State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: May 8, 2008

TO: Office of Commission Clerk (Cole)

FROM: Division of Competitive Markets & Enforcement (Dowds, Higgins,)
Office of the General Counsel (Mann)

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

AGENDA: 05/20/08 – Regular Agenda – Motion to Dismiss – Oral Argument Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\080110.RCM.DOC

Case Background

Bright House Networks Information Services (Florida), LLC ("Bright House") is a competitive local exchange carrier ("CLEC") operating in the state of Florida. Bright House adopted an existing interconnection agreement between Verizon Florida Inc. ("Verizon") and MCImetro Access Transmission Services LLC. This adoption was deemed approved and became effective as noted in Commission staff's April 7, 2006 memorandum filed in Docket No. 060015-TP.

On February 22, 2008, Bright House filed with the Commission its Complaint and petition for resolution of interconnection pricing dispute against Verizon ("Petition"). On March 13, 2008, Verizon filed its Motion to Dismiss Complaint ("Motion"). Verizon alleges that Bright

House's complaint should be dismissed because it has failed to state a claim for which relief can be granted.

On March 20, 2008, Bright House filed its Opposition to Motion to Dismiss ("Response"), as well as its Request for Oral Argument. Bright House argues that Verizon's Motion should be rejected because Bright House has stated a claim for which relief can be granted.

Staff's recommendation addresses Verizon's Motion to Dismiss and its Request for Oral Argument.

Jurisdiction

Pursuant to Section 252(e) of the Telecommunications Act of 1996 ("Act"), the Commission approved an Interconnection Agreement ("Agreement") between GTE Florida Incorporated (n/k/a Verizon) and AT&T. The Agreement was subsequently adopted by MCImetro Access Transmission Services LLC and later by Bright House. Accordingly, the Commission has jurisdiction to resolve this dispute pursuant to Sections 251 and 252 of the Act. *See, Iowa Utilities Bd. v. FCC*, 120 F. 3d 753, 804 (8th Cir. 1997) (holding that State commissions' authority under the Act to approve agreements carries with it the authority to enforce the agreements); *accord, BellSouth Communications, Inc. v. MCImetro Access Transmission Servs.*, 317 F. 3d (11th Cir. 2003).

Discussion of Issues

Issue 1: Should the Commission grant Bright House's Request for Oral Argument?

Recommendation: Yes. Staff recommends that the Commission grant Bright House's Request for Oral Argument. **(R. Mann)**

Staff Analysis: Bright House

On March 20, 2008, Bright House filed, concurrently with its Response to Verizon's Motion, its Request for Oral Argument, pursuant to Rule 25-22.0022, Florida Administrative Code. Bright House submits that oral argument would help the Commission understand the competitive significance and policy implications of the Verizon practice that Bright House challenges, as well as the scope and meaning of the alternative dispute resolution procedures in the parties' Agreement.

Verizon

Verizon does not object to oral argument on Verizon's Motion.

Analysis

Staff believes that it would be beneficial for the Commission to hear from the parties regarding Verizon's Motion to Dismiss. This should not, of course, include argument by the parties on the merits of this case. Accordingly, staff recommends that the Commission grant Bright House's Request for Oral Argument. If the Commission grants oral argument, staff recommends that each party be allowed ten minutes apiece to present its argument.

<u>Issue 2</u>: Should the Commission grant Verizon's Motion to Dismiss?

<u>Recommendation</u>: Yes. Consistent with prior Commission Orders, staff recommends that the Commission grant Verizon's Motion to Dismiss Bright House's Petition for failing to follow the alternative dispute resolution provisions of the parties' current Interconnection Agreement. **(R. Mann)**

<u>Staff Analysis</u>:

<u>Arguments</u>

<u>Verizon's Motion to Dismiss</u>

Verizon asserts that Bright House's complaint should be dismissed because it has failed to state a claim for which relief can be granted. [Motion, p.1] Verizon's primary argument is that the parties' Agreement, for which Bright House seeks dispute resolution, contains a mandatory arbitration clause. In the Agreement, the parties have agreed to use specified alternative dispute resolution procedures as their exclusive remedy with respect to all disputes arising under the Agreement or the breach thereof. [Motion p.2] Verizon cites to "the key provision" of the Agreement's Attachment 1, entitled "Alternative Dispute Resolution," which states:

> 2. **Exclusive Remedy**
>
> 2.1 Negotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between [Verizon] and [Bright House] arising out of this agreement or its breach. [Verizon] and [Bright House] agree not to resort to any court, agency, or private group with respect to such disputes except in accordance with this Agreement. [Motion, p.2]

The specified alternative dispute resolution procedures include pre-arbitration negotiation, American Arbitration Association commercial arbitration, and the opportunity to appeal the arbitrator's decision to the Commission, to the FCC, or to a state or federal court, as appropriate. [Motion, p.2] Verizon points out that Bright House does not allege that it has complied with the alternative dispute resolution process; Bright House does not allege that any provision of the Agreement excuses its noncompliance; and Bright House, by filing its Petition with the Commission, has breached the Agreement in violation of Section 2.1, above. [Motion, pp.2, 3]

Verizon states that this Commission has consistently held that it will honor commercial arbitration clauses in interconnection agreements, citing to prior Commission Orders. In one case involving BellSouth Telecommunications, Inc. and Supra Telecommunications and Information Systems, Inc., disputes arose between the parties under two different agreements - - one with, and the other without, an arbitration clause.[1] The Commission held "that the dispute

[1] *In re: Request for arbitration concerning complaint of BellSouth Telecommunication, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes,* Docket No. 001097-TP, Order No. PSC-00-2250-FOF-TP, pp. 4-5 (Nov. 28, 2000).

resolution provisions in each of the agreements should be strictly followed" and accordingly dismissed the portion of the complaint arising under the agreement which contained an arbitration clause. [Motion, p.3] Likewise, the Commission dismissed a complaint by XO Florida against Verizon, where the parties' interconnection agreement had a commercial arbitration clause.[2] The Commission stated that it "was following our established precedent and honoring the right of the parties to choose in advance by contract the forum for settling any disputes which may arise over the terms of their agreement." [Motion, p.3] Verizon states that the Commission reached the same conclusion in a case in which Intermedia brought a complaint against GTE Florida, finding that because the parties' interconnection agreement had a commercial arbitration clause, "Intermedia has failed to state a cause of action upon which we can grant relief."[3]

Verizon asserts that the Federal Arbitration Act requires that commercial arbitration clauses be honored and that the Act establishes a national policy favoring arbitration when the parties contract for such method of dispute resolution. [Motion, p.4] Verizon states that the Florida Arbitration Code, Chapter 682, F.S., similarly favors arbitration clauses as "valid, enforceable, and irrevocable without regard to the justiciable character of the controversy." [Motion, p.4]

Verizon asserts that even though Bright House claims that this dispute concerns "competitive fairness" and is thus subject to the Commission's direct jurisdiction, Bright House points to no "competitive fairness" exception to alternative dispute resolution in the Agreement or in the law. Verizon states further that even if there were such a loophole in the Agreement, this case would not qualify because it involves a "garden variety" commercial dispute concerning the interpretation of a contract as it relates to the price of a service. [Motion, p.4]

Bright House's Response

Bright House argues that while consideration of the parties' Agreement is necessary to understand the dispute at issue, the dispute in question is not fundamentally about the Agreement or how it is supposed to operate. Bright House argues that Verizon's Motion is "based on the fact that the parties' agreement contemplates a form of alternative dispute resolution." Bright House states that its Petition frankly acknowledges this fact [of mandatory arbitration] but that the Petition also explains why the alternative dispute resolution provision is not controlling here. [Response p.4] Bright House argues that,

> The problem is that, while the agreement plainly says that Verizon will [insert Bright House's customer listings into Verizon's directory databases], for free, Verizon is brazenly claiming that somehow it is entitled to charge Bright House anyway. Despite months of private negotiations between the parties, Verizon has

[2] *In re: Request for arbitration concerning complaint of XO Florida, Inc. against Verizon Florida Inc. (f/k/a GTE Florida Incorporated) regarding breach of interconnection agreement and request for expedited relief,* Docket No 011252-TP, Order No. PSC-01-2509-FOF-TP, pp. 8-9 (Dec. 21, 2001).

[3] *In re: Request for arbitration concerning complaint of Intermedia Communications, Inc. and petition for emergency relief against GTE Florida Incorporated regarding request for physical collocation in specific central offices,* Docket No. 981854-TP, Order No.PSC-99-0564-FOF-TP, p. 6 (March 26, 1999).

> never explained how it can tie $4 million in charges to the actual language of the agreement. In these circumstances, it is fair to say that Verizon is not acting "under" the agreement. It is acting entirely outside the agreement. . . . This is simply an anticompetitive effort to impose added customer acquisition costs on Bright House, not any legitimate dispute under the agreement.

Bright House then asserts, however, that it is "seeking a ruling that the agreement **does not** permit Verizon to send bills; it is not seeking an interpretation or an enforcement of Verizon's obligation to do anything." [Response, pp.4,5 emphasis in original]

Bright House asserts that although it notes the Agreement in its Petition, it relies as well on Section 364.01(4)(g), Florida Statutes, which provides that the Commission shall "ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior." [Response, p.5] Bright House contends that its Petition differs from the cases cited by Verizon in its Motion, as this case implicates important Commission policy issues independent of the Agreement, and that this fact brings the dispute under the jurisdiction of the Commission, notwithstanding the Agreement. [Response, pp.5, 6] Additionally, Bright House argues that the cases cited by Verizon concerned interconnection agreements with "binding" arbitration procedures, whereas here the alternative dispute resolution procedures are neither final nor binding.[4] Bright House argues that, to the contrary, the relevant provisions here recognize that the Commission may take jurisdiction of a dispute before private arbitration has occurred, and expressly state that arbitration results are not final, because the Agreement expressly permits an appeal to the Commission. Bright House argues that this dispute does not implicate the Federal Arbitration Act's policy regarding arbitration: a means to efficiently, fully and finally resolve disputes without the need to litigate. Thus, since the arbitration called for in the parties' Agreement is not final, the policies that "might normally impel the Commission to require strict adherence to these provisions [of the Agreement] simply do not apply." [Response, pp.6, 7]

Bright House claims alternatively that "if the Agreement somehow contemplates that Verizon could charge something" for the administrative work Verizon provides in uploading Bright House's directory listing information, then the Commission must establish that charge, not a private arbitrator. [Response, p.9]

Finally, Bright House concludes that this case involves "important policy matters regarding how this Commission will enable and encourage facilities-based competition." Given that the Agreement contemplates continued Commission involvement and arbitration is not exclusive or binding, the Commission may, and should, exercise its own direct jurisdiction over this dispute to resolve it. [Response, pp.9, 10]

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[4] Staff notes that Bright House cites a federal case, on page 7 of its Response, apparently for the proposition that this Commission should not require private arbitration of the dispute here because "forcing this dispute into time-consuming, interlocutory private arbitration would run counter to the Commission's direct responsibilities for interpreting and enforcing interconnection agreements." *Verizon New York, Inc. v. Covad Communications Company, New York State Public Service Commission, et al*, 2006 U.S. Dist. LEXIS 7414. Staff does not believe it necessary to address this cite in this recommendation.

Standard of Review

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. *In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc.*, 95 FPSC 5:339 (1995); *Varnes*, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. *Matthews v. Matthews*, 122 So. 2d 571 (Fla. 2nd DCA 1960).

Analysis

Bright House brought its petition before the Commission explicitly stating that it was:

> A petition for dispute resolution against Verizon Florida, LLC ("Verizon") (a) for violation of the terms of the Parties' Interconnection Agreement ("Agreement") by imposing charges on Bright House not provided for in, and contrary to the terms of, that Agreement, and (b) for a determination regarding the scope and meaning of that Agreement as it relates to charges for and related to directory listings for Bright House customers.

This statement is unequivocal and the essence of it is echoed throughout Bright House's argument.

The primary basis for Verizon's Motion to Dismiss Bright House's Petition is that the parties' Agreement contains a mandatory arbitration clause with which Bright House did not comply. The parties agreed to use specified alternative dispute resolution procedures as their exclusive remedy with respect to all disputes arising under the Agreement or the breach thereof:

> 2. **Exclusive Remedy**
>
> 2.1 Negotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between [Verizon] and [Bright House] arising out of this agreement or its breach. [Verizon] and [Bright House] agree not to resort to any court, agency, or private group with respect to such disputes except in accordance with this Agreement.

The specified alternative dispute resolution procedures include pre-arbitration negotiation, mandatory commercial arbitration, and possible appeal to the Commission or FCC -- but explicitly, appeal of an arbitrator's decision. [Agreement, Attachment 1, pp.2-6] There is

no provision to allow a party to bypass these procedures and bring its case directly to the Commission. The finality of the arbitrator's decision is addressed in Attachment 1, Section 11, of the Agreement:

> 11.1 Except as provided below, the Arbitrator's decision and award shall be final and binding, and shall be in writing and shall set forth the Arbitrator's reasons therefor for decision unless the Parties mutually agree to waive the requirement of a written opinion. Judgment upon the award rendered by the Arbitrator may be entered in any court having jurisdiction thereof. Either Party may apply to the United States District Court for the district in which the hearing occurred for an order enforcing the decision.
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> 11.2 A decision of the Arbitrator shall not be final in the following situations:
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> a) A Party appeals the decision to the Commission or FCC, and the matter is within the jurisdiction of the Commission or FCC, provided that the agency agrees to hear the matter.

Based on Section 11.2, staff believes that the Commission's ultimate decision to hear this matter is discretionary - - but only if or when it is properly brought before the Commission by appeal of an arbitrator's decision. Before that discretion comes into play, however, staff believes that the Commission must take into account the private contract (the Agreement) to which Bright House and Verizon are parties.

Bright House acknowledges that it has not complied with the Agreement's mandatory arbitration process but argues that it should not have to. Notwithstanding the unequivocal opening paragraph of its Petition, Bright House contends that its complaint is not really about the Agreement and that it is not asking the Commission for an interpretation of the parties' Agreement. This contention, however, is belied by the facts alleged by Bright House itself. The dispute, as Bright House alleges it, is undeniably about the agreement and its terms. That is, the question at the heart of $4 million in charges that Bright House claims have been improperly billed by Verizon is "what are the terms of the Agreement that provide for Verizon to levy, or preclude Verizon from levying, these charges?" In order to answer this question, an interpretation of the Agreement is absolutely necessary.

Bright House argues that unlike the Commission's prior cases cited by Verizon, the mandatory arbitration required by this Agreement is not final and binding. A party may appeal an arbitrator's decision to the Commission. Consequently, arbitration, according to Bright House, is a waste of time and resources. Bright House, however, voluntarily adopted this Agreement and was aware of the alternative dispute resolution requirements when it did so. There is no allegation to the contrary. Neither is there a provision in the Agreement that allows a party to skip arbitration and take its case directly to the Commission.

Bright House asserts, nevertheless, that because the arbitration procedure permits an appeal of an arbitrator's decision, the Agreement "contemplates Commission involvement from the beginning." Indeed, Bright House argues that the Agreement in this case pointedly

recognizes that the Commission "may take jurisdiction of a dispute before a private arbitration has occurred." Staff disagrees with this argument. The opportunity to appeal an arbitrator's decision, which necessarily happens after arbitration takes place, does not mean that the Agreement contemplates direct Commission involvement from the beginning, or that the Commission may take jurisdiction before arbitration has occurred. Staff believes that Bright House misreads the relevant Agreement provisions that it cites as providing for the Commission to take jurisdiction before arbitration. Indeed, Staff believes that Attachment 1, Section 2.1.2, provides just the opposite: That arbitration must come first and only then may a party appeal the arbitrator's decision pursuant to Section 11.2. Thus, the "result" in Section 2.1.2 is that there may be two rulings: "the agency ruling," as described in Section 2.1.2.1, and "[t]he arbitration ruling," as described in Section 2.1.2.2. Section 2.1.2 provides:

> 2.1.2 If, for any reason, the FCC or any other federal or state regulatory agency exercises jurisdiction over and decides any dispute related to this Agreement or to any [Verizon] Tariff and, as a result, a claim is adjudicated in both an agency proceeding and an arbitration proceeding under this Attachment 1, the following provisions apply:
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> 2.1.2.1 To the extent required by law, the agency ruling shall be binding upon the parties for purposes of regulation within the jurisdiction and authority of such agency.
>
> 2.1.2.2 The arbitration ruling rendered pursuant to this Attachment 1 shall be binding upon the parties for purposes of establishing their respective contractual rights and obligations under this Agreement, and for all other purposes not expressly precluded by such agency ruling.

Bright House argues that this case, unlike the Commission cases cited by Verizon, implicates important Commission policy issues independent of the Agreement. Bright House argues that, because of this distinction, the Commission's holdings in those cited cases, which honor the alternative dispute resolution provisions, would not apply here. Bright House argues further that the implication of these important policy issues brings this dispute under the jurisdiction of the Commission, notwithstanding the Agreement. Staff disagrees. Bright House cannot transform this matter, which it expressly brings before the Commission as "a dispute over the terms of the parties' agreement," into a "competitive fairness" issue, by simply referring to Section 364.01(4)(g), F.S.

Bright House contends that Verizon's imposition of the $4 million in charges flies "in the face of an agreement that says the relevant functions will be provided for free." Bright House argues that this is "anticompetitive behavior" that takes this dispute outside the agreement, rather than constituting "a dispute arising out of the agreement or its breach," pursuant to Section 2.1 of the Agreement. But as Bright House's argument in its quote, above, reflects, the dispute over the $4 million in charges is inextricably intertwined with an alleged breach of the terms of the Agreement. Even Bright House's alternative claim that "if the Agreement somehow contemplates that Verizon could charge something" for the administrative work it provides in uploading Bright House's directory listing information, begs the question: does the Agreement

contemplate that Verizon could charge something? And this question, as does the rest of Bright House's argument, requires an interpretation of the Agreement.

Staff Conclusion

Taking all of the facts alleged by Bright House as true, staff believes that the Petition should be dismissed. As set forth in Attachment 1, Section 2.1, of the Agreement, the parties have agreed to utilize an alternative dispute resolution process, which includes mandatory arbitration, for the remedy of all disputes that may arise out of the Agreement or its breach. The dispute Bright House brings to the Commission arises out of the Agreement or its breach. Bright House's reference to Verizon's "anticompetitive behavior" does not trigger the Commission's authority under Section 364.01(4)(g), F.S., to investigate this secondary allegation, especially not within the context of the essential allegation driving Bright House's Petition - - that Verizon is violating the terms of the parties' Agreement by charging $4 million for Bright House customer listings. The Commission acknowledged the Agreement between the original parties, and the adoption thereof by Bright House. Bright House did not comply with the alternative dispute resolution process before filing its Petition. Proceeding with this Petition would contravene the clear terms of the Agreement. The Commission has consistently held that it will honor commercial arbitration clauses in parties' interconnection agreements, and staff sees no reason to deviate in this instance. *See*, *footnotes 1, 2, 3, supra*. Bright House has failed to state a cause of action upon which the Commission can grant relief. Accordingly, staff recommends that the Commission grant Verizon's Motion to Dismiss.

Issue 3: Should this Docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendation in Issue 2, this Docket should be closed. **(R. Mann)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 2, this Docket should be closed.