Diamond Williams 110056-TP

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Subject: Electronic Filing - Docket No. 110056-TP

Attachments: 20110607155516434.pdf

Attached is an electronic filing for the docket referenced below. If you have any questions, please contact Beth Keating at the number below. Thank you.

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Docket Name and Number: Docket No. 110056-TP – Complaint against Verizon Florida LLC and MCI Communications Services, Inc. d/b/a Verizon Business Services for failure to pay intrastate access charges for the origination and termination of intrastate interexchange telecommunications service, by Bright House Networks Information Services (Florida), LLC

Filed on Behalf of: Bright House Networks Information Services (Florida), LLC

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June 7, 2011

VIA ELECTRONIC FILING

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

Re: Docket No. 110056-TP

Complaint against Verizon Florida LLC and MCI Communications Services, Inc. d/b/a Verizon Business Services for failure to pay intrastate access charges for the origination and termination of intrastate interexchange telecommunications service, by Bright House Networks Information Services (Florida), LLC

Dear Ms. Cole:

Please find attached the Response to Supplement to Verizon's Motion to Dismiss. Your assistance in this matter is greatly appreciated. Should you have any questions, please do not hesitate to call.

Sincerely,

Beth Keating

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Bright House Networks Information Services (Florida) LLC, Complainant v. Verizon Florida, LLC and MCI Communications Services, Inc. d/b/a Verizon Business Services, Defendants	Docket No. 110056-TP

RESPONSE TO SUPPLEMENT TO VERIZON'S MOTION TO DISMISS

Bright House Networks Information Services (Florida), LLC, ("Bright House") through its attorneys, hereby responds to the "Supplement to Verizon's Motion to Dismiss or Stay Bright House's Complaint" ("Supplement") filed in this matter on June 1, 2011.

1. The Commission Should Disregard Verizon's Supplement.

The Commission's rules do not contemplate "supplements" to fully-briefed motions to dismiss. Bright House's Complaint explained why Verizon cannot legally ignore its intrastate access charge bills. Verizon moved to dismiss, claiming the Commission lacks jurisdiction. We responded. No "supplement" is either necessary or appropriate at this juncture.[1]

2. This Case Is Properly Before This Commission.

Verizon claims that Bright House "agrees" that the FCC is the "appropriate body to determine VoIP intercarrier compensation obligations."[2] This flatly misrepresents our statements to the FCC. We recognize that the FCC might have the authority to preempt the states and set

[1] We do not believe it is necessary to formally move to strike a completely unauthorized pleading such as that filed by Verizon. The Commission is free to, and should, simply disregard it. If the Commission does not do so, however, we trust that it will also consider this pleading.

[2] Supplement at 2.

industry-wide intercarrier compensation rules.[3] But we recognized this potential for future preemptive FCC action in our Complaint,[4] Verizon addressed it in its Motion to Dismiss,[5] and we addressed it again in our opposition.[6] An FCC order setting new compensation rules for calls involving interconnected VoIP services would have no impact on this Commission's authority and obligation to decide this case. As of the time of the Complaint, Verizon owed Bright House approximately $2.2 million in unpaid intrastate access bills, and that amount was growing at about $500,000 per month.[7] The amount in dispute is approaching $5,000,000, and continues to grow. If the FCC were to issue an order ***tomorrow*** setting new rules in this area, the dispute between Bright House and Verizon would "live" and in need of resolution by this Commission.[8]

Bright House's actual FCC filings – as opposed to the out-of-context snippets on which Verizon relies[9] – confirm that Bright House does ***not*** agree with Verizon about the role of the FCC.[10] As noted, in our filings with the FCC we did not directly challenge that agency's claim to legal authority to preempt the states. Instead, we urged the FCC to establish a reasonable transition

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3 The FCC said that it may set intercarrier compensation rates for all traffic to or from a local exchange carrier ("LEC"), irrespective of whether the traffic is interstate or intrastate. *See In the Matter of Connect America Fund, et. al,* Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90 *et al.,* FCC 11-13 (FCC February 9, 2011) at ¶ 512. In our filings at the FCC, we chose not to directly challenge the FCC's claimed authority, but instead to focus what the FCC should do should it decide that preempting the states was appropriate. *See* note 11, *infra.*

4 Complaint, ¶ 20.

5 *See* Motion to Dismiss at 2-3, 22, 25-30.

6 *See* Opposition to Motion to Dismiss or Stay Complaint at 35-38. From this perspective, this aspect of Verizon's "Supplement" is simply rearguing points that have already been fully briefed.

7 Complaint at page 1, and ¶¶ 7-8.

8 Verizon claims that the fact that the FCC ***sought comment*** on intercarrier compensation issues relating to VoIP, means that the FCC thinks that such traffic is not subject to normal access charge rules. Supplement at 4. This is obviously absurd.

9 *See* Supplement at 4-5.

10 Our FCC filings are online at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7021236539 (comments) and http://fjallfoss.fcc.gov/ecfs/document/view?id=7021239744 (reply comments).

plan to move from the current system to a new unified system of intercarrier compensation. As part of that transition plan, we urged the FCC to declare that interstate access charges, intrastate access charges, or reciprocal compensation apply to PSTN traffic – including so-called "VoIP traffic" – irrespective of technology. This is in complete harmony with our arguments here. Moreover, the fact that we are urging the FCC – if it is going to preempt the states and federalize all intercarrier compensation – to do so in a fair and reasonable manner is entirely consistent with our position that this Commission must decide our specific dispute with Verizon.[11]

Furthermore, we made completely clear at the FCC that existing law requires Verizon to pay intrastate access charges on intrastate calls to or come from an interconnected VoIP provider.[12] We made this point at the FCC because Verizon asked that body to rule that current law supports Verizon's position in the litigation here in Florida. Confronted with that Verizon claim at the FCC, we obviously had to rebut it, and we did.[13]

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[11] One of Verizon's out-of-context snippets is especially egregious. Verizon states that our FCC comments "recognized that the FCC '***has the legal authority to dictate intercarrier compensation rates for all traffic PSTN carriers might exchange with each other,***' including ***all*** IP traffic exchanged with the PSTN." Supplement at 5 (first emphasis added). But what we actually said was quite different: "***For purposes of our comments and reply comments, Bright House has assumed that*** the [FCC] has the legal authority to dictate intercarrier compensation rates for all traffic PSTN carriers might exchange with each other." Bright House FCC Reply Comments at 8 (emphasis added). Bright House submits that the fact that Verizon is reduced to blatant and obvious misrepresentation of our FCC filings reveals a certain desperation to keep this Commission from doing its job and adjudicating our complaint.

[12] Bright House FCC Reply Comments at 6-8. That is, whether or not the FCC actually has the authority to preempt the states with respect to these issues, it is completely clear that it has not done so ***yet,*** with the result that intrastate access traffic, exchanged in TDM format on the PSTN, remains fully under state jurisdiction – including, in Florida, the jurisdiction of this Commission – irrespective of whether that traffic begins or ends with an interconnected VoIP provider.

[13] Verizon is correct that in our FCC reply comments, we said that <u>if</u> the FCC were to "promptly, clearly, and explicitly declare that this is, indeed, the current state of the law, [that] would end the most economically significant VoIP-related arbitrage that is occurring today." Bright House FCC Reply Comments at 7-8. But that conditioned statement is in no way inconsistent with the fact that this Commission has jurisdiction over, and responsibility for, our complaint here. Verizon's opposition to this Commission's jurisdiction depends entirely on Verizon's rroneous interpretation of certain FCC orders. If the FCC were to declare that Verizon's view of those orders is wrong, that would destroy Verizon's case (note continued)...

Finally, Verizon relies on two federal court orders – which it did not to attach to its June 1 filing or Supplement – to claim that this Commission should stay this case pending a ruling from the FCC.[14] Verizon fails to reveal, however that ***both*** those cases included claims against Verizon for the recovery of ***interstate*** access charges under ***FCC*** tariffs. Moreover, even Verizon had to admit that the motion to stay one of those cases was ***unopposed.***[15] Bright House's case here, however, relates only to ***intrastate*** access charges, and, obviously, we oppose any effort to stay it.

3. The Saga of the ICA Settlement.

Verizon suggests that a negotiated provision in the recently-filed interconnection agreement ("ICA") between Verizon Florida, LLC (Verizon-ILEC) and Bright House undercuts Bright House's positions on the merits in this case.[16] The situation surrounding that matter is as follows:

- At the beginning of the ICA negotiations, Bright House wanted direct IP-to-IP interconnection with Verizon-ILEC. Verizon-ILEC refused, but in exchange for other concessions, Bright House let that issue drop.
- Since Verizon-ILEC insisted on TDM-format traffic exchange, Verizon-ILEC and Bright House agreed that VoIP traffic (meaning traffic to or from Bright House's network) would be treated ***exactly the same as*** TDM traffic for purposes of intercarrier compensation.[17]
- Later, after hearings and briefing were complete, Verizon-ILEC and its long distance affiliate began to withhold access charges on traffic to and from Bright House.
- The earlier settlement had resolved this issue. But Verizon-ILEC reneged on that deal, and, after the Commission issued its ruling, Verizon-ILEC refused to sign an ICA that included it. (This was why the parties needed repeated extensions of time to file a conforming ICA.)

...(note continued)
here at this Commission. Recognizing the FCC rulings are relevant here, and urging the FCC to issue rulings that would be helpful to Bright House here, does not mean that this Commission lacks jurisdiction to decide this case.

14 Supplement at 6.

15 *See* Supplement at 6 n.10.

16 Supplement at 1-4.

17 This agreement is reflected in the draft ICA provisions included as an attachment to the direct testimony of its witness Mr. Gates. *See* Docket No. 090501-TP, Transcript of Proceedings, Volume IV (Exhibits), Exhibit TJG-3 at page 77 (setting out then-agreed language of Section 8.6 of the ICA's "Interconnection Attachment"). This appears at 1,470 within this voluminous, omnibus exhibit.

- Bright House sued Verizon-ILEC and Verizon Business, seeking unpaid access charges and a declaration that access charges apply to this traffic. (That is, we filed ***this*** case.)
- Aside from the VoIP issue, Bright House thinks intraLATA traffic exchanged between an ILEC and a CLEC should be treated as local (a standard arrangement in Florida with AT&T). Bright House had proposed this earlier, but Verizon-ILEC had rejected it.
- LATA-wide local made sense for both parties. All traffic between Bright House and Verizon-ILEC is exchanged in TDM via a PSTN connection, but does begin or end with a VoIP subscriber. Verizon thought $0.0007 should apply for that reason. But that traffic is all intraLATA, and Bright House thought $0.0007 should apply for ***that*** reason.
- This agreement on the economics permitted agreement on contract language, so Bright House and Verizon-ILEC were able to avoid further litigation on this issue.[18]

Verizon's furious effort to spin this settlement into something it is not reflects a deep weakness in Verizon's underlying position here. We note the following points about the ICA and the settlement, in response to Verizon's specific claims:

- We settled with Verizon-ILEC only because, as to Verizon-ILEC, we exchange only local and intraLATA traffic, which we think should all be rated as local in any event. That has nothing to do with Verizon Business's obligation to pay access charges on intrastate, interLATA traffic. (*See* Supplement at 2, 3.)
- Verizon claims that keeping the case going will make settlement with Verizon Business harder. (Supplement at 2.) But without the threat of an adverse judgment in litigation, Verizon Business has no incentive to settle at all.[19]
- Verizon claims that the ICA terms that treat intraLATA traffic as local are inconsistent with our insistence that Verizon Business is bound by our tariff. (Supplement at 2-3.) But, as noted, the ICA treats all intraLATA traffic as local, and access charges do not apply to local traffic. Moreover, any purported conflict between the tariff and the ICA is illusory: ICAs – established under federal law – control over tariffs, particularly intrastate tariffs. So, ***in the context of an ICA,*** we

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[18] Once the ICA becomes legally effective, we agree with Verizon that it will be appropriate to dismiss Verizon-ILEC from this case. The terms of 47 U.S.C. § 252(e)(4) govern the time line on which ICAs become effective. That provision states that in the absence of a specific Commission ruling, an ICA reached by negotiation takes effect 90 days after filing with the Commission. The overwhelming majority of the terms in the Bright House-Verizon ICA (including the specific term at issue here) were reached by negotiation, and the ICA was filed on April 29, 2011. This leads to a date of July 28, 2011, on which the ICA will take effect as a matter of law, unless the Commission issues an earlier order addressing it.

[19] In this regard, we believe that Verizon-ILEC settled, at least in part, because the ICA proceeding remained ongoing. Verizon-ILEC was at risk that we would be able to show that it had negotiated in bad faith, in violation of 47 U.S.C. § 251(c)(1) when it reneged on its earlier deal. Active litigation, not stayed litigation, is what encourages settlement.

may let Verizon-ILEC "off the hook" with respect to tariff terms. Verizon Business, an IXC, has no ICA with us, and so is fully subject to the terms of our tariff.

- Verizon claims that the ICA shows that Bright House does not believe that VoIP traffic is the same as any other traffic. (Supplement at 3-4.) But that is ***precisely*** what the ICA provides. The deal to treat intraLATA traffic as local applies only for traffic that is in balance. If traffic gets out of balance, the "default case" – the underlying legal situation – is that VoIP traffic is rated just like any other traffic.[20]
- Finally, Section 8.6.3 says that "Nothing [here] shall be construed by an admission by either Party that the terms of this Section 8.6 are required by Applicable Law, or that absent and apart from the terms of this Agreement, VOIP Traffic is or ought to be defined or treated in any particular way." (ICA, Interconnection Attachment, § 8.6.3.) This defeats any claim that our deal with Verizon-ILEC regarding intraLATA traffic exchanged under the ICA has any bearing on interLATA traffic exchanged with Verizon Business, which is not a party to the ICA.

There is, in sum, no merit to Verizon's claim that the ICA supports its position in this dispute.

4. Recent Changes in Florida Law *Confirm* That The Commission Has A Continuing Responsibility To Decide This Case.

Verizon claims that Count III of the Complaint should be dismissed, because under recently-enacted legislation, Florida Statutes §364.01(4)(g) "will be deleted from the Florida Statutes."[21] This grossly misrepresents the new legislation. In its amendments to Chapter 364, the Legislature took pains to ***preserve*** the Commission's jurisdiction – and, indeed, its responsibility – to prevent carriers from engaging in unfair, anticompetitive behavior. Thus, while "Section 364.01(4)(g)" is being "deleted," virtually identical language is being ***reenacted*** in a new provision:

> ***Section 364.01(4)(g):*** [The Commission shall exercise its jurisdiction to:] Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.
>
> ***Section 364.16(2):*** It is the intent of the Legislature that in resolving disputes, the Commission treat all providers of telecommunications services fairly by preventing anticompetitive behavior, including, but not limited to, predatory pricing.

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20 *See* ICA, Interconnection Attachment, §8.6.1.

21 *See* Supplement at 3 n. 4.

The Legislature's decision to ***preserve*** the Commission's responsibility and obligation to prevent unfair, anticompetitive carrier-on-carrier behavior – even as it took a number of other steps to deregulate certain aspects (notably certain retail aspects) of the telecommunications industry – actually emphasizes the importance of swift and sure Commission action against carriers like Verizon who engage in such unfair, anticompetitive behavior. The claim that the new legislation could be interpreted to give Verizon some sort of "free pass" with respect to unfair, anticompetitive behavior is breathtaking in its blindness to the Legislature's manifest intention to ***confirm*** this Commission's responsibility and authority to condemn such behavior.[22]

5. Conclusion.

Verizon's "Supplement" should never have been filed, and the Commission would be entirely justified in simply ignoring it. If the Commission considers it, however, we request that the Commission it also consider this Response, which clearly shows that Verizon's claims are entirely without merit.

Respectfully submitted,

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[22] Following July 1, all that will be necessary will be to amend the Complaint to allege that Verizon's conduct violates Section 364.01(4)(g) prior to July 1, 2011, and Section 364.16(2) after that date. In this regard, the Legislature also changed the ***numbering*** of other provisions relevant to this case. Specifically, references to Sections 364.02(13) and (14) will need to be re-stated as references to Sections 364.02(12) and (13). These provisions, respectively (a) confirm that the deregulated status of retail VoIP does not affect carrier obligations to pay access charges with respect to such services, and (b) confirm that notwithstanding the generally deregulated status of IXCs, such entities remain obliged to pay access charges.

AND

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June 7, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following by email, and/or U.S. Mail this 7th day of June, 2011.

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