

State of Florida



Public Service Commission
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DATE: April 23, 2009

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Murphy) *CM*
Division of Regulatory Compliance (Watts) *W*
Division of Service, Safety & Consumer Assistance (Moses) *M*

RE: Docket No. 080701-TP – Emergency complaint and petition requesting initiation of show cause proceedings against Verizon Florida, LLC for alleged violation of Rules 25-4.036 and 25-4.038, Florida Administrative Code, by Bright House Networks Information Services (Florida) LLC and Bright House Networks, LLC.

AGENDA: 05/05/09 – Regular Agenda – Oral Argument Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\080701.RCM.DOC

Case Background

PROCEDURAL MATTERS

This recommendation addresses a Motion to Dismiss and in the Alternative a Motion for Summary Final Order that was filed by Verizon Florida LLC (“Verizon”) in response to an Emergency Complaint and Petition Requesting Initiation of Show Cause Proceedings Against Verizon (collectively, “Complaint”) that was filed by Bright House Networks Information Services (Florida) LLC and Bright House Networks, LLC. (collectively “Bright House”). The

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recommendation also addresses a Verizon Request for Oral Argument that is not opposed by Bright House.

On December 9, 2008, Bright House filed its Complaint in which it alleges that Verizon is violating Florida Public Service Commission ("Commission") rules related to service installations and thereby creating unsafe conditions.

On December 18, 2008, Verizon filed its Motion for Extension of Time to Respond to Complaint which was not opposed by Bright House. By Order No. PSC-08-0823-PCO-TP, issued on December 22, 2008, the Commission granted the Verizon Motion for Extension of Time. On January 12, 2009, Verizon filed its Motion to Dismiss Complaint and Petition or in the alternative for Summary Final Order ("Motion"). On this date, Verizon also filed its Request for Oral Argument.

On January 15, 2009, Bright House filed its Motion for Extension of Time to Respond to Verizon's Motion to Dismiss and Alternative Motion for Summary Final Order which was not opposed by Verizon. By Order No PSC-09-0035-PCO-TP, issued on January 16, 2009, the Commission granted the Bright House Motion for Extension of Time. On January 22, 2009, Bright House filed its Opposition to Verizon's Motion to Dismiss and/or for Summary Final Order ("Opposition").

On March 24, 2009, the parties met with staff to demonstrate the nature of the dispute, using actual equipment.

BRIGHT HOUSE COMPLAINT

In its Complaint, Bright House asserts the following.

Allegations

Bright House argues that Verizon is altering or damaging Bright House-installed equipment and wiring in the process of installing Verizon's service to customers. Bright House asserts that drops are being left ungrounded (or unterminated) and either hanging on the outside wall of the house or curled inside the wall box in "willful violation" of Rules 25-4.036 and 25-4.038, Florida Administrative Code ("F.A.C.") and the National Electrical Code ("NEC"). Bright House contends that such installations create a fire and electrocution hazard at potentially thousands of customers' premises and for service technicians that might come into contact with, or close proximity to, the ungrounded wire should it become electrified. Based on an audit of Bright House equipment after Verizon installations, Bright House contends that the danger created by the Verizon installations is far reaching and that the danger will continue throughout Verizon's territory until Verizon is compelled to correct safety violations.

Commission Jurisdiction

Bright House asserts that the Commission has jurisdiction pursuant to the following authorities: Section 364.01(4)(c), Florida Statutes (“F.S.”), (charging the Commission with protecting the public health, safety, and welfare by ensuring that monopoly services provided by telecommunications companies are subject to effective price, rate, and service regulation); Section 364.15, F.S., (which authorizes the Commission to direct a local exchange company to make repairs, improvements, changes, additions or extensions that are necessary to promote the security of the public or employees, or to ensure the continued provision of adequate service); Rule 25-4.036, F.A.C., (which adopts standards governing the design and construction of plant as needed to insure, as far as reasonably possible, the safety of persons and property); and Rule 25-4.038, F.A.C., (which requires that utilities 1) use reasonable efforts to properly warn and protect the public from danger, 2) exercise due care to reduce the hazards to which employees, customers, and the public may be subjected by reason of its equipment and facilities, and 3) properly install all subscriber loops to prevent harm to the public in accordance with specified articles of the NEC).

Standing

Bright House asserts that the implications of Verizon’s installation practices for both Bright House equipment and its employees fall within the scope of protection contemplated by the Commission’s rules. Thus, Bright House argues that Bright House meets the test for standing set forth in *Agrico Chem. Co. v. DER*, 406 So. 2d 478 (Fla. 2nd DCA 1981): an injury in fact which is of sufficient immediacy to entitle the petitioner to a Section 120.57, F.S., hearing of a type which the proceeding is designed to protect.

Requested Relief

Bright House asks that the Commission provide the following relief:

- Require Verizon to cease and desist new installations of FiOS for customers won from Bright House until a full investigation of the scope of the grounding problems can be determined and fully remediated;
- Require Verizon to provide public reports to the Commission on the status of its investigation and remediation efforts, as well as its safety training program;
- Require Verizon to establish a training program for all of its installation and repair technicians regarding NEC requirements and the proper grounding of equipment, including competitors’ equipment;
- Require Verizon to show cause in writing why it should not be fined \$25,000 per day per violation of Rules 25-4.036 and 25-4.038, F.A.C.;

- Require Verizon to pay costs associated with the audit conducted by Bright House, as well as attorneys' fees associated with bringing this matter to the Commission's attention; and
- Provide any other such additional relief as the Commission considers just and reasonable in these circumstances.

Discussion of Issues

Issue 1: Should the Commission grant Verizon's Request for Oral Argument on its Motion to Dismiss Complaint and Petition or in the Alternative for Summary Final Order?

Recommendation: Yes. Staff recommends that the Commission grant Verizon's Request for Oral Argument on its Motion to Dismiss Complaint and Petition or in the Alternative for Summary Final Order because staff believes that it might benefit the Commission to hear oral argument on these matters. If the Commission grants oral argument, staff recommends allowing five minutes for each party. (Murphy)

Staff Analysis: Pursuant to Rule 25-22.0022, F.A.C., Verizon requests that the Commission hear oral argument on its Motion to Dismiss Complaint and Petition or in the Alternative for Summary Final Order. Verizon asserts that oral argument would help the Commission because Verizon's motion involves a technical discussion of the unregulated facilities involved in this case, as well as legal analysis concerning the Commission's jurisdiction, rules, and standing principles. Bright House does not believe that oral argument is necessary but does not oppose oral argument.

Staff recommends that oral argument might be beneficial for the Commission in its evaluation of this matter. If the Commission grants oral argument, staff recommends allowing five minutes for each party.

Issue 2: Should the Commission grant Verizon's Motion for Summary Final Order?

Recommendation: Yes. Staff recommends that the Commission grant the Verizon Motion for Summary Final Order. (Murphy)

Staff Analysis:

STANDARD OF REVIEW

Rule 28-106.204(4), F.A.C., provides that,

any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven (7) days of service, file a response in opposition, with or without supporting affidavits. A party moving for summary final order later than twelve (12) days before the final hearing waives any objection to the continuance of the final hearing.

Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993) (citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). "Summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 1123 (5th DCA 2000).

VERIZON MOTION

In its Motion for Summary Final Order, Verizon asserts that, accepting all of Bright House's allegations as facially correct, Bright House fails to state a claim for which relief may be granted. Verizon argues that Bright House's allegations relate to the disconnection of Bright House's coaxial cable drop and the installation of Verizon's data/video coaxial cable, neither of which are telecommunications facilities within the scope of the Commission's authority as defined in Chapter 364, F.S. In sum, Verizon asks that the Commission issue a summary final order because:

- the Bright House allegations fail to state a claim;
- the undisputed facts demonstrate that the Commission lacks jurisdiction over Bright House's claims;
- Verizon has not violated Rules 25-4.036 and 25-4.038, F.A.C.; and,
- Bright House lacks standing to assert its claims.

In support of its Motion, Verizon argues the following.

Jurisdiction

Verizon asserts that the coaxial cable facilities that are the subject of the Bright House Complaint are unregulated when used by Bright House and when used by Verizon because 1) the cable that Bright House contends has been disconnected is used to provide unregulated VoIP, broadband, and cable television services, and 2) the cable that Verizon installs, and that allegedly results in the incorrect disconnection of Bright House's cable, is used to provide unregulated broadband and video services.

Verizon argues that, while Bright House claims the Commission has jurisdiction over this dispute pursuant to Sections 364.01(4)(c) and 364.15, F.S., the former applies only to services provided by telecommunications companies and does not include VoIP, broadband, and cable services, and the latter applies to only telecommunications facilities and telecommunications services and does not apply to the services or facilities that are the subject of Bright House's Complaint. Thus, Verizon concludes that the statutes which Bright House cites do not authorize the Commission to exercise jurisdiction in this case.

Alleged Violations of Rules 25-4.036 or 25-4.038, F.A.C.

Verizon asserts that no Bright House allegations support claims that Verizon's actions violate Rules 25-4.036 or 25-4.038, F.A.C.

Verizon argues that Rule 25-4.036, F.A.C., applies to local exchange telephone companies and to the construction of their telecommunications facilities. Verizon argues that the rule does not apply to the allegedly incorrect disconnection of Bright House's VoIP, broadband, and cable facilities during the installation of Verizon's broadband and cable facilities. Thus, Verizon concludes that Bright House's allegations fail to state a claim that Verizon has violated Rule 25-4.036, F.A.C.

Similarly, Verizon asserts that Rule 25-4.038, F.A.C., applies to local exchange telephone companies and their telecommunications equipment and facilities. Verizon argues that the rule does not purport to address the disconnection or installation of facilities not used for telecommunications. Thus, Verizon concludes that Rule 25-4.038, F.A.C., does not apply to the alleged incorrect disconnection of Bright House's VoIP, broadband and cable facilities in connection with the installation of Verizon's broadband and cable facilities.

Standing

Verizon argues that, to proceed with its Complaint, Bright House must have standing to bring the claims it asserts and that to establish standing under *Agrico*, Bright House must show 1) that it will suffer injury which is of sufficient immediacy to entitle it to a Section 120.57, F.S., hearing, and 2) that its substantial injury is of a type or nature which the proceeding is intended to protect.

Assuming that Bright House has alleged an injury in fact, Verizon argues that Bright House fails to meet the second prong of the *Agrico* test because Bright House fails to allege a substantial injury that is of the type that Rules 25-4.036 and 25-4.038, F.A.C., are intended to protect. Verizon asserts that Bright House's alleged injuries do not arise from the disconnection or installation of telecommunications equipment and facilities covered by the referenced rules; rather Bright House's alleged injuries result from events related to the disconnection of Bright House's unregulated facilities and the installation of Verizon's unregulated facilities. As such, Verizon concludes that the referenced rules do not address the circumstances complained of by Bright House and therefore, Bright House lacks standing under the second prong of the *Agrico* test.

BRIGHT HOUSE OPPOSITION

Jurisdiction

In its Opposition, Bright House asserts that Verizon's reliance on the specific facilities at issue is misplaced and that the Commission has jurisdiction over Verizon's installation practices, more specifically the safety of those practices.

Bright House argues that Rule 25-4.036, F.A.C., applies to a utility's "plant and facilities" which must be "designed, constructed, installed, maintained, and operated" in accordance with the 2007 and 2005 NEC provisions applicable to telecommunications facilities, and that compliance with safety codes and "accepted good practice is required." Bright House contends that Rule 25-4.038, F.A.C., requires that the Utility must warn, protect the public, and take steps to reduce hazards resulting from its equipment and facilities. Bright House contends that the Verizon assertion that the facilities at issue are not telecommunications facilities is misleading because, at least in some cases, the installation of Verizon's FiOS service involves a change in the provision of telecommunications service over a telecommunications facility as contemplated by Section 364.02, F.S. Bright House argues that, because the voice component of the FiOS bundle is a traditional telephone service which is *concurrently* installed as part of the Verizon video and broadband service, the installation activity addressed in the Bright House Complaint includes the installation of a telecommunications facility pursuant to Section 364.02, F.S.

Standing

In its Opposition, Bright House asserts that the question of standing is a "red herring" and that it has standing to pursue its Complaint. Bright House argues that it meets the standard set forth in *Agrico*. In support of this conclusion, Bright House asserts that Verizon installation practices present a direct and immediate harm to Bright House employees and the public due to the threat of electrocution; that Bright House has already suffered harm contemplated by *Agrico*; that Rules 25-4.036 and 25-4.038, F.A.C., were designed to address precisely this type of problem; and that standing does not require that all affected facilities (or the complainant) be subject to Commission jurisdiction.

Summary Final Order

In its Opposition, Bright House asserts that:

- a summary final order may only be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue of any material fact exists and the moving party is entitled as a matter of law to the entry of a summary final order;
- the moving party must conclusively demonstrate the nonexistence of issues of material fact and every possible inference must be drawn in favor of the party against whom a summary judgment is sought;
- the movant must demonstrate that the party against whom summary judgment is sought cannot prevail;
- summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law;
- when facts are undisputed, issues as to the interpretation of facts may preclude the award of summary judgment; and
- even the possibility of an issue or that an issue *might* exist precludes summary final order.

Bright House contends that the Verizon Motion for Summary Final Order must fail because Verizon has not, and cannot, demonstrate that no genuine issue of material fact exists. In support of this position, Bright House argues that significant factual disputes include whether Verizon has improperly installed its facilities at customers' homes, whether such installations are safe and in accordance with the NEC and whether all of the installation problems discovered by Bright House are caused by Verizon. Bright House asserts that, until all material facts are determined, it is impossible to reach the second requirement of a summary final order, that (based on undisputed facts) Verizon is entitled to judgment as a matter of law. Bright House contends that Verizon has not presented competent evidence to support its motion and instead, simply disputes the facts presented by Bright House. Bright House asserts that safety concerns raised by Bright House are within Commission jurisdiction to address, and that Verizon has not indicated that it intends to investigate and address outstanding safety violations on its own initiative.

ANALYSIS

Staff recommends that no issues of material fact remain and that the facts are sufficiently crystallized that nothing remains but questions of law. Verizon has accepted Bright House's statement of the facts for purposes of its Motion for Summary Final Order.¹ Taking all of the Bright House factual allegations as true, staff believes that the Bright House allegations relate to the disconnection of Bright House's coaxial cable drop and the installation of Verizon's

¹ Verizon Motion at page 4, incorporated by reference at page 19.

data/video coaxial cable; none of the facilities involved are telecommunications facilities and none are used for the provision of regulated telecommunications services. Thus, staff believes that the Commission does not have jurisdiction over the services or the facilities which are the subject of the Bright House Complaint, the rules alleged by Bright House to have been violated by Verizon do not apply, and Bright House lacks standing to bring its Complaint. Staff does not believe that this conclusion is changed because Verizon is, in some instances, concurrently installing regulated services via a separate facility.

The Public Service Commission regulates telecommunications companies pursuant to Section 364.01(1), F.S. The term “telecommunications company” excludes cable providers providing cable service as defined by 47 U.S.C. s. 522.² The term “[t]elecommunications facility” includes real estate, easements, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire.³ The Commission does not regulate VoIP or broadband services; these services “are subject to this state’s generally applicable business regulation and deceptive trade practices and consumer protection laws, as enforced by the appropriate state authority or through actions in the judicial system.”⁴ The Florida Legislature has mandated that “[b]roadband service and the provision of voice-over-Internet-protocol (VoIP) shall be free of state regulation, except as delineated in this [Chapter 364, F.S.] or as specifically authorized by federal law, *regardless of the provider, platform, or protocol.*”⁵ Cable and video services are regulated by Chapter 610, F.S., which provides that customer complaints may be filed with the Department of Agriculture and Consumer Services.

Bright House acknowledges that the installation practices at issue “specifically reference Verizon FiOS installations,”⁶ and concedes that Verizon installs “a *separate* ‘telecommunications facility’ used in the provision of a telecommunications service when it installs the FiOS facilities used to provision video and broadband service.”⁷ Based on this assertion, Bright House would have the Commission conclude that installation of otherwise unregulated service and facilities somehow becomes regulated. Moreover, the remedies sought by Bright House involve FiOS installations for customers won from Bright House, and Bright House would have the Commission compel Verizon to inspect all of Bright House’s unregulated facilities in locations at which Verizon has won a cable or data customer from Bright House.⁸ Such inspections are to determine any defects that may have occurred while Verizon was installing its unregulated services.⁹

Bright House asserts that the Commission has jurisdiction to address the safety issues related to the installation of regulated telephone service by a local exchange company pursuant to Sections 364.01(4)(c), and 364.15, F.S. However, staff observes that the language from Section 364.01(4)(c), F.S., quoted by Bright House is limited to “monopoly services provided by

² Section 364.02(14), F.S.

³ Section 364.02(15), F.S.

⁴ Section 364.01(3), F.S.

⁵ Section 364.013, F.S. (emphasis supplied).

⁶ Complaint at page 7.

⁷ Opposition at page 7 (emphasis supplied).

⁸ Complaint at page 14.

⁹ Id.

telecommunications companies.”¹⁰ The Commission’s authority pursuant to Section 364.15, F.S., is limited to mandating “repairs or improvements to, or changes in, any *telecommunications facility*” and “additions or extensions . . . to any *telecommunications facility*.”¹¹ The Bright House Complaint does not encompass such services or facilities.

Taken as a given that Bright House is harmed by the Verizon installations, that the installations are unsafe, and that all installation problems were created by Verizon, staff believes that the rules relied upon by Bright House do not apply to the Verizon installations that are the subject of Bright House’s Complaint.

Rule 25-4.036, F.A.C., applies to the plant and facilities of the utility and incorporates the NEC by reference “pertaining to the construction of telecommunications facilities.”¹² Staff believes that the facilities that are the subject of this case are not telecommunications facilities; moreover, Bright House acknowledges that the regulated telecommunications facilities are separate from the unregulated FiOS facilities of which Bright House complains.¹³

Rule 25-4.038, F.A.C., provides that subscriber loops are to be installed in accordance with specified articles of the NEC which are incorporated by reference; however, the Bright House Complaint does not address subscriber loops. Moreover, Rule 25-4.038, F.A.C., implements Section 364.03, F.S., which establishes requirements for “telecommunications facilities” and Section 364.01(4), F.S., which mandates that the Commission ensure the availability of basic local telecommunications services subject to fair price, rate, and service regulation while reducing regulatory restraints and encouraging competition in the telecommunications market. Again, staff believes that the Bright House Complaint addresses neither regulated facilities nor regulated services.

CONCLUSION

Staff believes that there is nothing in rules referenced in the Bright House Complaint, or the statutes which those rules implement, that can be construed as contravening the Commission’s explicit lack of jurisdiction over broadband, VoIP, and cable services as set forth by the Legislature throughout Chapter 364. Staff believes that the Commission lacks jurisdiction over the VoIP, broadband, and cable facilities and services that are the subject of the Bright House Complaint. Similarly, staff believes that the Commission lacks jurisdiction to provide the remedies requested by Bright House, which would impose duties on Verizon with respect to unregulated facilities and services. Staff also believes that Bright House does not have standing under the second prong of the test established by *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2nd DCA 1981), because Bright House’s substantial injury is not of the type or nature which the proceeding is intended to protect. Therefore, staff recommends that the Commission grant Verizon’s Motion for Summary Final Order, thus denying the Bright House Complaint.

¹⁰ Bright House Complaint at page 5, quoting Section 364.01(4)(c), F.S.

¹¹ Section 364.15, F.S. (emphasis supplied).

¹² In this context, “Utility” means “telecommunications company” as that term is defined by Section 364.02, F.S. See Rule 25-4.002(9), F.A.C.

¹³ Opposition at page 7.

Issue 3: Should the Commission grant Verizon's Motion to Dismiss?

Recommendation: No. Staff recommends that, if the Commission grants the Verizon Motion for Summary Final Order in Issue 2, as recommended by staff, this issue will be moot. (Murphy)

Staff Analysis:

If the Commission grants the Verizon Motion for Summary Final Order in Issue 2, as recommended by staff, this issue will be moot.

However, if the Commission *denies* the Verizon Motion for Summary Final Order, it should similarly deny the Verizon Motion to Dismiss.

The arguments for and against the Verizon Motion to Dismiss are similar to those propounded by the parties for and against the Motion for Summary Final Order. However, in reviewing the Verizon Motion to Dismiss, the Commission is not to look beyond the "four corners" of the Bright House Complaint. This is a more restrictive review than applies to a Motion for Summary Final Order in which the Commission can look beyond the "four corners" of the Bright House Complaint and consider "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits."¹⁴ Thus, if the Commission does not grant the Motion for Summary Final Order, staff recommends that the Motion to Dismiss should similarly be denied.

¹⁴ Section 120.57(1)(h), F.S.

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Issue 4: Should this docket be closed?

Recommendation: Yes. If the Commission grants Verizon's Motion for Summary Final Order, this docket should be closed. (Murphy)

Staff Analysis: If the Commission grants Verizon's Motion for Summary Final Order, this docket should be closed.