

Marguerite McLean

090501-TP

From: beth.keating@akerman.com
Sent: Tuesday, August 03, 2010 4:37 PM
To: Filings@psc.state.fl.us
Cc: de.oroark@verizon.com; David Christian; Charles Murphy; Kevin Bloom; Beth Salak; ChrisSavage@dwt.com; DanielleFrappier@dwt.com
Subject: Docket No. 090501-TP
Attachments: 20100803162853181.pdf

Attached for electronic filing in the referenced docket, please find Bright House Networks Information Services (Florida), LLC's Response in Opposition to Verizon's Motion to Strike. 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: 7

E: Response in Opposition to Verizon's Motion to Strike



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August 3, 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 Bright House Networks Information Services (Florida), LLC's Response in Opposition to Verizon's Motion to Strike. 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: August 3, 2010

RESPONSE IN OPPOSITION TO VERIZON FLORIDA'S MOTION TO STRIKE

Pursuant to Rule 28-106.204, Florida Administrative Code, Bright House Networks Information Services (Florida) LLC (Bright House), respectfully submits this Response in Opposition to Verizon's Motion to Strike, and states as follows:

1. Near the close of business on Friday, July 30, 2010, Bright House filed its Reply Brief in this proceeding in accordance with the time frame set forth by the Prehearing Officer in Order No. PSC-10-0322-PHO-TP, issued May 19, 2010, in this proceeding. However, due to a scrivener's error, Bright House erroneously understood that the Reply Brief was limited to 30 pages, rather than 20 pages.¹

2. This error was not intentional. As explained in our Motion for Leave to File an Amended Reply Brief (filed under separate cover today), it arose due to counsel's inadvertent reliance upon earlier notes regarding discussions about the filing of Initial and Reply Briefs. Those notes reflected, incorrectly, that the Prehearing Officer had granted leave to the parties to submit Reply Briefs with a 30-page limitation.

3. Mid-day on Monday, August 2, 2010 (less than a single business day following the erroneous filing), counsel for Verizon contacted counsel for Bright House and pointed out the error. We immediately began discussions with Verizon regarding

¹ Verizon contends that the Brief was 31 pages, but the only thing on page 31 was, in fact, portions of the address from the signature block which overlapped onto page 31. Nothing substantive overlapped onto page 31, and the brief was signed at page 30.

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how to correct the error. Unfortunately, the parties were unable to reach a mutually satisfactory resolution.

5. Immediately upon becoming aware of the error, in addition to discussions with Verizon, we immediately began preparing an Amended Reply Brief that met the 20-page limitation. We filed our Motion for Leave to File Amended Brief earlier today – only about 12 business hours following the initial erroneous filing – along with a copy of the Amended Reply Brief.

6. Resolution of Verizon’s motion is governed by Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer “may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case” Under that rule, the question is what resolution of Verizon’s motion will promote the “just ... resolution of all aspects of the case.” We submit that under this rule, the appropriate course is to deny Verizon’s motion to strike, and, instead, to permit Bright House to file its Amended Reply Brief.

7. Verizon’s Motion to Strike would result in the record containing only a portion of Bright House’s response to Verizon’s arguments with respect to Issue No. 37, and none of our response to Issue Nos. 32, 49, 41, 13, and 7. It is difficult to square such a result with the principle of making rulings that promote the just resolution of “*all* aspects of the case.” Indeed, Verizon’s proposal to simply cut off the last 10 pages of the original Reply Brief will make a cut in mid-analysis, and in fact, mid-sentence, of Bright House's analysis of Issue 37. Obviously, this will reduce the coherence of the analysis of that particular issue, but it will also deprive the Commission of the additional analysis of Issues 32, 49, 41, 13, and 7. This seems to be a rather draconian approach in light of Bright House's prompt attempts to address its mistake. Moreover, it seems contrary to

the goal of developing a full and complete record upon which the Commission will base its decision. Bright House's counter proposal, whereby it has offered an Amended Reply Brief that complies with the 20-page limit, would allow the Commission to consider a coherent, complete brief in a time frame that does not cause any undue prejudice to Verizon or otherwise impair the schedule in this case.²

8. We note that Verizon has not alleged any prejudice arising from Bright House's initial filing of a 30-page brief. To the contrary, it merely noted the (uncontested) point that our initial filing indeed exceeded the 20-page limit. In fact, as noted in our Motion for Leave to File, Verizon has not experienced any prejudice by virtue of our filing on July 30, and will not experience any prejudice by denial of its Motion to Strike and granting of our Motion for Leave to File.³ To the contrary, without seeking to minimize the fact of our error, it appears that Verizon is seeking to obtain an advantage on the merits of certain issues in this case by reason of our inadvertent and

² See, Newman v. State Farm Auto Ins., 858 So. 2d 1205, 1206 (Fla. 4th DCA 2003), wherein the Court stated:

Although the policy in Florida to liberally allow amendments where justice requires diminishes as the case progresses to trial, see Allett v. Hill, 422 So.2d 1047, 1049 (Fla. 4th DCA 1982), in exercising its discretion to allow the amendment, the trial court should still weigh the amendment in terms of the prejudice to the opposing party in the preparation for trial. See Dimick v. Ray, 774 So.2d 830, 833 (Fla. 4th DCA 2000). *If the amendment simply restates an issue already present in the case of which the opposing party is aware and needs no extensive preparation for trial, then there may be no prejudice to the opposing party and great prejudice to the moving party to deny the amendment.* [emphasis added]

³ This situation thus contrasts starkly with cases where a Prehearing Officer has granted motions to strike. For example, in *Complaint by dPi-Teleconnect, L.L.C. against BellSouth Telecommunications, Inc. for dispute arising under interconnection agreement*, Docket No. 050863-TP; Order No. PSC-08-0457-PCO-TP (2008), a party tried to circumvent Commission rulings excluding certain matters from the record by filing slightly modified versions of those matters as an appendix to its post-hearing briefing. That material was stricken. Here, Bright House was properly and appropriately replying to Verizon's arguments on the merits of cases raised in Verizon's initial post-hearing brief, but due to an inadvertent error used more pages than allowed. We also note that our Amended Reply Brief does not make any arguments that are different from those initially made, ensuring that Bright House has not obtained any substantive benefit from filing the Amended Brief. In somewhat analogous circumstances the Commission has relied on this consideration to deny a motion to strike. See *Petition by Global NAPs, Inc. for arbitration pursuant to 47 U.S.C. 252(b) of interconnection rates, terms and conditions with Verizon Florida Inc.*, Docket No. 011666-TP, Order No. PSC-03-0724-FOF-TP (2003).

promptly-corrected error. In these circumstances, granting Verizon's motion would not contribute to a "just resolution" of those issues.

9. In this regard, we note that earlier in the case, Verizon itself committed a material procedural error based on an inadvertent failure to comply strictly with the requirements of the procedural rulings in this case. Specifically, notwithstanding the requirement of the Order Establishing Procedures that any proposed demonstrative exhibits be identified at the Prehearing Conference, Verizon presented such an exhibit for the first time during its opening statement. In order to avoid prejudice to Bright House, the Commission permitted us to briefly respond to that demonstrative exhibit, but it was allowed into the record. *See* Transcript, Volume 1, page 21, line 8 through page 25, line 15. As Verizon's counsel Mr. O'Roark noted there, the appropriate response to such a situation is to do "whatever is appropriate to *remedy*" the situation. *Id.* page 23, lines 1-2 (emphasis added). Bright House now finds itself in an analogous situation. And, just as the appropriate "remedy" for Verizon's inadvertent procedural error – that is, the "just resolution" called for by Rule 28-106.211 – was to permit its (formally untimely) exhibit to be used, here the appropriate "remedy" for our inadvertent procedural error is not to strike our response to certain Verizon arguments, but, instead, to allow us to file our Amended brief.

10. Again, Bright House sincerely apologizes for the inconvenience caused by this regrettable error, and assures the Commission that it will work diligently to ensure that no similar such error is committed by Bright House in the future.

WHEREFORE, Bright House respectfully asks that the Prehearing Officer rejected Verizon's Motion to Strike, and instead, accept Bright House's Amended Reply Brief as filed under separate cover today.

Respectfully submitted this 3rd day of August, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via Electronic Mail on August 3, 2010 to:

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