

**Ruth Nettles**

**From:** jctaylor@carrallison.com  
**Sent:** Tuesday, February 12, 2008 5:00 PM  
**To:** Filings@psc.state.fl.us  
**Cc:** Samuel\_Cullari@Comcast.com; Chris McDonald  
**Subject:** Amended Response to Verizon's Motion to Dismiss  
**Attachments:** Amended Response to Verizon's Motion to Dismiss.PDF

Dear Sir or Madam:

Attached is Comcast's Amended Response to Verizon's Motion to Dismiss in Docket No. 080036-TP, filed on behalf of Comcast by

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 Carr Allison  
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Please call or write with any questions.

Sincerely

**Bio**    **Location**    **V-card**

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2/13/2008



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February 12, 2008

**Via E-Mail Transmission Only For Electronic Filing**

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

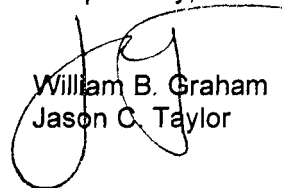
RE: Comcast Phone of Florida, LLC v. Verizon Florida, LLC  
Complaint of Comcast Phone of Florida, LLC  
Docket Number: 080036-ATP

Dear Ms. Cole:

Please accept this correspondence and Comcast Phone of Florida, L.L.C.'s Amended Response to Verizon Florida's Motion to Dismiss Complaint or Stay Proceeding. The response is eight (8) pages.

Please contact us if you have any questions or you require any additional action by us for filing of this Complaint with the Florida Public Service Commission.

Respectfully,



William B. Graham  
Jason C. Taylor

JCT

cc: Dulaney L. O'Roark, III, VP/General Counsel, Verizon Florida LIP  
David Christian, Verizon, Florida LIP  
Patrick Wiggins, Supervising Attorney, FPSC  
Beth Salak, Dir. Competitive Markets and Enforcement, FPSC

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Comcast Phone of Florida, L.L.C.,  
d/b/a Comcast Digital Phone,

Complainant,

v.

FPSC Docket Number: 080036-TP

Verizon Florida, L.L.C. (TL 710),

Defendant.

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**COMCAST PHONE OF FLORIDA, L.L.C.'S AMENDED RESPONSE TO  
VERIZON FLORIDA'S MOTION TO DISMISS COMPLAINT OR STAY PROCEEDINGS**

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Comcast Phone of Florida, L.L.C., d/b/a Comcast Digital Phone, through its attorneys, respectfully files its response to Verizon Florida LLC 's Motion to Dismiss Complaint or, in the Alternative, Stay Proceedings ("Verizon Motion") filed on or about February 4, 2008.

Verizon's Motion to Dismiss or, alternatively, stay this proceeding, contains several arguments regarding the interpretation of Florida statutes and Administrative Rules based on the *disputed characterization of Verizon's actions*. Accordingly, many of those arguments are improper to be raised in a Motion to Dismiss Comcast's Complaint. Particularly as to the Motion, the Commission should consider only those arguments regarding the ability of Comcast to state a cause of action in its Complaint. Specifically as to those arguments, Verizon's Motion is insufficient to establish a basis for dismissal or, alternatively, a stay of this action and should be denied.

Further, Verizon's Motion to Dismiss contains arguments that are not applicable to the allegations in Comcast's Complaint and, therefore, should not be considered by the Commission.

**1. Comcast's Complaint States a Claim for Relief Before this Commission.**

Verizon argues Comcast has failed to state a cause of action. This claim is entirely

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unsupported. Verizon makes the arguments that (1) retention marketing is permitted by Florida law, (2) only state law is applicable to this action and (3) Verizon's actions are permissible pursuant to Federal law (despite its second assertion that only state law is applicable). Verizon's claims are based largely on its contention that its retention marketing efforts utilize information obtained through a retail transaction with Comcast. Verizon's attempt to characterize its position as a retail provider of telecommunications services in regard to Comcast is inaccurate. As a result of this factually inaccurate characterization, Verizon's Motion is premised on a flawed analysis of the Florida Statutes and Commission determinations cited in Comcast's Complaint.

Specifically, Comcast alleges Verizon takes information that it learns entirely from its wholesale-side interactions with Comcast and uses it to support its own retention and retail marketing efforts. Verizon has yet to dispute this claim and acknowledges it receives the advance notice of customer disconnection from Comcast, not from Verizon's own efforts.<sup>1</sup> Verizon also admits it then engages in retention marketing using this advance notice.<sup>2</sup> This marketing occurs prior to any switch being completed and, therefore, is squarely within a time frame where such activity is prohibited, consistent with the Commission's prior determinations in *Final Order on BellSouth's Alleged Use of Carrier to Carrier Information*, Order No. PSC-03-1392-FOF-TP, December 11, 2003 (In re Complaint by Supra Communications and Information Systems, Inc., against BellSouth Telecommunications, Inc., Docket No. 031349-TP) and *Final Order on BellSouth's Key Customer Tariff's*, Order No. PSC-03-0726-FOF-TP, June 19, 2003 (In re Petition for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs, Docket No. 20119-TP).

Further, Comcast's Complaint clearly establishes a cause of action based on its

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<sup>1</sup> See Verizon Motion at 5 ("Verizon receives a local service request ('LSR') for local number porting ('LNP') from Comcast . . .").

<sup>2</sup> See *id.* (Verizon "provides additional information to the customer" "in response to" the customer loss notification that arises from Comcast's submission of the LSR).

allegations of anticompetitive behavior in violation of Florida Statutes §364.01(4)(g); that Verizon is favoring itself unfairly (in violation of Florida Statutes §364.10(1); and that Verizon is failing to facilitate the porting of numbers (in violation of Florida Administrative Code §25-4.082).<sup>3</sup> Accordingly, Verizon's assertion that Comcast has failed to state a cause of action is unsupported both factually and by any legal authority pertinent to this action.

**2. Verizon's Characterization of Its Actions as Retail Activities is Inaccurate.**

Verizon admits that it gets the advance knowledge of customer disconnects not from its own retail efforts, but instead from information that Comcast submits to Verizon. Furthermore, Verizon chooses to ignore the fact it receives this information on its wholesale side, by means of a wholesale carrier-to-carrier ordering document (the LSR). Instead, Verizon attempts to focus the transaction on the retail user of the service, which provided no information to Verizon and made no direct request for number porting.

Verizon further attempts to remove the focus from the wholesale transaction by failing to acknowledge that the source of the information used by its retail department is the wholesale transaction. Verizon alternatively describes the retail involvement only as necessary to the process and a benefit to the customer in order to ensure there is no double billing during the switch. However, Verizon fails to describe to the Commission that the sole means of the retail department receiving the information is the wholesale transaction between Comcast and Verizon based on the switching customer's request. Verizon's characterization is false and the Commission should reject it.

**3. Florida Law Does Not Authorize Retention Marketing.**

Using the characterization described above as its platform, Verizon claims that Florida Statutes §364.051 "specifically permits Verizon to engage in retention marketing." Verizon

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<sup>3</sup> Section 25-4.082, *Florida Administrative Code* requires the local provider to port the number *upon request* of the acquiring carrier (emphasis added). It does not permit the local carrier to unreasonably delay in porting the number, particularly to conduct illegal marketing activities, as demonstrated by Exhibit A to Comcast's Complaint

Motion at 8. But that is a plain misrepresentation of the statute. Section 364.051 relates to price-based regulation of incumbent Florida telephone companies. In dealing with prices for non-basic services subsection 364.051(5)(a)(2) addresses the question of whether a regulated carrier is allowed to lower its rates for non-basic services to match the rates offered by competitors. As the material quoted by Verizon shows, Florida law allows a regulated carrier, such as Verizon, to lower its rates to match those of a competitor. However, this language does not support Verizon's efforts herein.

Comcast's Complaint is not based on allegations regarding Verizon's pricing. The focus of this action is Verizon's marketing practices, specifically its illegal use of wholesale information. The statutory language does not prohibit Verizon from using a lawful marketing practice, such as taking out an ad in the newspaper. However, Verizon is not permitted to use an unlawful marketing practice, to provide information about a lawful price.

Prior Commission precedent establishes that Section 364.051 does not relate to marketing practices. Order No. PSC-03-0726-FOF-TP included the principal issue regarding whether the prices in BellSouth's promotional tariffs were lawful. In addressing that issue, the Commission relied on Section 364.051. By contrast, while addressing BellSouth's marketing practices, the Commission made no reference to Section 364.051. The absence of Commission reliance on Section 364.051 in addressing marketing issues demonstrates the irrelevance of that section to the issues raised in this action.

Further, the section of the statute that Verizon relies upon relates to pricing of non-basic services. Although Verizon's unlawful marketing efforts include some non-basic services, Verizon is using its advance knowledge of customer departures to try to keep such customers as consumers of Verizon's basic services. As a result, the statute cannot be fairly read to permit Verizon's conduct in this case.

Finally, while, as noted above, Section 364.051 does not embrace marketing practices, if it did it would not help Verizon. The statute also makes clear that the Commission retains the

overarching obligation to protect the competitive process from abuses such as those perpetrated by Verizon here. After granting regulated carriers substantial pricing flexibility to meet competitors' offers, the statute continues:

However, the local exchange telecommunications company ***shall not engage in any anticompetitive act or practice***, nor unreasonably discriminate among similarly situated customers.

Florida Statutes §364.051 (5)(a)(2) (emphasis added). And, anticipating that even the seemingly unobjectionable ability to set prices to meet competition might create problems, the legislature provided, in the very next subsection of the law, a specific directive that:

[t]he commission shall have continuing regulatory oversight of nonbasic services for purposes of ... preventing cross-subsidization of nonbasic services with revenues from basic services, and ***ensuring that all providers are treated fairly in the telecommunications market***.

Florida Statutes §364.051(5)(b) (emphasis added). Accordingly, if Section 364.051 relates to marketing practices at all, it means that, with respect to marketing practices, the Commission must ensure that "all providers are treated fairly." Comcast believes it is unfair in the extreme to allow Verizon to exploit its wholesale-side advance knowledge of which customers are leaving Verizon — which Comcast has no choice under current industry standards and conditions but to provide — to try to prevent those customers from leaving.

#### **4. The Commission Is Not Limited To Enforcing Federal Restrictions.**

Contrary to Verizon's position, the scope of the Commission's power includes the ability of the Commission to enforce Florida law. Specifically, Verizon takes the position that "if federal law permits the challenged conduct, the Commission must deny the claim." *Id.* at 10. Verizon's analysis is incorrect. This Commission has jurisdiction over Verizon's marketing practices as they relate to Verizon's intrastate services. In fact, state law prohibits all anticompetitive and unfair carrier practices, including any and all marketing practices that are anticompetitive and unfair.

**5. Verizon's Arguments as to Federal Law are Irrelevant.**

The FCC's CPNI rules discussed by Verizon are irrelevant. It is clear from Comcast's Complaint that it is making no allegations regarding Verizon's actions as they relate to federal law in this proceeding. Comcast is not raising any claims based on federal law. Comcast's Complaint solely establishes a cause of action based in state law, therefore Verizon's federal law arguments should be disregarded.

**6. Public Policy Does Not Support Verizon.**

Verizon claims that public policy supports its unfair marketing efforts. Verizon Motion at 16-17. It argues that consumers benefit from having the information about Verizon's services that its retention marketing efforts provide, so those efforts must, themselves, be deemed to be pro-competitive.

This is wrong for several reasons. First, nothing prevents Verizon from undertaking generally applicable marketing efforts — newspaper, TV, radio or Internet ads, bill-stuffers, etc. — to inform consumers of Verizon's offerings.

Second, the technical actions required of telephone service require coordination between the losing and winning provider in order to make the transition possible without disrupting service. It is the required coordination between Comcast and Verizon that makes Verizon's unfair retention marketing efforts possible.

**7. There is No Reason to Stay This Case.**

Verizon suggests that this Commission should stay consideration of this case based on the idea that Comcast has brought "parallel claims" to the FCC. Verizon Motion at 17-18. This language mischaracterizes the status of the proceedings at the FCC.

Comcast believes Verizon's retention marketing also violates federal law, and is therefore entitled to file a complaint at the FCC (or in federal court) seeking damages from Verizon as compensation for those violations. See 47 U.S.C. §§206-08.

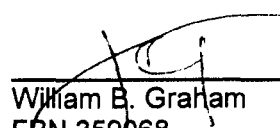
Whether Comcast pursues a federal action is of no relevance to this cause of action. A



federal action is wholly separate from Comcast's complaint before the Commission in this proceeding which is based entirely on Florida law. The Commission can enforce federal law and the FCC has taken no preemptive action precluding states from addressing anti-competitive behavior by local exchange carriers in their respective states. In fact, the FCC has specifically stated that individual states are "uniquely qualified to assess the local competitive landscape and determine whether additional safeguards are necessary."<sup>4</sup>

Based upon the foregoing reasons Verizon's Motion to Dismiss or Stay Proceedings should be denied.

Respectfully submitted,



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<sup>4</sup> *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd. 14860, 14918 para. 134 (2002).

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been served via U.S. Mail, this 12<sup>th</sup> day of February, 2008, to the persons listed below:

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