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July 30, 2010

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 090501-TP
Petition for arbitration of certain terms and conditions of an interconnection agreement with Verizon Florida LLC by Bright House Networks Information Services (Florida), LLC

Dear Ms. Cole:

Please find enclosed for filing in the above matter an original and seven copies of Verizon Florida LLC's Post-Hearing Reply Brief. Also enclosed is a diskette with a copy of the Reply Brief in Word format. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at (678) 259-1657.

Sincerely,
WC for
Dulaney L. O'Roark III
Dulaney L. O'Roark III

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Enclosures

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail on July 30, 2010 to:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of certain terms and conditions of an interconnection agreement with Verizon Florida LLC by Bright House Networks Information Services (Florida), LLC	)))))	Docket No. 090501-TP Filed: July 30, 2010

VERIZON FLORIDA LLC'S POST-HEARING REPLY BRIEF

Bright House's Initial Post-Hearing Brief confirms there is no law supporting its extreme positions. Bright House seeks to force Verizon to subsidize its operations by, among other things, attempting to apply § 251 interconnection obligations to matters that have nothing to do with local interconnection and radically changing the intrastate access regime. The Commission should reject Bright House's anticompetitive proposals and refuse to consider the new issues Bright House raises for the first time in its rebuttal testimony and Post-Hearing Brief ("BH Br.").

ISSUE 7: SHOULD VERIZON BE ALLOWED TO CEASE PERFORMING DUTIES PROVIDED FOR IN THIS AGREEMENT THAT ARE NOT REQUIRED BY APPLICABLE LAW?[1]

Bright House's brief reveals there is very little in dispute under Issue 7. Bright House initially argues that the ICA's "terms should be fully binding on both parties for the full term of the agreement," but it does not really mean that, as it agrees that those terms should change whenever there is a "material change in law." (BH Br. at 44.) Indeed, the parties have agreed on language in GTC § 4.6 that requires them to negotiate ICA changes in the event of a change in law. Thus, the parties agree on the principle that the ICA should not continue to bind the parties to obligations to which they would not have agreed absent legal compulsion.

Verizon's proposal contemplates the scenario in which a duty is eliminated and no negotiation is necessary; all that must be done is to stop providing a service or stop paying. The parties already have agreed upon similar self-effectuating language in GTC § 4.7, which allows

[1] *See* Verizon's opening Post-Hearing Brief ("VZ Br.") for its summary position statements on each Issue.

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Verizon to discontinue providing a service or payment upon written notice where, as the result of a change in law, it is no longer required to provide the service or payment. And the Commission has rejected the notion that incumbents must negotiate to stop providing services they have no legal obligation to provide.[2] The same result is warranted when there has been no change in law, but changes in factual circumstances render legal requirements no longer applicable.

Bright House complains that Verizon's language allows it to claim existing (unchanged) law does not require a service or payment that the parties previously thought it did. (BH Br. at 44-45.) But Verizon cannot act in the manner Bright House claims to fear; Verizon's language requires 30 days' notice before doing anything. That affords Bright House the opportunity to evaluate whether Verizon is correct, to engage Verizon in discussions and, if necessary, bring the issue to the Commission – just as it would under the agreed-upon change-in-law provisions.

The same point applies to Bright House's assertion that Verizon could claim – absent any change in law – that Bright House is not entitled to interconnection at all under the Telecommunications Act of 1996 (the "Act") and, therefore, walk away from the ICA. (*Id.* at 44.) Moreover, Verizon has not pursued that claim here, so Bright House's last-minute request that the Commission "find Bright House is entitled to interconnection with Verizon" under § 251 (*id.* at 46) is improper. The parties have not presented for arbitration, offered testimony on, or briefed that issue, so the Commission cannot consider it. (47 U.S.C. § 252(b)(4)(A).) Verizon has assumed that Bright House has interconnection rights; the Commission should do the same.

<u>ISSUE 13</u>: WHAT TIME LIMITS SHOULD APPLY TO THE PARTIES' RIGHT TO BILL FOR SERVICES AND DISPUTE CHARGES FOR BILLED SERVICES?

Bright House's Brief ignores the fact that the Commission already has decided the question in Issue 13, holding that the Florida statute of limitations (Fl. Stat. § 95.11(2)(b))

[2] *Generic Docket to Consider Amendments to Int. Agreements Resulting from Changes in Law, by BellSouth, etc.*, Order Denying Emergency Petitions, PSC-05-0492-FOF-TP, at 6-7 (2005).

provides the time limit in which parties should bill for services and dispute charges and specifically rejecting a shorter, one-year limit like Bright House proposes here. (*Petition for Arbitration of Open Issues*, Order PSC-03-1139-FOF-TP (2003) ("*Verizon/Covad Order*").) The Commission's prior decision is no secret to Bright House; Bright House's witness tried – unsuccessfully – to distinguish it from this case. (Gates RT, T.266-67.) But, for the reasons stated in Verizon's Brief (at 7-8), the Commission's prior decision is not distinguishable and the same result should apply here.

Bright House asserts that using the statute of limitations is problematic, and that a one-year limit would provide greater financial "certainty" and greater "incentive" to ensure that invoices are correct. (BH Br. at 47.) But Covad made the same claims regarding its need for business certainty, which the Commission rejected. As Verizon has explained, both parties track their own orders and already have enough "certainty" regarding where they stand financially. (VZ Br. at 7.) Bright House identifies no problems that have occurred since the Commission held that the statute of limitations is the proper standard, confirming that no further "incentive" is necessary. The Commission should adhere to its prior decision that "the current state of the law should be sufficient" (*Verizon/Covad Order* at 16) and adopt Verizon's language for Issue 13.

ISSUE 24: IS VERIZON OBLIGED TO PROVIDE FACILITIES FROM BRIGHT HOUSE'S NETWORK TO THE POINT OF INTERCONNECTION AT TELRIC RATES?

In its Brief, Verizon asked the Commission to decline to decide the new version of Issue 24 that Bright House raised for the first time in its rebuttal testimony, too late for Verizon to respond to it. Bright House's Brief confirms that the dispute Mr. Gates addressed in his Direct Testimony under Issue 24 – that is, whether entrance facilities must be priced at TELRIC (Gates DT, T.80, 111, 113) – no longer exists. Instead, Bright House now asks the Commission to rule

that the access toll connecting ("ATC") trunks that run from Bright House collocations in two Verizon end offices to a Verizon tandem office should be priced at TELRIC.[3] These ATC trunks are not entrance facilities (Gates RT, T. 226),[4] they were not mentioned in Mr. Gates' Direct Testimony on Issue 24, Bright House's arbitration petition did not seek TELRIC pricing for these facilities, and they do not fit within the Issue 24 issue statement.[5] The only question about ATC trunks presented for arbitration was whether Bright House should pay Verizon for them *at all* (addressed in Issue 36(b)), not whether Bright House should pay Verizon *less* for them. Because § 252(b)(4)(A) of the Act requires the Commission to "limit its consideration...to the issues set forth in the petition and in the response," and Bright House's issue about TELRIC pricing of ATC trunks appeared in neither, the Commission cannot consider it. If, however, the Commission rules on Bright House's new Issue 24, it should reject its request to change the pricing of ATC trunks from tariffed rates to much lower, TELRIC-based rates. (VZ Br. at 8-21.)

Bright House claims that "Verizon is required by long-standing FCC rules to provide such facilities at TELRIC rates" as part of the ILEC's § 251(c)(2) interconnection obligation. (BH Br. at 26). But the rule Bright House cites for this theory, FCC Rule 51.501, does not require anyone to provide anything, let alone provide facilities to carry third-party traffic. The

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[3] In footnote 97, Bright House tries to further modify the scope of Issue 24 by asking the Commission to rule that TELRIC rates, instead of existing tariffed rates, apply not just to the ATC trunks, but also to any facilities Bright House might want to transport traffic from Verizon's 85 end offices in the Tampa LATA to Bright House's network. Bright House never raised this issue before its Brief, so the Commission must disregard it. There is, in any event, no legal support for Bright House's position, which rests on the erroneous notion that Bright House may unilaterally designate meet points for hand-off of third-party interexchange ("IXC") traffic. (*See* Issue 36(b), *infra*, and VZ Br. at 32-37.)

[4] Entrance facilities are wires or cables that transport calls between a CLEC switch and an ILEC switch, so that traffic can flow between the CLEC and ILEC networks. (VZ Br. at 8-9; Gates DT, T.98-100, 109; RT, T.226.) ATC trunks transmit calls from IXCs to Bright House's cable affiliate's end users (and in a few cases, in the opposite direction); they do not carry any calls between Bright House and Verizon end users. (VZ Br. at 12-13.)

[5] In an apparent attempt to fit ATC trunks within the wording of Issue 24, Bright House claims that there is a § 251(c)(2) point of interconnection ("POI") at Verizon's tandem where Bright House picks up IXC traffic, so that the ATC trunks are on Verizon's side of the POI. As Verizon explains in Issue 36(b) here and in its initial Brief, that is wrong; it assumes the existence of the unsupported "exception" to the meet-point billing regime Bright House seeks under Issue 36(b).

Rule, instead, establishes the scope of the FCC's pricing rules, stating that they apply to "network elements, interconnection, and methods of obtaining access to unbundled elements, including physical collocation and virtual collocation." (47 CFR § 51.501(a).) Rule 51.501 does not define *what* the ILEC must provide to satisfy its interconnection or network element unbundling obligations.

Bright House argues that ATC trunks are either interconnection or methods of obtaining interconnection (it does not settle on one or the other (BH Br. at 28)) because the Rule lists "interconnection, and methods of obtaining interconnection" as subject to FCC pricing rules. (*Id.* at 26). But Bright House does not and cannot claim that this rule defines what either term means. "Interconnection" is instead defined in Rule 51.5 as "the linking of two networks for the mutual exchange of traffic" and "does not include the transport and termination of traffic." As discussed, the ATC trunks do not link Verizon's and Bright House's networks to mutually exchange traffic between them; rather, they facilitate Bright House's exchange of traffic with IXCs. And the ATC trunks are for transport, which the FCC specifically excluded from its interconnection definition.

Rule 51.321 defines "methods of obtaining interconnection," and lists only collocation and meet-point interconnection arrangements. (VZ Br. at 19, *citing* 47 C.F.R. § 51.321.) Although the FCC did not intend this list to be exhaustive, neither the FCC nor any state commission has ever identified ATC trunks (or any transport facilities to carry third-party IXC traffic) as a method of obtaining interconnection within this rule. In fact, the only methods of obtaining interconnection described in the rule are "premises" or "points" at which interconnection may occur, with no suggestion that facilities must be provided by the ILEC. In short, no FCC rule provides that the "interconnection" or "method of obtaining interconnection"

to be priced at TELRIC means any method a CLEC chooses to obtain interconnection, including any and all facilities a CLEC wants to obtain to exchange traffic with IXCs. (*Id.* at 19-20.)

Although Bright House acknowledges that no one has ever ruled that ILECs must provide ATC trunks at TELRIC rates (Gates, T.308, 311, 350), it nevertheless claims that its legal "analysis has been expressly affirmed by unanimous panels of three of the four courts of appeal that have considered the question."[6] That is not true. None of the four Circuit Court decisions Bright House cites "considered the question" it raises here – that is, whether § 251(c)(2) requires an ILEC to provide a CLEC with TELRIC-priced *transport facilities* to exchange long-distance traffic with third-party IXCs. All of the decisions addressed a different question, involving different facilities – that is, whether § 251(c)(2) requires an ILEC to provide a CLEC with TELRIC-priced *entrance facilities* linking the CLEC switch to an ILEC switch, to allow the CLEC and ILEC end users to call each other. The Sixth Circuit decision, unchanged on rehearing last month, held that an ILEC has no § 251(c)(2) obligation to provide any entrance facilities, while the Seventh, Eighth and Ninth Circuits affirmed state Commission holdings that ILECs must provide TELRIC-priced entrance facilities for interconnection purposes.

While the Sixth Circuit decision is correct, even if the other Circuits' decisions were sound, they do not say what Bright House implies they do. None of these decisions identifies Rule 51.501 as a mandate to offer at TELRIC any facilities the CLEC claims are for interconnection. All of them exclusively address the entrance facilities that some CLECs (but not Bright House) sometimes use to link their networks with the ILEC's network and that had previously been subject to an unbundling obligation. None of the courts mentions facilities CLECs use to exchange traffic with IXCs, which were never subject to an unbundling obligation.

[6] BH Br. at 29, *citing Pacific Bell v. Cal. Pub. Util. Comm'n*, 597 F.3d 958 (9th Cir. 2010) (pending rehearing); *Southwestern Bell v. Missouri PSC*, 530 F.3d 676 (8th Cir. 2008); *Ill. Bell v. Box*, 526 F.3d 1069 (7th Cir. 2008). *Michigan Bell v. Covad*, 597 F.3d 370 (6th Cir. 2010) (rehearing denied June 2, 2010).

On the contrary, all three rulings make clear that § 251(c)(2) interconnection is for the mutual exchange of traffic (both exchange and exchange access) between ILEC and CLEC networks: "Pursuant to 47 U.S.C. § 251(c)(2), incumbent LECs must allow the competitive LEC to link its network to that of the incumbent LEC, so that customers of the competitive LEC may place calls to customers of the incumbent LEC." (*Pacific Bell*, 597 F.3d at 961. *See also Southwestern Bell*, 530 F.3d at 684 ("transmission and routing of telephone exchange service and exchange access service" under § 251(c)(2) means "CLEC to ILEC and ILEC to CLEC traffic"); *Ill. Bell*, 526 F.3d at 1070 ("interconnection" means "transferring voice and data traffic from a CLEC's network to the ILEC's and the reverse").)

Therefore, to the extent that any court has held that § 251(c)(2) imposes a duty to provide interconnection facilities, they have always been facilities a CLEC uses "to permit its own customers to reach customers of the incumbent LEC." *Pacific Bell*, 597 F.3d at 960. These are indisputably ***not*** the kind of facilities at issue here, which do not permit CLEC customers to reach ILEC customers, but carry only IXC calls between CLEC customers and IXCs. These facilities, therefore, satisfy no § 251(c)(2) duty of Verizon to Bright House. If they fulfill any obligation under the Act, it is instead Bright House's duty, imposed upon all telecommunications carriers under § 251(a), to interconnect "directly or indirectly with the facilities and equipment of other telecommunications carriers." (47 U.S.C. § 251(a).) Bright House uses the ATC trunks to interconnect with IXCs' networks indirectly, through Verizon's tandem switch, a common industry practice. (Munsell DT, T.597.)

In an attempt to shore up its theory that the FCC requires ILECs to provide TELRIC-priced ATC trunks, Bright House quotes from ¶ 140 (mis-cited as ¶ 141) of the *TRRO*.[7] That

[7] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, etc.*, Order on Remand, 20 FCC Rcd 2533 ("*TRRO*") (2005).

paragraph is in the "Entrance Facilities" section, where the FCC ruled that entrance facilities would no longer be available as UNEs under § 251(c)(3). In ¶ 140, the FCC stated:

> [O]ur finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

This is the language that gave rise to the Circuit Court cases, as well numerous other disputes before state commissions, including this one, that were not appealed to any court. In proceedings to implement the *TRRO*, CLECs sought rulings interpreting ¶ 140 to mean that they could receive TELRIC-priced entrance facilities for interconnection under § 251(c)(2), even though the same facilities were no longer available as UNEs under § 251(c)(3).[8] This Commission was among those rejecting CLEC requests for such rulings.[9] Some other commissions adopted the CLECs' arguments, as reflected in the court cases discussed above. But no one has interpreted ¶ 140 the way Bright House does, to mean that "interconnection facilities" include transport facilities a CLEC uses to exchange traffic with third-party IXCs.

Indeed, despite Bright House's claim that an ILEC's obligation to provide TELRIC-priced ATC trunks (and anything else a CLEC might claim it can use for interconnection) goes back to adoption of Rule 51.501 in the 1996 *Local Competition Order*,[10] no one has interpreted it that way in the 14 years since. As Verizon pointed out (VZ Br. at 19-20), ATC trunks have

[8] Contrary to Bright House's claims (BH Br. at 27), Verizon's refusal to provide Bright House TELRIC-priced ATC trunks does not rely on the *TRRO* holding that § 251(c)(3) does not require ILECs to unbundle entrance facilities. Verizon understands that its interconnection obligations are governed by § 251(c)(2), not § 251(c)(3). But as Verizon has explained, nothing in § 251(c)(2) or the FCC's rules requires a change in the pricing of ATC trunks from tariffed special access rates to TELRIC rates.

[9] *Petition for Arbitration of Amendment to Interconnection Agreement with Certain Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Florida by Verizon Florida Inc.*, Order No. PSC-05-1200-FOF-TP, at 106 (Dec. 5, 2005). Verizon, therefore, provides entrance facilities to CLECs under tariffed rates, not at TELRIC rates.

[10] BH Brief at 28 n. 82, *citing Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, etc.*, ("*Local Competition Order*"), 11 FCC 15499 (1996).

always been tariffed special access facilities, not offered at TELRIC as either UNEs (like entrance facilities were) or interconnection facilities. That did not change under the Act, consistent with Congress' express intent not to disturb the pre-existing access regimes. *Id.*

Even if Bright House were correct (and it is not) that the FCC "established that ILECs are obliged to provide CLECs with facilities *needed* for 'interconnection' at TELRIC rates" (BH Br. at 28 (emphasis added)), the Commission still would have to reject Bright House's demand for TELRIC-priced ATC trunks here. As Verizon explained, Bright House does not *need* these facilities for interconnection with Verizon – or even for interconnection with IXCs. (VZ Br. at 20-21.) Bright House has built direct connections with many IXCs and does not need ATC trunks to connect indirectly with IXCs through Verizon's tandem. As Bright House admitted, it can pick up the IXCs' traffic at the tandem, where Bright House is already collocated, and transport it over Bright House's own facilities. In fact, Bright House has already disconnected a number of the ATC trunks it took from Verizon. (VZ Br. at 20-21.) The mere fact that Bright House *wants* to pay less for ATC trunks does not mean it "require[s] them." (*TRRO* ¶ 140.)

As Verizon explained (VZ Br. at 15-16), Bright House wants TELRIC-priced ATC trunk rates to create an arbitrage scheme at Verizon's expense. Bright House today pays Verizon for the ATC trunks it orders and, in turn, charges IXCs for their use under its own access tariffs. If the Commission adopts Bright House's position, Bright House will pay less for the ATC trunks, but it has no intention of reducing its charges to IXCs. (BH Resp. to VZ Int. 26, Ex. 4c at 249.) The effect of Bright House's proposal would be to increase its own access profits by avoiding Verizon's access charges. The Commission should reject that anticompetitive proposal and contract language.

<u>ISSUE 32</u>: MAY BRIGHT HOUSE REQUIRE VERIZON TO ACCEPT TRUNKING AT DS-3 LEVEL OR ABOVE?

Rule 51.321(a) states that an ILEC shall provide, "on terms and conditions that are just, reasonable, and nondiscriminatory . . . any technically feasible method of obtaining interconnection . . . at a particular point upon a request by a telecommunications carrier." The Rule identifies collocation and meet point arrangements as methods of obtaining interconnection. Bright House claims the Rule entitles it to hand off traffic at the DS3 level or higher and to shift to Verizon the cost of multiplexing that traffic to the DS1 level necessary for routing through Verizon's network. Bright House cites no authority for its claim and is wrong, for several reasons.

Bright House acknowledges that the parties' settlement resolves their dispute concerning multiplexing charges as long as their current interconnection arrangements remain materially unchanged. (BH Br. at 41.) Bright has not proposed any change, but says it "is considering a variety of possible rearrangements" (*id.*) and has not yet requested another "method of obtaining interconnection . . . at a particular point." If for no other reason, Bright House's proposal should be rejected because Verizon and the Commission have no way to assess what terms and conditions should apply to an as-yet unidentified method of obtaining interconnection.

Even putting the settlement aside, Verizon's proposed language should be adopted because it provides methods of obtaining interconnection that accommodate DS3 and higher levels of traffic "on terms and conditions that are just, reasonable, and nondiscriminatory." Verizon's proposal permits Bright House, for example, to route traffic (as it does today) to its collocation spaces at the DS3 level or higher and to multiplex the traffic using either its own equipment or equipment obtained from Verizon. As explained in Verizon's Brief, multiplexing Bright House's traffic to the DS1 level is necessary for traffic balancing and outage prevention at Verizon's tandem switches and for routing traffic to Verizon's end offices. (VZ Br. at 22-23.)

Verizon's proposed language appropriately assigns Bright House responsibility for the multiplexing required for its own traffic. This approach is nondiscriminatory because other carriers, including Verizon, perform that function for their traffic.

Bright House acknowledges that it "should pay for any necessary demultiplexing," but then seeks to avoid paying Verizon's tariffed rates, or indeed any rates, because it claims that DS1-level interconnection is inefficient and unnecessary. (BH Br. at 41) As Verizon has shown, multiplexing to the DS1 level is required as a practical, engineering matter – and is performed by Verizon itself and all other interconnecting carriers – not because of alleged inefficiencies in Verizon's network. (VZ Br. at 22-23.) Nor may Bright House avoid the cost of multiplexing on the theory that it may move the point of interconnection to its side of the multiplexing equipment. Because Bright House is using that equipment exclusively for its own traffic, it must be considered part of Bright House's network. In short, Bright House should be required to pay Verizon's tariffed rates for multiplexing, just as other carriers must do.

ISSUE 36: WHAT TERMS SHOULD APPLY TO MEET-POINT BILLING, INCLUDING BRIGHT HOUSE'S PROVISION OF TANDEM FUNCTIONALITY FOR EXCHANGE ACCESS SERVICES?

Bright House begins its discussion of Issue 36 – regarding its desire to act as a competitive tandem provider linking third party IXCs to Verizon end users – by blaming Verizon for not understanding its shifting position on this issue. (BH Br. at 32.) Then Bright House changes positions again.

At the end of the hearing, Verizon thought it finally understood what Bright House wanted, and explained that Bright House could order Tandem Switch Signaling ("TSS") services from Verizon's FCC Tariff No. 14 (Munsell, T.693, 695-96), leading Verizon to believe there was no remaining dispute with respect to this traffic. (VZ Br. at 29.) However, Bright House

now asserts – for the first time – that Verizon's tariff "does not meet the requirements of the 1996 Act" (BH Br. at 32-33) and asks the Commission to "clarify" that (1) where Bright House is acting as a competitive tandem provider, Verizon must facilitate that function by exchanging IXC traffic at any "technically feasible point" of Bright House's choosing, (2) after creating that exception to industry practice, "normal meet point billing rules would apply," and (3) Verizon has to provide any facilities Bright House wants to facilitate its competitive tandem services at TELRIC rates, rather than the rates contained in the TSS Tariff. (*Id.* at 33-34.)

These "clarifications" are really just restatements of Bright House's position on Issues 24 and 36(b), and are wrong for the reasons addressed in those sections. Moreover, it is notable that neither the FCC nor any state commission has ever read § 251(c)(2) to apply to a CLEC seeking to operate as a competitive tandem provider for third-party IXC traffic. In fact, Bright House's proposal would take the "competitive" out of the term "competitive tandem provider," enabling Bright House to avoid a substantial portion of the costs Bright House would incur in providing tandem services to IXCs – including the costs of the facilities needed to provide those services. There is nothing remotely "competitive" about that proposal, which also would disadvantage true competitive tandem providers that do not enjoy the special advantage Bright House is seeking here.

ISSUE 36(A): SHOULD BRIGHT HOUSE REMAIN FINANCIALLY RESPONSIBLE FOR THE TRAFFIC OF ITS AFFILIATES OR OTHER THIRD PARTIES WHEN IT DELIVERS THAT TRAFFIC FOR TERMINATION BY VERIZON? (Int. Att. § 8.3.)

Bright House barely mentions Issue 36(a), devoting just one paragraph of its brief to what it calls this "relatively minor issue." (BH Br. at 34.) The dispute concerns how Verizon will be compensated for terminating local traffic that Bright House delivers to Verizon, but that originated with a third party (or Bright House affiliate). Bright House says it "should not be

responsible" for such traffic and that "Verizon should be required to bill the third party carrier directly" because that is how the parties have agreed to handle traffic that Verizon transits for third parties to Bright House. (*Id.*) But, as Verizon explained in its brief, Verizon and Bright House are not similarly situated, so it is appropriate for different rules to apply. (VZ Br. at 31-32.) In particular, Bright House is not required to provide transit services to third-party carriers; it does so only on a voluntary, contractual basis. (*Id.*) When Bright House chooses to transit local traffic to Verizon, it should be responsible for that choice. Verizon does not enjoy the same freedom of choice that Bright House does and, therefore, should not have the same obligations to be financially responsible for that traffic. (*Id.*)

Moreover, it is important that Bright House compensate Verizon in the same amount that the originating carrier would have if it had handed off the traffic directly to Verizon because that acts as a check on potential arbitrage of intercarrier compensation rates and encourages LECs to establish a more efficient direct interconnection with Verizon. (*Id.* at 30-31.) Accordingly, the Commission should reject Bright House's proposals regarding Issue 36(a).

ISSUE 36(B): TO WHAT EXTENT, IF ANY, SHOULD THE ICA REQUIRE BRIGHT HOUSE TO PAY VERIZON FOR VERIZON-PROVIDED FACILITIES USED TO CARRY TRAFFIC BETWEEN INTEREXCHANGE CARRIERS AND BRIGHT HOUSE'S NETWORK?

Issue 36(b) concerns the same tariffed special access facilities – the ATC trunks – discussed under Issue 24 (but not properly part of that issue). Currently, Bright House uses ATC trunks from Verizon in a meet-point billing arrangement, common in the industry, in which Bright House and Verizon collaborate to provide access services to IXCs. (VZ Br. at 13-14.) As explained in Issue 24, Bright House buys ATC trunks from Verizon at tariffed access rates and charges the IXCs for the traffic carried on them at its own tariffed switched access rates. But Bright House proposes to shift to Verizon the financial responsibility for the ATC trunks (and

the right to bill IXCs for using them), even though they carry no Verizon traffic and even though Bright House, not Verizon, controls how many trunks to establish.

Bright House admits that its approach would be a "variation" (BH Br. at 31) from industry rules that require parties to *agree* to the meet-point for allocating their respective responsibilities for the access functions provided to the IXCs. (Gates, T.300.) To get around the requirement for agreement on the location of the meet point, Bright House asserts that the meet points are § 251(c)(2) POIs, and claims a right unilaterally to select those meet points. But Bright House makes little attempt to defend its proposed "exception" to industry rules (BH Prehearing Statement at 9; Gates RT, T.230 n.29), couching its arguments in terms of "*[a]ssuming* that Bright House has the right to designate the interconnection point for this meet-point billing traffic," and "*if* in fact Bright House has that right." (BH Br. at 30-31 (emphasis added).) Bright House does not, in fact, have the right to dictate meet points for access traffic or to decree that those meet points are § 251(c)(2) POIs. Bright House's argument rests on its theory that, because it is handling exchange access (long-distance) traffic and because § 251(c)(2) permits CLECs to designate a POI "for the transmission and routing of telephone exchange service and exchange access" (47 U.S.C. § 251(c)(2)(A)), Bright House can dictate the location of the meet point (and as many meet points as it wants) for jointly provided access traffic. As Verizon explained in its Brief (at 35-37), Bright House is wrong.

Joint provision of access to third parties is not § 251(c)(2) interconnection. It is and always has been something separate – specifically, part of the access regime that Congress left intact in the Act. (Vasington, T.493-94.) As explained in Issue 24, courts have held that § 251(c)(2) addresses "CLEC to ILEC and ILEC to CLEC traffic," both exchange and exchange access (*Southwestern Bell*, 530 F.3d at 684), whereas the ATC trunks at issue satisfy Bright

House's obligation to interconnect with *other* networks under § 251(a). In any event, even in the context of meet points used to route traffic between ILEC and CLEC networks, the FCC has recognized that the CLEC "will build out facilities to the *agreed-upon* point," with no suggestion that a CLEC may select that point unilaterally. (*Local Competition Order* ¶ 1385.)

Aside from having no legal foundation, Bright House's proposal would be bad policy because it would break the link between the party causing the ATC trunk costs (Bright House) and the party bearing the expense (Verizon). It is fair and appropriate for Bright House to bear the costs associated with the trunks (which, again, Bright House can recover from the IXCs using them), because only Bright House can control those costs. Verizon cannot be left exposed to the costs and inefficiencies of Bright House's network engineering decisions. (VZ Br. at 35-37.)

Finally, Verizon reminds the Commission that Bright House does not even need any ATC trunks from Verizon. Bright House has its own facilities to carry IXC traffic to and from Bright House end users. (VZ Br. at 20-21.) So, it makes no sense for Bright House to claim a unique exception to the meet-point billing rules because it is a facilities-based carrier with a large market share. (*See*, *e.g.*, Gates, T.310.) If anything, smaller carriers without their own facilities would have a greater need to lease ATC trunks than Bright House does, yet these other carriers have not claimed the special exception Bright House proposes. Bright House admits that neither the FCC nor any state Commission has ever blessed its proposed exception (Ex. 4c at 253), and there is no reason for this Commission to be the first to take that extraordinary step.

<u>ISSUE 37</u>: HOW SHOULD THE TYPES OF TRAFFIC (E.G., LOCAL, ISP, ACCESS) THAT ARE EXCHANGED BE DEFINED AND WHAT RATES SHOULD APPLY?

Bright House's brief offers no support for its position that traffic exchanged between the parties should be classified as local (and therefore subject to reciprocal compensation rates) or interexchange (subject to substantially higher access rates) based on the originating carrier's

retail local calling plan. As Verizon detailed in its Brief, that anticompetitive and unworkable position has been rejected by commissions throughout the country. (VZ Br. at 42-44.)

Bright House attempts to distinguish this authority, first by asserting its "belie[f]" that the precedent Verizon cited involved the treatment of virtual NXX calls, rather than the kind of proposal Bright House raises here. (BH Br. at 36-37.) But that is wrong. Although some of the cases Verizon cited discuss virtual NXX calls, they *also* separately address – and reject – the proposal to use the originating carrier's retail calling plan to govern intercarrier compensation.

For example, the Vermont Public Service Board decision that Verizon cited in its brief (and in Mr. Munsell's testimony (T.672)) addressed virtual NXX traffic, but also – as a separate issue – addressed the same originating carrier proposal at issue here.[11] The Board concluded that the originating carrier's retail calling plan should "not determine the intercarrier compensation that applies (*i.e.*, whether the call is subject to reciprocal compensation or access charges)."[12] The Board's rulings on both issues were appealed to and affirmed by the U.S. Court of Appeals for the Second Circuit. Indeed, that court expressly noted that the debate about virtual NXX traffic "sheds little light" on the separate question of "inter-local calling areas or access fees." (*Global NAPS, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 99 (2d Cir. 2006).)

Bright House also claims these decisions are wrong because, when its cable affiliate offers flat-rated retail calling plans for LATA-wide calling, its customers' calls are not "exchange access" – *i.e.*, are not subject to a "separate [toll] charge" – so reciprocal compensation, not access charges, applies to that traffic under rules the FCC adopted in 2001 and

[11] *Petition of Global NAPs, Inc. for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England Inc., d/b/a Verizon Vermont*, Order, Docket No. 6742 (Vt. PSB Dec. 26, 2002).

[12] *Id.* at 12.

reaffirmed in 2008. (BH Br. at 35-36.)[13] The CLEC in the Second Circuit case made the same claim, "center[ing] its argument on the 'separate charges' language in the statutory definition of 'telephone toll services' (which in turn defines exchange access, which in turn determines whether access charges apply)." (*Global NAPS*, 454 F.3d at 98.) The Second Circuit squarely rejected this argument, finding that it "attributes far too much significance to the term 'separate charge,'" as "what really mattered" was "whether a call traversed local exchanges, not how a carrier chose to bill its customers." (*Id.* at 98.) Therefore, like the CLEC's argument there, Bright House's claim that it can avoid paying access charges by changing the way it bills its retail customers "is beside the point." (*Id.*) As the Second Circuit recognized, "if carriers were free to define local calling areas for the purposes of intercarrier compensation, the door would be open to overweening conduct by the CLECs," which would "require ILECs to absorb all the costs and allow CLECs to reap all the benefits." (*Id.* at 99.)

In any event, Bright House's proposal remains profoundly unworkable. Indeed, Bright House finally seems to have abandoned the notion that there is any practical way for Verizon to rate individual calls under its proposal. (VZ. Br. at 39-41.) Bright House instead suggests that, according to Verizon's "own witness," "the solution is to bill based on agreed billing factors." (BH Br. at 36.) But Verizon's own witness said no such thing. In the testimony cited by Bright House, Mr. Munsell explained that – in general – billing factors have been used in the industry as a fallback position when carriers are unable to individually rate calls. (Munsell Cross, T.702-703; Munsell Dep., Ex. 14 at 206-207.) He did ***not*** testify that using billing factors was appropriate here.

[13] Bright House is thus wrong in suggesting that matters changed in the FCC's *2008 Reciprocal Compensation Order*. (BH Br. at 37.) That order did not directly address the question presented here, nor did it do so indirectly either, as the FCC did not change any of its existing definitions or promulgate any new rules. The relevant law remains as it was in 2001. As so many other jurisdictions have found, that law does not support the originating carrier approach Bright House proposes.

Moreover, the effort required to arrive at the billing factors Bright House now suggests would require substantial time, effort, and expense "outside the normal … process" (Gates RT, T.250), while also representing a giant step backwards from what the parties do today. The current system accurately and automatically identifies the jurisdiction of calls based on the ILEC's basic local exchange area. (*See* VZ Resp. to BH Int. 49, Ex. 5b at 30-31.) Bright House would replace that efficiency and accuracy with a burdensome and less accurate factor approach. (*Id.*) There is no point in moving backwards just so Bright House can escape paying access charges to Verizon.

For all these reasons, the Commission should adopt Verizon's position for Issue 37.[14]

<u>ISSUE 41</u>: SHOULD THE ICA CONTAIN SPECIFIC PROCEDURES TO GOVERN THE PROCESS OF TRANSFERRING A CUSTOMER BETWEEN THE PARTIES AND THE PROCESS OF LOCAL NUMBER PORTABILITY ("LNP") PROVISIONING? IF SO, WHAT SHOULD THOSE PROCEDURES BE?

Bright House does not seriously contest the one remaining dispute under Issue 41. Aside from the introductory reference on page 12, Bright House devotes only two paragraphs at the end of its brief to "the narrow question" regarding a particular compensation issue arising when a customer transfers (or "ports") a large number of telephone numbers when switching service providers. (BH Br. at 41.) Such ports ordinarily are automated (Munsell DT, T.614; Gates, T.327) and – as Bright House notes – generally "go[] smoothly." (BH Br. at 49.) However,

[14] Bright House's witness on Issue 37 testified that "there is really only one disagreement" between the parties with respect to this issue – namely, the question discussed above regarding "what traffic is to be treated as access traffic for purposes of their intercarrier compensation arrangements." (Gates RT, T.245, 246-47.) However, in its brief, Bright House attempted to interject another dispute into Issue 37, claiming that it "[a]lso included … the question of how to apply the term 'transport,' in the context of intercarrier compensation for 'transport and termination' of calls." (BH Br. at 38.) Bright House says the answer to this "question" is that the low reciprocal compensation rate of $0.0007 per minute covers virtually any arguably "transport"-related function Bright House can think of, such that Bright House does not have to pay anything at all for additional functions "such as multiplexing." (*Id.* at 39.) But this new "question" is an attempt to backdoor the multiplexing disputes addressed under Issue 32. Bright House offered no testimony on this question under Issue 37, it is not properly included as a separate dispute here, and the Commission should not consider it. Of course, even if the Commission were to consider it, Bright House has not sustained its position with any testimony and its proposal therefore should be rejected. That is the correct result in any event, because – as addressed under Issue 32 above – Bright House is not entitled to foist the costs of multiplexing its traffic onto Verizon.

Bright House asks that the parties also "be ready to manually handle any problems that might arise" – otherwise known as providing "coordination." (*Id.*)

Verizon has no objection to providing coordination in connection with any port, but does object to Bright House's proposal to provide such services "at no charge." (*Id.*) Bright House does not explain why it should be entitled to free coordination services, simply asserting that its proposal "is more reasonable." (*Id.*[15]) But, as Verizon explained in its brief, while Verizon does not charge Bright House for the ports themselves, coordination is a separate and additional service that is provided only in unique circumstances and necessitates the time, attention and input of multiple departments and people in ways that standard, automated ports do not. (VZ Br. at 45-48.) It is "special handling" that imposes additional – and, sometimes, significant – costs beyond those typically associated with a port. (Munsell DT, T.614.) In that sense, providing coordination is no different than providing other ancillary services – like expedites – that Bright House agrees should be compensable. (Gates RT, T.202, T.327.) And when a carrier interrupts the efficient, automated process and asks Verizon to expend extra time and resources to coordinate, it should be required to pay for that special handling. Bright House's proposed changes therefore should be rejected.

<u>ISSUE 49</u>: ARE SPECIAL ACCESS CIRCUITS THAT VERIZON SELLS TO END USERS AT RETAIL SUBJECT TO RESALE AT A DISCOUNTED RATE?

Bright House is not entitled to the resale discount on point-to-point special access services because the FCC has ruled expressly that special access services are not subject to the discount. Bright House acknowledges that in "certain rulings" the FCC has stated "in general"

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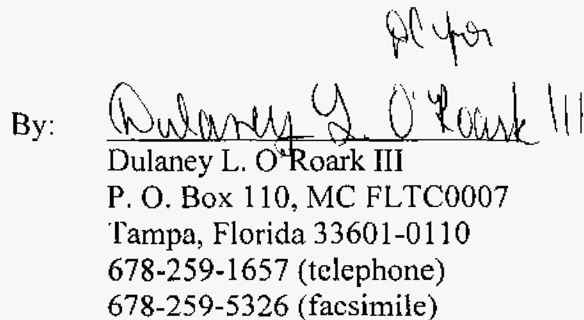
[15] Bright House previously asserted various reasons which it claimed substantiated its request for free coordination, all of which Verizon addressed in its Post Hearing Brief. (*See* VZ Br. at 46-48.) To the extent Bright House continues to assert those claims via footnote 142 of its brief, in which it purports to incorporate all of its discovery responses and its witnesses' prior testimony on Issue 41, Verizon hereby incorporates its prior briefing, testimony and discovery responses in reply.

that access services are not subject to the resale discount. (BH Br. at 43.) But Bright House goes on to argue that the FCC was "more careful" when it developed its resale rule, which exempts exchange access services from the discount. (*Id.*) And Bright House asserts, without explanation or citation to the record, that point-to-point data circuits sold to business customers would not involve exchange access. (*Id.*)

The FCC has not been careless in its statements about special access services. In 2005, almost a decade after it issued its local competition rules, the FCC left no doubt when it stated that "the Commission has explicitly excluded special access services from the ambit of section 251(c)(4)." (TRRO ¶ 51 n.146.) Bright House therefore has no right to the resale discount on point-to-point special access services. Moreover, Bright House's own witness admitted that point-to-point special access circuits could be used for calls routed through Bright House's switch (Gates Dep., Ex. 9 at 84), which means those circuits could provide exchange access services. Even if the FCC's clear statements about special access services could be ignored (and they cannot be), Bright House's request should be denied for that independent reason.

Respectfully submitted on July 30, 2010.

By: 

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