of our traffic) does not change the fact that it is Verizon's equipment, not ours, and does not make that equipment part of ***our*** network. *See* Verizon Brief at 24-25, 27.

84 Here we assume that – contrary to the discussion above – TELRIC permits a charge at all.

85 Bright House Brief at 38-39.

86 Note that this situation only applies to CLECs with whom Verizon has agreed to use the FCC's integrated $0.0007/minute rate for transport and termination.

87 *See* 47 C.F.R. § 51.605(b); Bright House Brief at 42-43.

88 Verizon Brief at 48-49. We note that Verizon does not contest in any way our basic argument,

We note three points in rebuttal. First, even in the *dicta* Verizon cites, the FCC repeatedly refers to "exchange access service," not all "access services," as a description of what is carved out from the discounted resale obligation.[89] Second, in a conflict between *dicta* and a regulation, the regulation wins. Section 252(c)(1) states that this Commission must decide arbitrations based on "the requirements of section 251, including the ***regulations*** prescribed by the [FCC] pursuant to section 251." Bright House's proposal would conform to this requirement; Verizon's would not. Finally, the record shows that Verizon offers at least some of the data circuits at issue out of an effective ***retail*** tariff.[90] That tariff incorporates the terms of Verizon's access tariff by reference, but it remains a distinct, tariffed retail offering. This separate retail private line tariff eviscerates Verizon's claim that its private line services even ***are*** "special access" services.

The Commission should adopt our proposal and allow us to obtain Verizon's point-to-point data services at a discount for resale.

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which is that point-to-point data circuits sold to business customers are ***not*** "exchange access" services.

[89] *Local Competition Order* at ¶¶873-74 (***Exchange access services*** are not subject to the resale requirements of section 251(c)(4). ... [W]e conclude that the language and intent of section 251 clearly demonstrates that ***exchange access services*** should not be considered services an incumbent LEC "provides at retail to subscribers who are not telecommunications carriers" under section 251(c)(4). We note that virtually all commenters in this proceeding agree, or assume without stating, that ***exchange access services*** are not subject to the resale requirements of section 251(c)(4). ... We find several compelling reasons to conclude that ***exchange access services*** should not be subject to resale requirements ...") (emphasis added, footnotes omitted). As to the *TRRO*, that order states that carriers seeking to buy special access as a wholesale input to their own services cannot do so at discounted rates. But when citing to the origin of that rule, it cites ¶ 873 of the *Local Competition Order* (above), and characterizes it as "stating that ***exchange access services*** are not subject to the resale requirements of section 251(c)(4)." *TRRO* at ¶ 51 n.146 (emphasis added). Verizon did not quote this language, apparently viewing it as simply part of a "citation," which Verizon "omitted." *See* Verizon Brief at 49.

[90] Tr. 500:22-501:8 (Vasington Cross-Examination). *See* Verizon Florida Inc., General Services Tariff, § A.25.3. We respectfully request that the Commission take official notice of the tariff, a public document in the Commission's own files.

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

With respect to Issue No. 7, Verizon's strategy is to minimize and obscure the real problems and unfairness its proposed contract language (General Terms and Conditions, § 50) would create. The problem is this: under its proposed § 50, "notwithstanding anything" else in the agreement, Verizon does not have to do anything if it is not required to do so by "applicable law." That can sound reasonable, but conspicuously absent from § 50 is any orderly process for deciding what "applicable law" actually requires. The result is that under § 50, any time Verizon's ***opinion*** about its legal obligations changes, it can try to walk away from the contract on 30 days notice. As we explained, this is of great concern to Bright House because Verizon will not say if it accepts that it must interconnect with Bright House at all.[91]

To see the problems, first consider a scenario in which the law does not change in any objective way – no new statutes, no new FCC rulings, etc.[92] In a normal contract, if there is no change in the legal regime governing the parties' behavior, their contractual obligations remain in place. But, as Verizon's witness admitted, under § 50, a mere change in Verizon's ***opinion*** would allow Verizon to terminate the contract on 30 days' notice.[93] That is completely unjust and unreasonable on its face. Moreover, because § 50 would operate "notwithstanding" any other provision in the agreement, Verizon would argue that it has no obligation to discuss the matter, and that the normal dispute resolution provisions do not apply. There is no conceivable basis for giving the a party to a contract the unilateral power to destroy – or at least threaten to

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91 Bright House Brief at 43-46.

92 In situations where the law ***does*** change, the parties have already agreed on what procedures to follow, in agreed-to §4.6 of the General Terms and Conditions.

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

destroy – the other party's business and reliance interests in that way.

Verizon argues that it needs § 50 to protect it from situations where the underlying facts change in such a way that it has no further obligation to perform.[94] But Verizon is protected from factual changes by the normal operation of contract law. Suppose Alice agrees to pay Bob $25 to cut her lawn on weekends by Sunday afternoon, but to pay him an extra $10 if he gets it done on Saturday morning. Now suppose Bob cuts the lawn every Saturday morning for two months – earning him $35 each time. If the next weekend comes and Bob doesn't cut the lawn until Sunday, no special contractual provision is needed to protect Alice against having to pay the extra $10 – Bob (factually) didn't cut the lawn on time, so Alice (legally) doesn't owe him the extra $10. So it is with Verizon's "fact-based" worries. If the facts change in such a way that a Verizon obligation does not exist under the contract – then Verizon has no obligation to perform. No separate provision is needed to ensure this result. If this is what Verizon is worried about, then § 50 is entirely unnecessary.[95]

Verizon also tries to minimize the scope of § 50 by noting that it only applies to "Services" under the agreement.[96] The problem is that the definition of "Service" is extraordinarily broad – "Any Interconnection arrangement, Network Element. Telecommunications Service, collocation arrangement, ***or other service, facility or arrangement offered or provided by a Party under this Agreement.***"[97] It is hard to see what contractual

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94 Verizon Brief at 4-5.

95 This applies fully to Verizon's worries about one of its wire centers becoming classified as a Tier 1 center, thereby eliminating its obligation to provide certain UNEs, as well as the others it cites. *See* Verizon Brief at 4-5 and note 5. The factual changes that would affect its obligations are just like Bob (factually) not mowing the lawn until Sunday – they automatically relieve Verizon of the obligation to provide the UNEs in question, just as Bob's tardiness in mowing automatically relieves Alice of the obligation to pay the extra $10.

96 Verizon Brief at 3.

97 Exhibit TJG-3 (marked-up draft ICA) (Hearing Exhibit No. 17), Glossary Attachment § 2.109

activities would ***not*** be covered by the "other service ... or arrangement" clause in this definition.

The best solution to the problems posed by § 50 is, as Bright House has suggested, simply to strike it. If the Commission chooses not to do so, then at a minimum the Commission should (1) expressly rule that Bright House is entitled to full interconnection rights as a CLEC under 47 U.S.C. §§ 251(b) and 251(c); (2) require that § 50 be modified so that any Verizon claim that it may stop providing a service is subject to the contract's normal dispute resolution mechanism, rather than a unilateral 30-day notice provision; and (3) require that § 50 be modified to state that Verizon many not withdraw from any of the services or arrangements provided for in the Interconnection Attachment, or cease providing Directory Listings in accordance with the contract, without an affirmative Commission order permitting it to do so.

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

Our key point here is that it is unreasonable for a party to bill more than a year after a service is rendered, or to object to charges more than a year after they were paid. Verizon claims that the statute of limitations addresses these concerns,[98] but a statute of limitations and a contractual billing/bill protest provision are quite different. A statute of limitations determines when a party can ***file a lawsuit*** alleging a breach of contract.[99] Billing/bill protest provisions determine what a contract ***requires*** for rendering and protesting bills. Confusing these two, as Verizon does, leads to absurd results. Under Verizon's theory, it could back-bill Bright House in 2015 for services rendered in 2010, and then, after Bright House pays in 2015, Bright House could raise a protest in 2020. To avoid this absurdity, the contract must expressly say when back-

(emphasis added).

[98] Verizon Brief at 6-7.

[99] *See, e.g., Florida Dept. of Health & Rehab. Svcs. v. S.A.P.*, 835 So. 2d 1091, 1096 (Fl. 2002).

bills and protests must be made. One year is a reasonable time for those functions.[100]

Verizon tries to wish away this problem by noting that "both parties have always submitted bills and disputed charges within a one-year period, anyway,"[101] but this actually shows that Verizon would not be harmed by adopting Bright House's proposed one-year time frame. Moreover, Verizon is wrong to suggest that this actual practice gives Bright House "certainty." Even if Verizon has rendered some back-bills within a year, the only thing that the passage of that year means is that Verizon hasn't sent out additional back-bills – yet. Until the 5-year limitations period passes, Bright House has no certainty at all.

The Commission should adopt Bright House's reasonable proposal on Issue No. 13.

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?

Verizon understands that it may not charge Bright House for direct LNP functions,[102] so it tries to characterize coordination for multi-line ports as a separate service.[103] It claims that coordination is like asking for a port to be expedited – a function that both parties agree is

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[100] Verizon notes that the Commission stated in an earlier case that it was uncertain if it had the authority to impose a limitations period that conflicted with state law. Verizon Brief at 7-8. We are not asking the Commission to alter the state statute of limitations, which relates to ***filing lawsuits for breach of contract***, in any way. We are asking the Commission to establish reasonable contractual time frames within which a party may bill for services rendered or to retroactively protest a bill already paid. If one party sends the other a bill and the billed party ignores it, the billing party would still have the full 5-year statutory time frame to file a lawsuit seeking collection. The Commission has full authority to establish just and reasonable contract terms under 47 U.S.C. § 252(c), and under Fl. Stat. §§ 364.012, 364.013, 364.16(3), and 364.162. Also in this regard, we are not asking Verizon to "contractually waive rights to payment or to dispute charges." Verizon Brief at 7-8. We are asking that Verizon and Bright House agree to keep their accounting in order and either bill for services, or retroactively protest bills already paid, within a reasonable time.

[101] Verizon Brief at 7.

[102] *See* Tr. 197:4-201:19 (Gates Direct).

[103] Verizon Brief at 45-46.

chargeable.[104] But coordination is not a separate service; it simply ensures that for large orders, the basic LNP function is performed correctly. We do not want any port to go awry, but if the customer is a business, health care provider, school or government institution with many lines, the consequences of a botched port can fall on the many members of the public who need to call that customer.[105] Coordination on large ports, therefore, is not an extra service. It is integral to ensuring that the basic LNP function is performed properly.

Specifically, and contrary to Verizon's suggestion,[106] coordination is totally different from expediting a port. Shortening the standard interval – an expedite – ***is*** something extra. Coordination just ensures the basic job is done right.[107]

The Commission should adopt our proposal regarding coordinated ports.

CONCLUSION.

For the reasons stated herein and in our opening brief, and based on the entire record of this case, Bright House respectfully requests that the Commission adopt its position on all of the disputed issues in this arbitration proceeding, as described herein and in our opening brief.

Respectfully submitted,

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104 Verizon Brief at 47-48.

105 Tr. 196-202 (Gates Direct); Tr. 333-34 (Gates Redirect).

106 Verizon Brief at 46-47.

107 Note that unlike "coordination" on (for example) cutting over UNE loops from one network to another, the coordination needed for handling large-customer LNP situations would not involve any facilities transfers, central office, or outside plant work. It would simply involve having someone available from whichever carrier is losing the customer to coordinate with the winning carrier to ensure that the customer's service is properly reflected as transferred in each carrier's switches and the industry-wide LNP database.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been served via Electronic Mail, U.S. Mail First Class, or Hand Delivery this 30th day of July, 2010, to the persons listed below:

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