Marguerite McLean

090501-TP

From: Beth Keating [BKeating@gunster.com]
Sent: Friday, December 17, 2010 3:55 PM
To: Filings@psc.state.fl.us
Subject: Docket No. 090501-TP
Attachments: 20101217133424907.pdf; 20101217133454847.pdf

Attached, please find two documents, a Motion for Reconsideration and a Request for Oral Argument, submitted in this Docket on behalf of Bright House Networks Information Services (Florida), LLC. If you have any questions, please do not hesitate to contact me.

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B. 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.

C. On behalf of Bright House Networks Information Services, LLC

D. Number of pages: Document 1(file ending in 907): 8 pages
Document 2 (file ending in 847): 3 pages

E. Document 1: Motion for Reconsideration (w/attached cover letter)
Document 2: Request for Oral Argument

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Our File Number: 33006.3
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December 17, 2010

VIA ELECTRONIC FILING: ***FILINGS@PSC.STATE.FL.US***

Ms. Ann Cole, Clerk
Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 090501-TP - 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

Dear Ms. Cole:

Attached for electronic filing, please find a Motion for Reconsideration submitted on behalf of Bright House Networks Information Services (Florida), LLC, as well as a separate Request for Oral Argument filed contemporaneously herewith.

If you have any questions whatsoever, please do not hesitate to contact me. Thank you for your assistance in this matter.

Sincerely,

Gunster, Yoakley & Stewart, P.A.

Beth Keating

Beth Keating, Esquire
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cc: Parties of Record
Charles Murphy, Staff Counsel

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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: December 17, 2010

MOTION FOR RECONSIDERATION

Pursuant to Rule 25-22.060, Florida Administrative Code, Bright House Networks Information Services (Florida) LLC (Bright House), respectfully moves for reconsideration of the Commission's ruling on in this case, released on December 3, 2010 (the "Order").[1] Without waiving our right to seek judicial review of any and all aspects of the Order, there are two matters in particular where the Commission appears to have either misapprehended, or overlooked, relevant legal and factual considerations. We request that the Commission reconsider its ruling on those two matters.

1. Standard of Review.

The Commission will grant reconsideration when there is a point of fact or law that the Commission overlooked or failed to consider in rendering its order. *See Stewart Bonded Warehouse, Inc. v. Bevis,* 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King,* 146 So. 2d 889 (Fla. 1962); *Pingree v. Quaintance,* 394 So. 2d 162 (Fla. 1st DCA 1981). Mere reargument of matters that have already been considered is not a sufficient ground for reconsideration. *Sherwood v. State,* 111 So. 2d 96 (Fla. 3rd DCA 1959), *citing State ex. rel. Jaytex Realty Co. v. Green,* 105 So. 2d 817 (Fla. 1st DCA 1958). A motion for reconsideration will not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon

[1] Order No. PSC-10-0711-FOF-TP (December 3, 2010).

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specific factual matters set forth in the record and susceptible to review." *Stewart Bonded Warehouse, Inc.*, 294 So. 2d at 317.

Applying these standards, Bright House submits that reconsideration is appropriate with respect to two matters, discussed below.

2. The Commission Should Reconsider Its Decision To Allow Verizon To Unilaterally Cease Providing Services When Its Opinion About Applicable Law Changes.

Bright House respectfully requests that the Commission reconsider its determination to allow Verizon's proposed language in Section 50 of the contract's General Terms and Conditions to remain in place.[2] Verizon's language permits it to unilaterally determine that either the law or the underlying factual situation has changed to such an extent that it may simply stop providing a service under the agreement on 30 days notice. It is certainly true that if Verizon attempts to suspend the provision of a service that, in Bright House's view, Verizon remains obliged to provide, Bright House will – within the 30-day notice period – appear here at the Commission seeking emergency relief barring Verizon from ceasing to provide the affected service. If the Commission is unable or unwilling to render a decision within that 30-day period, Bright House will then move immediately to court, having no choice but to treat any Commission inaction as effectively denying our request for relief. The result will be rushed filings and rulings, significant expense on attorneys, and a lack of certainty on the part of both Bright House and Verizon as to the status of the service in question.

The fact that Bright House has that unwieldy option does not mean that it makes any sense to require it, if a more reasonable alternative is available – which it is. The parties agreed to a "change in law" provision so that if either party believes that changes in the legal or regulatory environment warrant a modification to the contract, they will sit down and discuss the

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[2] *See* Order at 5.

matter to see if an agreement can be reached. If not, the party seeking the change has full and unimpaired rights to bring the matter to the Commission for resolution.[3] Notably, if Verizon feels strongly that a change in law entitles it to more or less immediately cease providing a service and Bright House disagrees, Verizon is entitled – after the required negotiation period – to make a filing with the Commission requesting expedited action on its request to terminate the service in question.

The very brief discussion in the Order appears to have entirely overlooked the fact that, under the negotiated "change of law" provision in the agreement, Verizon will be able to seek and obtain expedited relief from the Commission – that is, an order permitting it to cease providing a service under the Agreement – if, in fact, such an order is appropriate. Instead, the Commission concluded that Verizon's Section 50 language was necessary to deal with the situation "in which a legal obligation is entirely eliminated and nothing remains to be negotiated."[4] In such a situation, if there is truly nothing to negotiate, then Bright House will agree to the termination of service. On the other hand, if Verizon believes things are that clear, and Bright House disagrees, Verizon has to ability to seek (and, if appropriate in the circumstances) to obtain expedited relief under the agreed-to "change of law" provision – an ability that seems not to have been considered by the Commission in any way. As a result, the justification for giving Verizon the unilateral right to cease providing service is, to put it mildly, highly attenuated.[5] .

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[3] This provision is Section 4.6 of the Contract's General Terms and Conditions, and is not in dispute.

[4] Order at 5.

[5] In practical terms, we can assume either that the parties will discuss disagreements about Verizon's obligations in good faith, or that they will act strategically and in bad faith. If the parties will act in good faith, then if Verizon's obligation to perform some service has legally dissipated, there will be no problem – the parties will agree on a reasonable schedule for the termination of the service. But if in good faith Verizon and Bright House ***disagree,*** there is no conceivable reason to tilt the contractual

Finally, we note that adoption of Verizon's language in Section 50 will not cut down on the number of disputes between the parties. The only result will be that, if a dispute arises, Bright House will be forced by the 30-day time period in Section 50 to proceed with emergency, expedited legal and regulatory filings in all cases where it cannot convince Verizon – within the space of at most two weeks or so – to "confess error" and withdraw a termination notice for a particular service. Considering that Verizon is free to request expedited relief under the "change in law" provision of Section 4.6 of the contract – which, again, the Commission appears not to have considered – it is appropriate for the Commission to reconsider its ruling regarding Section 50 of the contract and – as Bright House has requested – strike that provision from the final agreement.

3. The Commission Should Reconsider Its Decision To Permit Verizon To Charge Tariffed Special Access Rates For Facilities Used To Carry Third-Party Toll Traffic, And To Deny Bright House The Right To Designate The Point Of Interconnection For Such Traffic.

In two related issues – Issue No. 24 and Issue No. 36 – Bright House requested contract provisions that recognize that when an interexchange carrier (IXC) routes traffic from its network, through Verizon's tandem, and then onward to Bright House's network (or for traffic that flows in the opposite direction), the traffic in question is "exchange access" traffic within the meaning of Section 251(c)(2) of the Communications Act. That is, Section 251(c)(2) requires Verizon to interconnect with Bright House, at any technically feasible point, for the

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playing field in favor of Verizon – which is what its Section 50 does – rather than simply requiring the parties to bring the matter to the Commission. On the other hand, if one assumes that the parties will act strategically and in bad faith, Commission intervention before changing the contractual status quo is critical. That is, while one can imagine that Bright House might (unreasonably) resist allowing Verizon to cease providing a service that is no longer required, one can at least as easily imagine Verizon (unreasonably) claiming that its obligation to provide some essential service has ended. In that case, there is obviously no reason to allow Verizon to take unilateral action to which Bright House objects. Again, the logical thing to do is to require disputes to be submitted to the Commission for resolution before the contractual status quo is altered. This is what is required by the "change of law" provision in Section 4.6 of the agreement.

"transmission and routing of telephone exchange service and exchange access." For the exchange of traffic subject to this statutory provision, Bright House gets to select the (technically feasible) point of interconnection, and the affected interconnection arrangements and services are priced at the "Total Element Long Run Incremental Cost."

Bright House explained that this traffic is plainly "exchange access" within the meaning of the statute. Obviously, if this claim is correct, Section 251(c)(2) applies and Bright House's position must prevail. However, there is no evidence in the Order that the Commission ever considered this central Bright House argument.[6] Indeed, while the statute expressly requires interconnection for the "transmission and routing of ... exchange access," and while Bright House expressly argued that third-party IXC traffic constituted "exchange access" traffic subject to the statute, the "Decision" on this issue does not cite the statute, does not quote the statutory language, and, indeed, never uses the key term "exchange access" at all. The only reasonable conclusion in these circumstances is that the Commission overlooked or failed to consider this point of law in rendering its decision. *See Stewart Bonded Warehouse, Inc. v. Bevis,* 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King,* 146 So. 2d 889 (Fla. 1962); *Pingree v. Quaintance,* 394 So. 2d 162 (Fla. 1st DCA 1981).[7]

We emphasize that we are not arguing here that the Commission considered and rejected our central statutory argument on this point. We recognize that reconsideration would not be

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[6] *See* Order at 8-10.

[7] Specifically, the Commission appears to have overlooked, or failed to consider, the following points: Traffic bound to or from third-party IXCs is plainly "exchange access" traffic within the meaning of 47 U.S.C. § 153(16) (defining the term "exchange access"). Interconnection under 47 U.S.C. § 251(c)(2) is required for "exchange access" traffic, so Section 251(c)(2) clearly covers third-party IXC long distance traffic. *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") at ¶ 191 (noting that a carrier's ***own*** toll traffic is not eligible, on its own, for Section 251(c)(2) interconnection). The Commission is bound to apply these rules and rulings in resolving arbitrations. 47 U.S.C. § 252(c).

appropriate in those circumstances, and that our remedy would be to file an action in federal court seeking reversal.[8] Our concern is that there is no evidence from the face of the Order that our central statutory argument was ever considered by the Commission ***at all.*** To overlook and/or fail to consider this key argument does warrant reconsideration.

For these reasons, we respectfully request that the Commission reconsider its decision with respect to Issue Nos. 24 and 36 in this matter and, upon such reconsideration, conclude that since third-party IXC traffic is plainly "exchange access" traffic within the meaning of Section 251(c)(2), that that section applies to both the physical interconnection arrangements between the parties for exchanging third-party IXC traffic, as well as the pricing applicable to those physical arrangements.

WHEREFORE, Bright House respectfully requests that the Commission reconsider its Order in this matter, in the respects stated above.

Respectfully submitted this 17th day of December, 2010.

By: _____

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[8] *See* 47 U.S.C. § 252(e)(6).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via Electronic Mail on December 17, 2010 to:

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