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August 31, 2010

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

In re: Armstrong Telecommunications, Inc. v. Verizon Pennsylvania Inc., Verizon North LLC, MClmetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and MCI Communications Services Inc.,
Docket Nos. C-2010-2216205, C-2010-2216311, C-2010-2216325, C-2010-2216293
Florida Public Service Commission Order Issued August 26, 2011,
Denying Verizon Motion to Dismiss or Stay

Dear Secretary Chiavetta:

After Armstrong Telecommunications, Inc. filed its Brief on the Material Question, we discovered that the Florida Public Service Commission, on August 26, 2011, denied Verizon Florida's Motion to Dismiss or Stay on grounds identical to those argued by Armstrong in its Brief. A copy of that Order is attached.

Thank you for your attention to this matter.

Sincerely,

THOMAS, LONG, NIESEN & KENNARD

By

Norman J. Kennard

Enclosure

cc: Administrative Law Judge Dennis J. Buckley
Cheryl Walker Davis (OSA)
Mohan Samuel (OSA)
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of August, 2011, served a true and correct copy of the foregoing letter in the above-captioned proceeding, upon the persons and in the manner via first class and electronic mail as follows:

Suzan D. Paiva Esquire
Verizon
1717 Arch Street
Philadelphia, PA 19103
Suzan.D.Paiva@Verizon.com

Norman J. Kennard

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.	DOCKET NO. 110056-TP ORDER NO. PSC-11-0359-PCO-TP ISSUED: August 26, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

On February 22, 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 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 we lack jurisdiction over the subject matter of the complaint. As an alternative to dismissal of the complaint, Verizon advocates staying the 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

[1] 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 our jurisdiction over much of the provision of retail local distribution service, it maintained our 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 our resolution of the complaint may be an issue in the case as it proceeds, but it does not materially affects our decision at this preliminary juncture.

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House filed its Opposition to Verizon's motion to dismiss 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. We did not address the supplement or the supplemental response in our consideration of the motion to dismiss, because the filing was 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 we have disallowed such responses in our 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, F.A.C. requires.

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 Order will only address Bright House's remaining complaint against Verizon business.

We have jurisdiction to consider Verizon's motion to dismiss pursuant to Sections 364.16 and 120.569, F.S. At our August 9, 2011, Agenda Conference, we granted Verizon's request for oral argument on its motion to dismiss, and after due consideration of the parties' arguments, as explained below, we denied Verizon's motion to dismiss

DECISION

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.

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[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 we 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."

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 we: (1) 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 VoIP technology, and because Section 364.011, F.S., exempts VoIP service from our jurisdiction, we 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 our jurisdiction, and thus we cannot adjudicate a dispute over the exchange of intrastate interexchange access charges. In its motion, Verizon Business focused on the issue of jurisdiction and did not address 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 intrastate interexchange services from our regulation for purposes of this complaint.

Verizon Business also argues that Section 364.013, F.S., precludes our 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 we lack 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 we are not precluded by state law from considering Bright House CLEC's complaint, Verizon Business argues, we are 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 orders[3] 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

[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).

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, we 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 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 our 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 us as a competitive local exchange carrier, with a price list for its services filed with us. Bright House CLEC notes that Section 364.02(13), while excluding VoIP from the definition of "service" for purposes of our 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 our 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 we have 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).

We find that 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 we do 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 cites no statutory change or reinterpretation of existing law to support nonpayment.

State Jurisdiction

Verizon Business argues that because Bright House Cable customers' telecommunications traffic originates on a network employing VoIP technology, Sections 364.01 and 364.02(13), F.S., preclude our regulation of VoIP activities and exclude VoIP and intrastate interexchange companies from the definition of "service" for purposes of our regulation. 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).

We believe 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. If the complaint dealt with VoIP service 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 our actions. Rather, the facts asserted by Bright House CLEC show that the matter in dispute in this case involves wholesale intercarrier compensation, which remains within our jurisdiction by the plain terms of Chapter 364, F.S.

Federal Preemption

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. Our 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, we find that we may resolve a complaint by one carrier against another alleging anticompetitive behavior and violations of Florida law, and in fact are 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.

It is our view that 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 that the absence of a classification for VoIP 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, we deny Verizon Business's motion to dismiss or stay consideration of the complaint. We have 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 we can grant relief.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Verizon Business Services' Motion to Dismiss or Stay the Complaint of Bright House Networks Information Services (Florida), LLC is denied. It is further

ORDERED that since Bright House Networks Information Services (Florida), LLC has filed a notice of voluntary dismissal of its complaint against Verizon Florida, LLC, Verizon Florida, LLC shall be removed from this docket. It is further

ORDERED that this docket shall remain open to address the issues raised by the complaint.

By ORDER of the Florida Public Service Commission this 26th day of August, 2011.

ANN COLE
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.