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State of Florida



Public Service Commission

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COMMISSION
CLERK

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

DATE: July 28, 2011

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Brown) *MLB AT*
Division of Regulatory Analysis (Bloom) *KB*

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. *WNS*

AGENDA: 08/09/11 – Regular Agenda – Motion to Dismiss – Oral Argument Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Balbis

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\110056.RCM.DOC

Case Background

On February 23, 2011, Bright House Information Services (Florida) LLC (Bright House) filed a complaint with the Commission alleging that Verizon, Florida, LLC (Verizon ILEC), and MCI Communications Services, Inc. d/b/a Verizon Business Services (Verizon Business) are violating Sections 364.01(4), 364.02(13) and 364.02(14), Florida Statutes (F.S.), and “other

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statutory provisions and applicable law and rules” by refusing to pay Bright House’s established intrastate interexchange access charges.¹

Verizon filed a Motion to Dismiss or Stay Bright House CLEC’s complaint on March 14, 2011, alleging that the Commission lacks jurisdiction over the subject matter of the complaint. In the absence of a dismissal by the Commission, Verizon advocates staying the current proceeding until the Federal Communications Commission (FCC) issues rules pursuant to its Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (FCC 11-13), released February 9, 2011. Verizon filed a Request for Oral Argument along with its motion to dismiss.

Bright House filed its Opposition to Verizon’s Motion to Dismiss or Stay Complaint on March 21, 2011. Bright House CLEC did not oppose Verizon’s request for oral argument.

Thereafter, on June 1, 2011, Verizon filed a Supplement to its Motion to Dismiss or Stay Bright House CLEC’s Complaint, to which Bright House responded on June 7, 2011, opposing consideration of Verizon’s supplemental filing and providing a response should the Commission consider the supplement. Staff has not addressed Verizon’s supplement to its motion to dismiss, because the filing is in the nature of a reply to Bright House’s response to the motion to dismiss. Rule 28-106.204(1), F.A.C. does not contemplate the filing of an additional response to a response to a motion, and the Commission has disallowed such responses in its proceedings repeatedly.² Furthermore, Verizon did not file a motion for leave to file the supplement to its motion to dismiss, as Rule 28-106.204 requires.

Staff notes that on June 10, 2011, Verizon filed a Motion to Dismiss Verizon Florida LLC as a party because it and Bright House have filed an interconnection Agreement that resolves their dispute over the appropriate intercarrier compensation rate for VoIP traffic. In its response, Bright House agreed that the complaint should be dismissed against Verizon Florida, but disputed the timing of the dismissal. Bright House has now filed a notice of voluntary dismissal of its complaint against Verizon Florida. Verizon Florida will be removed from the complaint docket, and this recommendation will address Bright House’s remaining complaint against Verizon business.

¹ Staff notes that Chapter 2011-36, Laws of Florida, passed by the Legislature this year, deleted Section 364.01(4), F.S., changed the numbering for Section 364.02(13) and (14), and revised other wording in Sections 364.01 and 364.011, F.S. While the bill limited Commission jurisdiction over much of the provision of retail local distribution service, it clearly maintained the Commission’s jurisdiction to resolve competitive disputes between telecommunications providers, such as the one manifested in Bright House’s complaint, in Section 364.16, F.S. Further, the statutory revisions kept in place carriers’ obligations to pay established exchange access charges and other interconnection compensation. The question of which law should control the Commission’s resolution of the complaint may be an issue in the case as it proceeds, but staff does not believe that it materially affects the Commission’s deliberations at this preliminary juncture.

² See, for just one example, Order No. PSC-98-1435-PCO-EG, issued October 26, 1998, in Docket No. 971004-EG, In re: Adoption of Numeric Conservation Goals by Florida Power & Light Company, where the Commission granted a motion to strike a reply to a response to a motion for a procedural order, stating that: “the pleading cycle must stop at a reasonable point.”

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The Commission has jurisdiction to consider Verizon's motion to dismiss pursuant to Sections 364.16 and 120.569, F.S.

Discussion of Issues

Issue 1: Should the Commission grant Verizon's Request for Oral Argument on its Motion to Dismiss?

Recommendation: Yes. Oral Argument will assist the Commission's consideration of the Motion to Dismiss. (Brown)

Staff Analysis: In its Request for Oral Argument, Verizon asserts that oral argument will assist the Commission in its consideration of the Motion to Dismiss by helping the Commission understand why, according to Verizon, Florida and federal law preclude it from considering Bright House's Complaint. Verizon asserts that oral argument will help the Commission "to gain important perspective on the importance of this issue to the Florida telecommunications industry."

Rule 25-22.0021(1), F.A.C., provides for oral argument before the Commission as follows:

Oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested, or no later than ten (10) days after exceptions to a recommended order are filed. Failure to timely file a request for oral argument shall constitute waiver thereof. Failure to timely file a response to the request for oral argument waives the opportunity to object to oral argument. The request for oral argument shall state with particularity why oral argument would aid the Commissioners, the Prehearing Officer, or the Commissioner appointed by the Chair to conduct a hearing in understanding and evaluating the issues to be decided, and the amount of time requested for oral argument.

Verizon properly filed its request for oral argument concurrently with its Motion to Dismiss. Bright House did not file a response to Verizon's request.

Staff believes that oral argument would aid the Commissioners in their disposition of this matter. The pleadings in the case demonstrate considerable disagreement not only about the substantive issues in the case, but also about federal and state jurisdictional authority and the current procedural posture of FCC deliberations on related issues. Oral argument could help clarify these matters.

If the Commission grants oral argument, staff recommends that each party be permitted 10 minutes for its argument.

Issue 2: Should the Commission grant MCI Communications Services, Inc. d/b/a/ Verizon Business Services' motion to dismiss the complaint of Bright House Networks Information Services (Florida) LLC for failure to pay intrastate access charges?

Recommendation: No. The Commission should deny Verizon's motion to dismiss. The Bright House complaint states a cause of action upon which the Commission can grant relief. (Brown, Bloom)

Staff Analysis:

Bright House's Complaint

Bright House, according to its complaint, is actually two separate entities: Bright House Networks, LLC, a cable operator (Bright House Cable); and Bright House Networks Information Services (Florida), LLC, a competitive local exchange company (Bright House CLEC). Bright House Cable provides telecommunications, video and data services to its residential and business customers using Voice over Internet Protocol (VoIP). All of Bright House Cable's telecommunications traffic is handed off to Bright House CLEC, which converts the VoIP signal to the industry standard time division multiplexing (TDM), before routing the traffic to other carriers. Bright House CLEC performs the same conversion function for traffic arriving at its switches from Verizon and other carriers. As such, according to the complaint, Bright House Cable is a customer of Bright House CLEC's local exchange telecommunications services.

Bright House CLEC states that the bulk of the telecommunications traffic at issue falls into two categories: inbound intrastate traffic from Verizon's network intended for customers of Bright House Cable, or outbound intrastate traffic for which Bright House Cable customers dial toll-free (8YY) numbers to reach an entity that has selected Verizon Business as its carrier.

Bright House CLEC alleges Verizon Business failed to pay Bright House CLEC's lawful intrastate access charges for the origination and termination of intrastate interexchange telecommunications service, as Florida law requires. Bright House CLEC states that Verizon Business paid intrastate interexchange access charges for intrastate long distance calls Verizon Business sent to, or received from, Bright House CLEC's customers, from early 2007 through August 2010. Aside from "relatively minor" disputes, according to Bright House CLEC, Verizon Business paid the charges through approximately August 2010 when Verizon Business disputed nearly 50 percent of Bright House CLEC's bills. According to the complaint, Verizon Business subsequently disputed all Bright House CLEC bills and has ceased paying intrastate interexchange access compensation entirely. As of January 2011, according to the complaint, Verizon Business was delinquent in the amount of approximately \$2.2 million, an amount that increases by an estimated \$500,000 per month.

Bright House requests that: (1) the Commission determine that the access charges contained in Bright House CLEC's filed price list are enforceable against Verizon Business for origination and termination of intrastate interexchange calls on Bright House CLECs network; (2) determine that Verizon Business's unilateral cessation of payment of Bright House CLEC's access charges is an unfair practice in violation of Section 364.01(4)(g), F.S., and; (3) direct

Verizon Business to pay Bright House CLEC's outstanding intrastate access charges, plus interest and late payment fees.

Verizon Business's Motion to Dismiss

In its motion, Verizon Business alleges that because Bright House Cable's end users originate their calls using Voice over Internet Protocol (VoIP) technology, and because Section 364.011, F.S., exempts VoIP service from the Commission's jurisdiction, the Commission cannot hear Bright House CLEC's complaint. Verizon Business contends that decisions of federal appellate courts have held that state access charges do not apply to VoIP, and that VoIP is inherently an interstate service which falls within the exclusive jurisdiction of the Federal Communications Commission (FCC). Verizon Business also argues that Section 364.011, F.S., exempts intrastate interexchange telecommunications services from the Commission's jurisdiction, and thus the Commission can not adjudicate a dispute over the exchange of intrastate interexchange access charges. In its motion, Verizon Business focused on the issue of this Commission's jurisdiction to hear Bright House CLEC's complaint to the exclusion of addressing the issues of disputed fact raised by Bright House CLEC.

According to Verizon Business, Section 364.011, F.S., lists services that are exempt from Commission oversight, "except to the extent delineated in this chapter or specifically authorized by federal law." Among the exempt services cited are; (1), intrastate interexchange services, and (3) VoIP. Verizon Business contends that "[u]nder the plain terms of the statute, therefore, VoIP services and the entities that provide those services, are expressly exempt from commission jurisdiction." Verizon Business asserts this section also exempts the Commission from regulating intrastate interexchange services for purposes of this complaint.

Verizon Business also argues that Section 364.013, F.S., precludes the Commission's exercise of jurisdiction over Bright House CLEC's complaint when it states, in pertinent part; "Broadband services and the provision of voice-over-Internet-protocol (VoIP) shall be free of state regulation, except as delineated in this chapter or as specifically authorized by federal law, regardless of provider, platform, or protocol."

Verizon Business also refers to Section 364.01, F.S., to support its argument that the Commission lacks jurisdiction under Florida law to hear the complaint. That section says "[t]hat the provision of voice-over-Internet-protocol (VoIP) free of unnecessary regulation, regardless of the provider, is in the public interest." In addition, Verizon Business relies on the definition of "service" in Section 364.02(13), F.S., which "does not include broadband service or voice-over-Internet-protocol for purposes of regulation by the commission."

Even if the Commission is not precluded by state law from considering Bright House CLEC's complaint, Verizon Business argues, it is preempted by federal law from that consideration, because VoIP is an interstate information service subject to the FCC's exclusive jurisdiction. Verizon Business cites two federal district court decisions, Manhattan Telecommunications Corp. v. Global Naps, Inc., 2010 U.S. Dist. LEXIS 32315 (S.D.N.Y. 2010) and Paetec Communications, Inc. v. Commpartners, LLC, 2010 U.S. Dist. LEXIS 51926 (D.D.C. 2010) to support its position that intrastate interexchange access charges cannot be applied to

VoIP traffic, because VoIP services are information services and thus not subject to access charges. Verizon Business does acknowledge that neither case is binding on this Commission.

Verizon Business contends that the FCC's Vonage Order, Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, 19 FCC. Rcd 22404 (2004), found that VoIP traffic is inseverably interstate for jurisdictional purposes, and therefore states are preempted from regulating rates, terms, and conditions under which VoIP service is provided. Verizon Business asserts that the FCC made no distinction between "nomadic" VoIP service, the type of VoIP service Vonage provided, and "fixed" VoIP service, the type of service Bright House Cable provides, where service can be identified with a specific geographical location. According to Verizon Business, the FCC made it clear in the Vonage order that it "would preempt state regulation" of other services similar to the VoIP service it addressed in the order. Verizon Business notes that the 8th Circuit Court upheld the Vonage order in Minnesota Public Utilities Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007).

Verizon Business argues that the FCC's federal and state Universal Service orders³ do not support Bright House CLEC's contention that determination of VoIP compensation obligations is a matter to be addressed by the states. According to Verizon Business, "[n]othing in the FCC's USF orders authorizes states to assign a portion of IP traffic to the intrastate jurisdiction in order to *regulate* it by subjecting it to state access tariffs or price lists." (Motion to Dismiss, p. 22)

Verizon Business concludes by asserting that, at a minimum, for administrative efficiency, the Commission should stay consideration of Bright House CLEC's complaint pending adoption of FCC rules governing a unified intercarrier compensation scheme, as indicated in its *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, FCC 11-13, released February 9, 2011. Verizon Business states "the FCC is considering this precise issue and intends to resolve it in the near future." Comments on the FCC's NPRM were due to the FCC in April. As of this writing, the FCC has not issued any final rules.

Bright House CLEC's Opposition to Motion to Dismiss or Stay

In its opposition to Verizon Business's motion to dismiss, Bright House CLEC states that Verizon Business selectively quotes provisions of Chapter 364, F.S., that appear to preclude the Commission from taking jurisdiction over its complaint, while ignoring the statutory provisions that compel the Commission to hear the matter. Bright House CLEC also argues that the federal court decisions that Verizon Business relies upon relate to a wholly separate form of VoIP, "nomadic VoIP", which is not involved in this matter, and have no application or precedential value to this case. Bright House CLEC disputes Verizon Business's contention that either the FCC or any federal court have declared VoIP to be jurisdictionally interstate in nature, and Bright House CLEC points out that the FCC has been considering a comprehensive intercarrier

³ Universal Service Contribution Methodology, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006)(Federal USF Assessment Order) and Universal Service Contribution Methodology, Declaratory Ruling, FCC 10-185, WC Dkt 06-122 (Nov. 5, 2010) (State USF Assessment Order).

compensation scheme for more than a decade with no result. To wait on federal action prior to settling this matter allows Verizon Business to continue defaulting on its obligation to pay access charges to Bright House CLEC, to its anticompetitive advantage, and to the obvious detriment of Bright House CLEC.

Bright House CLEC does not dispute that Section 364.011, F.S., exempts certain retail services, including VoIP, from Commission oversight. Bright House CLEC argues that is irrelevant, however, because the dispute is not between Verizon Business and Bright House Cable, a retail provider of VoIP service, but between Verizon Business and Bright House CLEC, a company registered with the Commission as a competitive local exchange carrier, with a price list for its services filed with the Commission. Bright House CLEC notes that Section 364.02(13), while excluding VoIP from the definition of “service” for purposes of Commission jurisdiction, states, “[n]othing herein shall affect the rights and obligations of any entity related to the payment of switched network access rates or other intercarrier compensation.” The payment of switched network access rates is the subject of Bright House CLEC’s complaint, Bright House CLEC contends, not the provision of VoIP service. Bright House CLEC argues that the Legislature has removed the retail aspect of VoIP from Commission jurisdiction, but the wholesale obligations – including intercarrier compensation – remain in effect. Bright House CLEC states that no FCC order says or implies that intrastate access charges do not apply to intrastate traffic that starts or ends on an interconnected VoIP service. Bright House CLEC also argues that:

The retail VoIP services that Bright House Cable offers to its subscribers are deregulated under Florida law. But neither the access services that Bright House-CLEC provides to Verizon, nor the plain old telephone traffic that Verizon exchanges with Bright House-CLEC, fall under the definition of ‘VoIP,’ and so cannot be treated as equivalent to, or part of, the deregulated VoIP services.”

(Bright House Response, p. 11)

Similarly, Bright House CLEC rejects Verizon Business’s arguments that the Commission has no jurisdiction over intrastate interexchange compensation disputes. While Bright House CLEC acknowledges that Section 364.02 (14)(g) excludes intrastate interexchange companies from the definition of a “telecommunications company,” that same section states that those companies, “shall continue to pay intrastate switched access rates or other intercarrier compensation to the local exchange telecommunications company or the competitive local exchange telecommunications company for the origination and termination of interexchange telecommunications service.”

Bright House CLEC also takes issue with Verizon Business’s assertion that VoIP traffic is inherently interstate in nature. Rejecting Verizon Business’s claim that the Vonage order prohibits state commissions from considering complaints of this nature, Bright House CLEC claims Verizon Business’s analysis does not go far enough. Bright House CLEC points out that in its brief to the 8th Circuit for the Court’s review of the Vonage order the FCC itself asserted that it had not yet made a determination that fixed VoIP service would be preempted from state oversight as nomadic VoIP service was. The Court acknowledged the FCC’s assertion in its

Order, stating that the FCC had suggested it would preempt fixed VoIP service, but it had not actually purported to do so. Minnesota Public Utilities Commission, Supra., 582-83. Bright House CLEC states that to date the FCC has not preempted fixed VoIP service from state jurisdiction.

Analysis

Standard of Review

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition. The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). When making this determination, only the petition and documents incorporated therein can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).

Staff believes Bright House CLEC has presented a number of issues for the Commission to consider, which, when the facts asserted are presumed to be true and taken in the light most favorable to Bright House CLEC, demonstrate that the Commission does have jurisdiction over this case, and state a cause of action for which relief can be granted. Those issues include:

Compensation

Bright House CLEC alleges it is owed at minimum \$2.2 million as of January 2011 in intrastate interexchange access charges from Verizon Business, an amount that increases monthly. Verizon Business does not challenge the amount owed, only the Commission's jurisdiction to hear the complaint. Based on the allegations submitted, Verizon Business paid Bright House CLEC intrastate interexchange access charges from early 2007 until August 2010, which, on the surface, appears to be a tacit admission on Verizon Business's part that the charges were legitimate. Verizon Business's Motion to Dismiss or Stay the complaint cites no statutory change or reinterpretation of existing law to support nonpayment.

State Jurisdiction

The parties disagree on the issue of whether the Commission is barred by state statute from hearing Bright House CLEC's complaint. Verizon Business argues that because Bright House Cable customers' telecommunications traffic originates on a network employing VoIP technology, that Sections 364.01 and 364.02(13), F.S., preclude Commission regulation of VoIP activities and exclude VoIP and intrastate interexchange companies from the definition of "service" for purposes of regulation by the Commission. Bright House CLEC argues the issues in dispute have nothing to do with retail provision of VoIP to Bright House Cable customers, but comprise a compensation dispute between Bright House CLEC, a separate legal entity, and Verizon Business. In addition, Bright House CLEC points out that the same statutes that

Verizon Business employs to exclude its intrastate interexchange operations from Commission jurisdiction, plainly state that such companies “shall continue to pay intrastate switched network access rates or other intercarrier compensation to the local exchange telecommunications company or the *competitive local exchange telecommunications company*...” (emphasis added).

Staff believes that Verizon Business’s interpretation of the statutes on this issue is too narrowly drawn. By focusing exclusively on the definitions of services for Commission purposes, Verizon Business fails to distinguish between jurisdiction at the retail level and jurisdiction at the wholesale level, which includes its statutory obligation to continue to pay intrastate interexchange access compensation. The facts asserted by Bright House CLEC show that the matter in dispute in this case involves wholesale intercarrier compensation, which remains within the Commission’s jurisdiction by the plain terms of Chapter 364, F.S.

Staff also notes that if the complaint dealt with VoIP at the retail level, the issue would be Bright House Cable’s to raise, as they would be the entity that would be affected by Commission actions.

Federal Preemption

Staff believes that Verizon Business has gotten ahead of the facts in its assumption and assertion that the FCC has preempted state consideration of all matters relating, however indirectly, to VoIP service. Staff’s review of FCC and federal court decisions indicate that this is not the case with respect either to the provision of fixed VoIP service or to the method of intercarrier compensation for telecommunications providers that translate VoIP traffic for transfer to the public switched telecommunications network. While the FCC may preempt state review of these matters at some time in the future, it has not done so yet. Therefore the Commission may resolve a complaint by one carrier against another alleging anticompetitive behavior and violations of Florida law, and in fact is called upon under Florida law to do so.

In the absence of a dismissal, Verizon Business seeks a stay of the proceedings until the FCC completes its rulemaking process, ostensibly to include intercarrier compensation for fixed VoIP services and the transfer of that traffic to the PTSN by telecommunications carriers like Bright House CLEC. As Bright House CLEC points out, however, there is no guarantee that the FCC will resolve these issues soon, and Bright House CLEC suffers financial harm in the interim.

Staff believes a stay, aside from financially disadvantaging Bright House CLEC, fails to take note of FCC Order DA 09-2205, Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, WC Docket No. 09-134, Released October 9, 2009. The dispute arose from an interconnection dispute between UTEX, an IP-enabled provider, whose services included VoIP, and AT&T Texas. The Public Utility Commission of Texas (PUCT) arbitrators dismissed the proceeding on the grounds that the PUCT previously declined to consider issues involving VoIP believing the FCC intended to address such issues. UTEX petitioned the FCC for preemption, which was denied. However, in its ruling the FCC concluded the absence of a classification for VoIP

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services was no reason for the PUCT to decline to rule, stating, “the lack of regulatory direction from the Commission regarding these issues does not, in fact, stand as a legal obstacle to the PUCT’s resolution” of the dispute. (Order at 9) In light of this opinion, and for the reasons given above, staff recommends that the Commission should deny Verizon Business’s motion to dismiss or stay consideration of the complaint. The Commission has jurisdiction to resolve it. Verizon Business’s motion to dismiss has not shown that Bright House CLEC’s Complaint fails to state a cause of action upon which the Commission can grant relief.

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Issue 3: Should this docket be closed?

Recommendation: No. If the Commission denies Verizon Business's Motion to Dismiss this docket should remain open to address the issues raised by Bright House CLEC's Complaint. If the Commission grants Verizon Business's Motion to Dismiss, this docket should be closed. (Brown)

Staff Analysis: If the Commission denies Verizon Business's Motion to Dismiss this docket should remain open to address the issues raised by Bright House CLEC's Complaint. If the Commission grants Verizon Business's Motion to Dismiss, this docket should be closed.