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 ORDER NO. PSC-11-0141-FOF-TP ISSUED: March 1, 2011

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR
RONALD A. BRISÉ

FINAL ORDER

BY THE COMMISSION:

Case Background

A hearing was held in this Florida Public Service Commission ("Commission") Docket on May 25, 2010. The issues in the case were addressed by a panel at the November 9, 2010 Commission Conference and Order No. PSC-10-0711-FOF-TP ("Order") was issued on December 3, 2010. On December 17, 2010, Bright House Networks Information Services (Florida) LLC ("Bright House") filed its Motion for Reconsideration of the Order ("Motion for Reconsideration") and Request for Oral Argument. An Amended Request for Oral Argument ("Amended Request for Oral Argument") was filed by Bright House the same day. On December 27, 2010, Verizon Florida LLC ("Verizon") filed its Opposition to Motion for Reconsideration and Request for Oral Argument ("Opposition"). The substance of the Bright House Motion for Reconsideration relates to Hearing Issues 7, 24 and 36.[1] This Commission has jurisdiction pursuant to Chapters 364 and 120, Florida Statutes.

Amended Request for Oral Argument

Bright House asserts the following in support of its Amended Request:

> Oral argument would aid the Commissioners in their evaluation of the nuanced and complex issues raised in Bright House's Motion. Moreover, Bright House believes that oral argument would facilitate the Commissioner's deliberations of these points the

[1] **Issue 7**: Should Verizon be allowed to cease performing duties provided for in this agreement that are not required by applicable law?
Issue 24: Is Verizon obliged to provide facilities from Bright House's network to the point of interconnection at total element long run incremental cost ("TELRIC") rates?
Issue 36: What terms should apply to meet-point billing, including Bright House's provision of tandem functionality for exchange access services?

> decisions upon which will have lasting impact on these companies, as well as broader implications on the market as a whole.

In its Opposition, Verizon argues that "Bright House has offered no valid reason for the Commission to grant oral argument on its Motion. Contrary to Bright House's argument, the Motion raises no 'nuanced or complex issues' that oral argument would help the Commission to evaluate." After evaluating perceived failures of Bright House's underlying Motion, Verizon concludes that "[t]he Commission should deny Bright House's Amended Request for Oral Argument, along with its Motion. Bright House gives no indication that it would do anything at oral argument other than re-argue points already in the record or try to introduce new evidence and argument into the record, both of which would be improper on reconsideration."

Granting or denying a request for oral argument is within the sole discretion of this Commission.[2] Upon review, we do not find that this Commission would benefit from oral argument because Bright House's arguments are adequately contained in its Motion for Reconsideration. Accordingly, we shall deny Bright House's Amended Request for Oral Argument.

Motion for Reconsideration

The parties agree that: 1) reconsideration is only appropriate when there is "a point of fact or law that this Commission overlooked or failed to consider in rendering its order," pursuant to *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981); 2) reconsideration is not for reargument of "matters that have already been considered," pursuant to *Sherwood v. State*, 111 So. 2d 96 (Fla. 3d DCA 1959), *citing State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958); and, 3) reconsideration will not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review," pursuant to *Stewart Bonded Warehouse*, 294 So. 2d at 317. The referenced standards are consistent with our prior Orders.[3] We have also recognized that:

> [a]n opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered.[4]

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[2] Rule 25-22.0022(3), Florida Administrative Code.

[3] *See e.g.*, Order No. PSC-08-0549-PCO-TP, issued August 19, 2008, in Dockets Nos. 070691-TP and 080036-TP, *citing:* Order No. PSC-07-0783-FOF-EI, issued September 26. 2007; Order No. PSC-07-0561-FOF-SU; issued July 5, 2007, in Docket No. 060285-SU; Order No. PSC-06-1028-FOF-EU, issued December 11, 2006, in Docket No. 060635-EU.

[4] Order No. PSC-08-0549-PCO-TP, issued August 19, 2008, in Dockets Nos. 070691-TP and 080036-TP, *quoting* Jaytex, 105 So.2d at 819.

Hearing Issue 7

Bright House

In its Motion for Reconsideration, Bright House asks that this 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." This subject was addressed by us as Issue 7 in the hearing. In support of its Motion for Reconsideration, Bright House argues the following: 1) The language permits Verizon to unilaterally stop providing service on 30 days notice. 2) Unilateral action by Verizon may force Bright House to seek emergency relief from this Commission or from a court. 3) The result will be rushed filings and rulings, significant legal expenses, and lack of certainty as to the status of the service in question. 4) It would be more reasonable to rely on the "change in law" provision[5] in the contract which includes a negotiation period and the right to bring a dispute to us for resolution. 5) We have overlooked that "under the negotiated 'change in law' provision in the agreement, Verizon will be able to seek and obtain expedited relief from [us] – that is, an order permitting it to cease providing a service under the Agreement – if, in fact such an order is appropriate." 6) Instead, we found 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.'" (quoting Order at 5). 7) Expedited relief is available to Verizon "under the agreed-to 'change in law' provision-- an ability that seems not to have been considered by [us] in any way." 8) The "justification for giving Verizon the unilateral right to cease providing services is, to put it mildly, highly attenuated." 9) The adoption of Verizon's language in Section 50 will not cut down on disputes and Verizon has the option of expedited relief under the "change in law" provision of Section 4.6 of the contract. 10) We did not consider the relief available to Verizon under the "change in law" provision. Bright House asks that we strike Section 50 from the final agreement.

Verizon

In its Opposition, Verizon recounts language from our Order as follows: the Interconnection Agreement is not a mutual voluntary agreement; Verizon is allowed to cease performing duties under the agreement that are not required by applicable law; depending on circumstances, cessation will be handled pursuant to the "change in law" or the "withdrawal of services" provisions of the contract; "withdrawal of services" applies when the duty to provide service is eliminated entirely and thus, there is nothing to negotiate.

Verizon asserts that Bright House offers no valid basis for reconsideration and is instead rearguing various points already considered by this Commission. Bright House has previously made, and this Commission previously considered, arguments that the contested language will permit Verizon to make unilateral determinations regarding contract obligations, lead to more disputes, result in rushed filings, increase expenses, and, create a lack of certainty. Providing extensive record citations, Verizon observes that these arguments have been made by Bright

[5] The parties refer to this provision as both "change in law" and "change of law". There is also variation between upper and lower case letters. For consistency, we have has used "change in law" throughout, even within quotations by the parties.

House in its witness testimony, in its prehearing statement, at hearing, in its post hearing brief, and in its post hearing reply brief. Verizon asserts that these arguments were expressly considered and rejected by this Commission.

Verizon reiterates that reargument of matters that have already been considered is not a sufficient ground for reconsideration and asserts the following: 1) Bright House is merely repackaging its prior arguments. 2) If the option of expedited relief under the "change in law" provision was overlooked by this Commission, it is because expedited relief was not specifically argued by Bright House and cannot be raised at this time as a grounds for reconsideration. 3) The expedited process argument is just a variation of the claim made by Bright House throughout the proceeding that the "change in law" provisions are sufficient and the "withdrawal of services" provisions are not needed. 4) We rejected Bright House's same arguments that were raised in its post hearing brief. 5) We specifically acknowledged Bright House's argument that the "withdrawal of services" language in GTC Section 50 is not needed in light of the procedures under Section 4.6 of the ICA. 6) We ruled more broadly that "Verizon did not have to pursue any recourse **at all** from [this] Commission. Rather, [we] held that, if Verizon does not have a legal obligation to provide service or make a payment, it can stop providing the service or making the payment." (emphasis in Opposition). In such a situation, no relief from this Commission is required.

Decision

Having reviewed the Bright House Motion for Reconsideration, the Verizon Opposition, and the record, we find that Verizon is persuasive in its argument that Bright House is simply rearguing its case regarding Issue 7. This is an insufficient ground for reconsideration pursuant to *e.g., Sherwood v. State*, 111 So.2d 96 (Fla. 3rd DCA 1959) and prior Commission Orders. Similarly, we find that Verizon is persuasive in its assertion that the availability of expedited relief under the "change in law" provisions of Section 4.6 is not properly raised for the first time by Bright House on reconsideration.[6]

The issue of whether the language in Section 50, "withdrawal of services," was needed in light of the procedures available to Verizon in Section 4.6 "change in law," was addressed throughout the proceeding, in our staff's post hearing recommendation, in the Order, and when the matter was considered by this Commission in our post hearing vote. There was a statement from the bench that Verizon had been persuasive in its argument that Section 50 was needed *in addition* to Section 4.[6].[7] We considered the Section 4.6 procedures and determined that a procedure other than Section 4.6 is nonetheless, "needed to address the situation in which a legal obligation is eliminated and nothing remains to be negotiated." We found that circumstances would dictate whether the Section 4.6 or Section 50 provisions should be followed.

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[6] *See e.g.,* Order No. PSC-99-1453-FOF-TP, issued on July 26, 1999, in Docket No. 981008-TP. (Having raised an argument for the first time in a motion for reconsideration, the party had "not identified anything that [the Commission] overlooked or failed to consider in rendering [its] decision.").

[7] November 9, 2010 Agenda Conference, Item 12 TR at 9-10.

Upon review, based on the foregoing, we shall deny the Bright House Motion for Reconsideration of Issue 7.

Hearing Issues 24 and 36

Bright House

Bright House asks that we reconsider our decision in two related issues and determine that "since third-party [interexchange carrier] traffic is plainly 'exchange access' traffic within the meaning of Section 251(c)(2) [of the Act], 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."

In support of its Motion, Bright House asserts the following: 1) It asked for contract provisions that recognize that when an interexchange carrier (IXC) routes traffic from its network, through Verizon's tandem, and onward to Bright House's network, the traffic is "exchange access" traffic within the meaning of Section 251(c)(2) of the Communications Act. 2) Section 251(c)(2) requires Verizon to interconnect with Bright House, at any technically feasible point, for the "transmission and routing of telephone service and exchange access." 3) For the exchange of traffic subject to this statutory provision, A) Bright House gets to select the (technically feasible) point of interconnection and affected interconnection arrangements, and B) services are priced at total element long run incremental cost ("TELRIC"). 4) In the proceeding, Bright House argued that the traffic at issue is "exchange access" within the meaning of the statute. If this argument is correct, Bright House must prevail; however, there is no evidence in the Order that we considered this central argument. 5) Specifically, the Commission appears to have overlooked, or failed to consider, the following points: A) 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");[8] B) 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; and C) this is supported by *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) (emphasis in Motion). Bright House concludes that we are bound to apply these rules and rulings in resolving arbitrations pursuant to 47 U.S.C. § 252(c).

Concisely stated, Bright House argues that

> [W]hile 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

[8] Definition renumbered as 47 U.S.C. § 153(20), effective October 8, 2010.

> "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.

Verizon

Generally, Verizon asserts that we had no reason to make any ruling about whether third-party access traffic sent over the Access Toll Connecting ("ATC") trunks fits the "exchange access" definition under section 251(c)(2), because we correctly found that these trunks are not used for section 251(c)(2) interconnection. Verizon argues the following: 1) no law supports the Bright House proposals which rely on "an interpretation of the FCC's rules that neither the FCC nor any state Commission has adopted in the Act's 14-year history;" 2) Bright House admitted that its proposal to unilaterally designate the meet point for jointly provided access services would be an exception to industry rules; 3) there is no precedent for Bright House's "conflation of meet-point billing arrangements with the Act's local interconnection regime;" 4) the Bright House record includes no citations or references to any jurisdictions in which a TELRIC pricing scheme for ATC trunks is in place; 5) relevant portions of the Order repeatedly refer to "exchange access," repeatedly cite section 251(c)(2), and this Commission's recognition of Bright House's central argument is stated in the Order as follows:

> Integral to Bright House's argument regarding pricing for access toll connecting trunks is an assertion that the facilities are used to provide "exchange access." Bright House relies on 251(c)(2)(A) of the Act, which imposed on ILECs an interconnection obligation "for the transmission and routing of telephone exchange and exchange access;"

6) the Order quotes Bright House's brief for its theory regarding TELRIC pricing for the ATC trunks used to route third-party long-distance and acknowledges Bright House's argument that section 251(c)(2) gives it the unilateral right to designate the meet point for exchange access traffic carried to and from third-party IXCs; and 7) Bright House's theory failed because the provision of access service to a third party is part of the access regime, not part of the § 251(c)(2) interconnection regime. Verizon concludes that Bright House simply disagrees with our analysis and asserts that such disagreement is not a sufficient ground for reconsideration.

Decision

Having reviewed the Bright House Motion for Reconsideration, the Verizon Opposition, and the record, we find Verizon to be persuasive in its argument that Bright House is simply rearguing its case regarding Issues 24 (regarding TELRIC pricing) and 36 (regarding meet-point billing and tandem functionality). This is an insufficient ground for reconsideration pursuant to *Sherwood v. State*, 111 So.2d 96 (Fla. 3rd DCA 1959) and prior Commission Orders.

In our Order, we 1) repeatedly referred to § 251(c)(2), quoted Bright House arguments regarding § 251(c)(2), and quoted § 251(c)(2); repeatedly referred to "exchange access;" repeatedly referred to "TELRIC;" repeatedly referred to "meet-point;" and referred to 47 U.S.C.

§ 153(16).[9] We did not specifically reference *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 F.C.C.R. 15499 (1996) at ¶ 191; however, we do not find this authority to be dispositive and we are not required to specifically reference all arguments made in the proceeding.[10]

Our review of TELRIC pricing for the facilities at issue is found in the Order at pages 6 through 10. Bright House asserts that, on the issue of exchange access, its "concern is that there is no evidence from the face of the Order that [its] central statutory argument was ever considered by the Commission ***at all***" (emphasis original). However, we addressed Bright House's argument that ATC trunks should be considered "exchange access" pursuant to § 251(c)(2)(A) of the Act and specifically rejected Bright House's argument that the trunks in question are used "in support of interconnection" under § 251(c)(2)(A) of the Act, instead finding that ATC trunks do not exist for the mutual exchange of traffic between two carriers, and thus can not be described as "exchange access."

We based our decision regarding TELRIC pricing on the following: 1) the requirements of 47 CFR 51.5; 2) an FCC determination in the TRRO that companies such as Verizon are not required to provide unbundled access to entrance facilities such as the facilities at issue; 3) Bright House's failure, when asked directly, to identify any FCC rulings supporting the Bright House position that the facilities at issue are interconnection facilities under § 251(c)(2); and 4) a determination that recent cases relied upon by Bright House apply to the pricing of facilities for the mutual exchange of traffic as opposed to the pricing of access toll connecting trunks.

Our review of meet-point billing and tandem functionality is found in the Order at pages 11 through 15. Bright House asserts that we failed to consider its § 251(c)(2) "exchange access" argument in the context of meet-point billing traffic. Bright House argues that Section 251(c)(2) governs interconnection for meet-point billing traffic and that Bright House has the unilateral right to designate the meet-point for jointly-provided service to IXCs in the same way it designates the point of interconnection (POI) for the transmission and routing of other telephone exchange and exchange access service. In its Opposition, Verizon recounts the various ways in which we considered the Bright House arguments and characterizes our decision as a determination that the provision of access service to a third party is part of the access regime, not part of the § 251(c)(2) interconnection regime.

We considered the Bright House arguments and determined that when two LECs jointly provide access service to a third-party IXC, the meet-point should be mutually decided by both parties. In reaching this decision, we determined that Bright House's unilateral meet-point determination argument does not comport with the MECAB/MECOD guidelines recognized by both parties as industry-standard. We noted that the POI and the meet-point are selected

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[9] Order at 20. We track that definition in our Order at page 26 as follows, "[e]xchange access refers to the use of local facilities for the origination and termination of telephone toll services," and at page 27 as follows, "[t]he parties agree that exchange access means the offering of access to telephone exchange services for the purpose of the origination and termination of telephone toll services." While this is in the context of a related issue, we were clearly mindful of the meaning of "exchange access." *See also* comment at footnote 8.

[10] *See Jaytex*, 105 So.2d at 819.

differently and are for different types of traffic. The meet-point for the exchange of third party IXC traffic is mutually decided by Bright House and Verizon. In contrast, pursuant to §251(c)(2), Bright House is entitled to determine the POI for the linking of two networks for the exchange of mutual traffic. We determined that accepting Bright House's argument[11] would require us to ignore the distinction between a meet-point and a POI.

Upon review, we find that Bright House has not presented sufficient grounds for reconsideration; Bright House simply disagrees with our analysis and is impermissibly rearguing its case. Thus, we shall deny Bright House's Motion to Reconsider Issues 24 and 36.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Bright House Amended Request for Oral Argument is hereby denied. It is further

ORDERED that the Bright House Motion for Reconsideration of Hearing Issue 7 is hereby denied. It is further

ORDERED that the Bright House Motion for Reconsideration of Issues 24 and 36 is hereby denied. It is further,

ORDERED that this Docket shall remain open pending the filing and administrative review of an interconnection agreement which conforms to the decisions reached in this Docket; thereupon the Docket shall be closed administratively.

By ORDER of the Florida Public Service Commission this 1st day of March, 2011.

ANN COLE
Commission Clerk

(S E A L)

CWM

[11] Referred to by Verizon in its Opposition as Bright House's "conflation of meet-point billing arrangements with the Act's local interconnection regime."

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.