

State of Florida



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

## -M-E-M-O-R-A-N-D-U-M-

**DATE:** February 21, 2008

**TO:** Office of Commission Clerk (Cole)

**FROM:** Office of the General Counsel (Mann, Poblete) *RE of CSB JK PK LSH*  
Division of Competitive Markets & Enforcement (Beard, Hallenstein, Casey)

**RE:** Docket No. 070691-TP – Complaint and request for emergency relief against Verizon Florida, LLC for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Bright House Networks Information Services (Florida), LLC, and its affiliate, Bright House Networks, LLC. *[Handwritten signature]*

**AGENDA:** 03/04/08 – Regular Agenda – Motion to Dismiss – Oral Argument Requested - Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Edgar

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\070691.RCM.DOC

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### Case Background

On November 16, 2007, Bright House Networks Information Services (Florida) LLC, and Bright House Networks, LLC (together, "Bright House") filed with the Commission its Complaint and Request for Emergency Relief ("Petition"). Bright House alleges that Verizon Florida, LLC, ("Verizon") is engaging in anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, Florida Statutes, and is failing to facilitate the transfer or

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customers' numbers to Bright House upon request, contrary to Rule 25-4.082, Florida Administrative Code.

On December 6, 2007, Verizon filed its Motion to Dismiss Complaint or, in the Alternative, Stay Proceedings ("Motion"). Verizon also filed on December 6, 2007, its Request for Oral Argument on the Motion. Verizon alleges that Bright House's complaint should be dismissed because it has failed to state a claim for which relief can be granted. Verizon also seeks dismissal, or in the alternative a stay, on the independent ground that Bright House has already put the same issues before the Federal Communications Commission ("FCC"), thus giving rise to the potential for conflicting decisions and wasteful and duplicative proceedings.

On December 13, 2007, Bright House filed its Opposition to the Motion of Verizon Florida, LLC to Dismiss Complaint or, in the Alternative, Stay Proceedings ("Response"). Bright House argues that Verizon's motion should be rejected, as Bright House has stated a claim for which relief can be granted.

On February 11, 2008, Bright House filed its formal Accelerated Docket complaint with the FCC.

Staff's recommendation addresses Verizon's Motion to Dismiss and its request for Oral Argument.<sup>1</sup>

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<sup>1</sup> Staff intends to present to the Commission at the March 18, 2008, Agenda, a similar complaint against Verizon in Docket No. 080036-TP, Complaint and request for emergency relief against Verizon Florida LLC for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, Florida Statutes, and for failure to facilitate transfer of customers' numbers to Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone.

**Discussion of Issues**

**Issue 1:** Should the Commission grant Verizon's Request for Oral Argument?

**Recommendation:** Yes. Staff recommends that the Commission grant Verizon's Request for Oral Argument, because staff believes that it would be beneficial for both parties to orally address Verizon's Motion to Dismiss. Staff recommends allowing each party five minutes to present its argument, if granted. (R. MANN)

**Staff Analysis:**

*Verizon*

On December 6, 2007, Verizon filed its Motion to Dismiss Complaint or, in the Alternative, Stay Proceedings. Concurrently with its Motion, Verizon filed its Request for Oral Argument, pursuant to Rule 25-22.0022, Florida Administrative Code. Verizon states as its basis for oral argument its belief that it would help the Commission in developing a complete understanding of how Florida law concerning retention marketing applies to facilities-based competition. Further, Verizon states that oral argument would also assist the Commission in determining whether a stay is appropriate in light of Bright House's parallel challenge at the FCC to Verizon's retention marketing program.

*Bright House*

Bright House does not object to oral argument on Verizon's Motion.

*Analysis*

Staff believes that it would be beneficial for the Commission to hear from the parties regarding Verizon's Motion to Dismiss or to stay the proceedings. This should not, however, include argument by the parties on the merits of this case. Bright House has not had a meaningful opportunity to address Verizon's alternative motion for stay, because at the time of filing its Response, Bright House had not yet filed its formal complaint with the FCC. Bright House's Response to Verizon's motion to stay was thus based on the fact existing at the time, that there was no live matter filed with the FCC. Since then, however, as noted in the Case Background, Bright House filed its formal Accelerated Docket complaint with the FCC. Accordingly, staff recommends that the Commission hear these arguments directed solely to the Motion to Dismiss or stay the proceedings. If the Commission grants oral argument, staff recommends that each party be allowed five minutes to present its argument.

**Issue 2:** Should the Commission grant Verizon's Motion to Dismiss Bright House's Petition for failing to state a claim for which relief can be granted or, alternatively to dismiss the Petition for the independent reason that Bright House should not be allowed to pursue collateral claims before this Commission and the FCC simultaneously?

**Recommendation:** No. Staff recommends that Verizon's primary Motion to Dismiss, as well as its alternative reason to dismiss, be denied, because Bright House's Petition does state a cause of action upon which relief may be granted and Verizon has presented no sufficient basis to conclude that dismissal for Verizon's stated independent reason would be appropriate. **(R. MANN)**

## **ARGUMENTS**

### **Verizon's Motion to Dismiss**

Verizon alleges that Bright House's complaint should be dismissed because it has failed to state a claim for which relief can be granted. Verizon also seeks dismissal, or in the alternative a stay, on the independent ground that Bright House has already put the same issues before the FCC, giving rise to the potential for conflicting decisions and wasteful and duplicative proceedings. [Motion, pages 1, 5]

Verizon contends that its retention marketing program is lawful under state and federal law and is also pro-competitive. Verizon asserts that contrary to Bright House's allegation that Verizon is misusing information received by its wholesale operations, Verizon depends solely on information that it receives due to its role as a retail services provider. [Motion, pages 1-3]

Verizon states that for the purposes of its Motion, it takes Bright House's factual allegations at face value. Verizon asserts that Bright House is not a Verizon wholesale customer. Rather, Bright House uses its own facilities to compete with Verizon, and Bright House acknowledges that it does not use Verizon unbundled network elements or resell services, and it co-locates with Verizon only for the purpose of exchanging traffic. [Motion, page 3]

First, Verizon asserts that, in accordance with industry standards, when Verizon receives a local service request (LSR) for local number porting (LNP) from Bright House, Verizon issues a retail disconnect order to ensure that the customer's retail service is discontinued at the appropriate time. In response to the *retail* loss notification and disconnect request, Verizon provides additional information to the customer to assist him or her in deciding whether to leave or remain with Verizon. If a customer chooses to remain with Verizon, Verizon may, at the customer's request, stop the disconnection and porting activity. [Motion, pages 2, 3; 5, 6]

Verizon contends that the design of its systems to generate a retail service disconnect request upon receipt of an LNP request is a convenience for the customer. This assures coordination of the porting-out of the customer's telephone number and disconnection of the retail service. If it were necessary for the departing customer to ask Verizon to discontinue service, Verizon states it undoubtedly would have the right to engage in retention marketing. Thus, when a new facilities-based provider submits an LNP request on a retail customer's behalf,

the new carrier is necessarily acting as the customer's agent, both for purposes of submitting an instruction to disconnect the customer's retail service at a specific time and for purposes of initiating a number port. Absent such an agency relationship, the new carrier would have no independent authority to ask Verizon to cancel service. Accordingly, Verizon argues, it is acting on *retail* information obtained from retail disconnect orders. [Motion, pages 6, 7]

Second, Verizon argues that pursuant to Section 364.01(4)(b), Florida Statutes, the Commission is charged with encouraging competition. Verizon asserts that, consistent with this responsibility, the Commission must allow an ILEC to respond to an offering that a competitive provider makes to one of its customers:

Nothing contained in this section [364.051] shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, nonbasic services in a specific geographic market or to a specific customer by deaveraging the price of any nonbasic service, packaging nonbasic services together or with basic services, using volume discounts and term discounts, and offering individual contracts. However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers. Section 364.051(5)(a)2, Florida Statutes.

Verizon asserts that its retention marketing program enables it to meet the offerings of Bright House and other competitors who are not Verizon's wholesale customers. Verizon argues that its retention marketing thus complies with Florida law and is in agreement with the legislature's directive to the Commission to promote competition. [Motion, page 8]

Third, Verizon asserts that the Commission's jurisdiction in this case is limited to the application of state law, as the Commission has recognized in *BellSouth Carrier-to-Carrier Information Order*.<sup>2</sup> Verizon further states, however, that:

In the *BellSouth Key Customer Tariffs Order*<sup>3</sup> and *BellSouth Carrier-to-Carrier Information Order* relied upon by Bright House, the Commission predicated jurisdiction on state law, but looked to the FCC's *CPNI Reconsideration Order*<sup>4</sup> and *2003 Slamming Order*<sup>5</sup> to ascertain the rules for winback and retention

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<sup>2</sup> *In re: Complaint by Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. regarding BellSouth's alleged use of carrier-to-carrier information*, Docket No. 030349-TP, Order No. PSC-03-1392-FOF-TP (December 11, 2003) ("*BellSouth Carrier-to-Carrier Information Order*").

<sup>3</sup> *In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional tariffs and for investigation of BellSouth's promotion price and marketing practices by Florida Digital Network, Inc.*, Docket No 020119-TP et al., Order No. PSC-03-0726-TP (June 19, 2003) ("*BellSouth Key Customer Tariffs Order*").

<sup>4</sup> *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Forbearance, 14 FCC Rcd 14409, 14445, ¶ 67 (1999) ("*CPNI Reconsideration Order*").

<sup>5</sup> *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 5099, ¶ 27 (2003) ("*2003 Slamming Order*").

marketing programs that it will apply under state law. [Motion, page 9 at Footnote 27; page 10]

Fourth, Verizon argues that the Commission's approach above, of seeking guidance from federal law makes two points: 1) "The Commission must ensure that its decisions do not conflict with applicable Federal law. Thus, if federal law permits the challenged conduct, the Commission must deny the claim;" and 2) "Because the Commission has not found that Florida law creates any requirements beyond those imposed by the FCC, if the Commission determines that Verizon's retention marketing program does not violate the FCC's requirements, Verizon's program also complies with Florida law." [Motion, page 10]

Verizon argues that the FCC rules specifically permit the use of Customer Proprietary Network Information (CPNI) in Verizon's retention marketing efforts, because Verizon legitimately learns of an imminent customer switch through its retail operations, as are the circumstances here. That is, Verizon argues that the CPNI it receives from Bright House is by virtue of its role as a *retail* service provider, not through its provision of wholesale service or network facilities to Bright House. [Motion, pages 10, 11]

Fifth, Verizon denies that its retention marketing efforts violate Section 222(b) of the Telecommunications Act because Verizon's *retail* operations independently and properly obtain notice of a customer's decision to cancel retail service, and Verizon's marketing representatives do not make use of another carrier's information in their marketing efforts. Verizon states that it provides no wholesale services to Bright House in connection with the processing of an LNP request. Verizon argues that there is thus no carrier-to-carrier service involved that would violate the prohibition of Section 222(b), against retention marketing when a carrier gains notice of the imminent cancellation of a customer through the provision of carrier-to-carrier service. [Motion, pages 13, 14]

Sixth, Verizon argues that it does not violate the FCC's *2003 Slamming Order* because Verizon is not the "executing carrier" in the LNP process. Instead, Verizon disconnects the customer's service and prepares the number for porting, but the neutral LNP database administrator effects the actual porting. The change in the carrier is actually effected by Bright House when it enables its voice product at the customer's premises and the number porting administrator, as requested by Bright House, instructs its computers to direct any carrier's calls to the customer's number to Bright House's switch. [Motion, pages 14, 15]

Additionally, Verizon argues that Bright House's complaint should be dismissed for the independent reason that Bright House has filed a complaint with the FCC. Verizon asserts that because this Commission in its orders has interpreted Florida law by looking to the FCC's federal retention marketing requirements, a decision by the FCC almost certainly would be dispositive of Bright House's issues. If the FCC renders a decision first, the efforts before the Commission will be wasted. If the Commission rules first, there is a risk that there might be a conflict between federal and state law. Alternatively, Verizon states that the Commission should stay these proceedings while the FCC clarifies the application of federal law to Verizon's retention marketing practices. [Motion, pages 17, 18]

Bright House's Response in Opposition

Bright House asserts that it has stated a claim for which relief can be granted. Bright House has alleged that Verizon takes information that it receives entirely from its wholesale-side interactions with Bright House and uses it to initiate its retail marketing efforts. Bright House has alleged that Verizon admits this use and acknowledges that it receives advance notice of imminent customer disconnection from Bright House, not from Verizon's own efforts. Bright House has alleged that Verizon admits that it then engages in retention marketing efforts based on that advance notice. [Response, pages 2, 3]

Bright House also alleges that Verizon's conduct falls directly within the scope of the two Commission orders cited previously in this recommendation (*BellSouth Key Customer Tariffs Order* and *BellSouth Carrier-to-Carrier Information Order*). Bright House alleges that Verizon is violating Sections 364.01(4)(g), and 364.10(1), Florida Statutes, and is violating Rule 25-4.082, Florida Administrative Code, by failing to facilitate the porting of numbers. [Response, page 3]

First, Bright House presents the factual allegation that Verizon receives information from Bright House, and that this is not through its retail side, but by means of a wholesale, carrier-to-carrier, ordering document (LSR). Bright House must coordinate this LSR and LNP process with Verizon to ensure the protection of the retail customer's service. Bright House asserts that the LSR and LNP process are wholesale-level activities. Bright House alleges that Verizon uses this advance notice of wholesale, proprietary information to engage in retention marketing efforts. [Response, pages 2-4]

Second, Bright House asserts that Verizon is wrong to state that Florida law, and specifically Section 364.051, Florida Statutes, supports its retention marketing efforts. Bright House argues that Verizon misreads Section 364.051, Florida Statutes. Bright House asserts that this statute relates to price-based regulation, as opposed to earnings-based regulation, and that Section 364.051(5)(a)2, Florida Statutes, cited by Verizon, specifically addresses whether a regulated carrier is allowed to lower its rates for non-basic services to match the rates offered by competitors. Bright House asserts that its Petition, however, complains not of Verizon's prices, but of its marketing practices, and Verizon's attempts to retain customers of its basic services. Bright House notes that the Commission's own precedent makes it clear that this section of the statute relates to pricing rather than marketing practices. Bright House notes that this statute also articulates that the Commission retains its overarching obligation to protect the competitive process from abuses: "However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice . . ." Section 364.051(5)(a)2, Florida Statutes. [Response, pages 4-6]

Third, Bright House argues that the Commission is not limited to enforcing federal restrictions in applying state law. Bright House states that Verizon is wrong to assert that "if federal law permits the challenged conduct, the Commission must deny the claim." Bright House states that the Commission has jurisdiction over Verizon's marketing practices as they relate to intrastate services and that authority does not derive in any way from federal law. Bright House further asserts that state law prohibits all anticompetitive and unfair carrier

practices, while federal law on the other hand, in Section 222 of the Telecommunications Act, forbids certain specific unfair and anticompetitive marketing practices. Bright House states that even if Verizon's retention marketing practices were outside the prohibition of Section 222, it would not mean that the Commission cannot enforce Florida laws to ban those practices. It would simply demonstrate that Florida law prohibits some practices that are not also explicitly prohibited by federal law. Bright House explains that this would not constitute a conflict, but rather, a fairly common situation of state law being stricter than federal law. Bright House posits that where abusive marketing practices are concerned, therefore, Florida Law is broader than federal law. [Response, pages 7, 8; Footnote 6]

Fourth, Bright House responds to Verizon's assertion that Verizon is permitted by federal rules to use CPNI by pointing out that Bright House has not raised as an issue the use of Customer Proprietary Network Information (CPNI). Rather, Bright House argues, this case involves the misuse by Verizon of competitively sensitive information that is made available to Verizon by Bright House - - that is, Carrier Proprietary Information (CPI). Bright House provides Verizon with the information of pending customer disconnections and that is why that particular information is "proprietary information of, and relating to" Bright House, for purposes of Section 222(a), and why it is "proprietary information from" Bright House, as provided in Section 222(b). Bright House states in Footnote 7 of its Response that Bright House's customer list is the information Verizon is taking advantage of and that it is competitively sensitive information, entitled to proprietary protection. [Response, page 9]

Fifth/Sixth (restated), Bright House argues that Verizon is violating federal law - - both Section 222 of the Communications Act and the FCC's *Slamming Orders* - - and states that Bright House is not proceeding before the Commission under federal law but rather, under state law. Bright House cites to the *CPNI Reconsideration Act*. In paragraph 76, the FCC states that "competition is harmed if **any** carrier uses carrier-to-carrier information, such as switch or PIC change orders, to trigger retention marketing campaigns and [we] prohibit such actions accordingly." (Emphasis in original).<sup>6</sup> In paragraph 77, the FCC stated in part,

The [FCC] previously determined that carrier change information is carrier proprietary information under section 222(b). In the *Slamming Order*, the Commission stated that pursuant to section 222(b), the carrier executing a change "is prohibited from using such information to attempt to change the subscriber's decision to switch to another carrier." Thus, ***where a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer, it does so in violation of section 222(b)***. *Id.* at ¶ 77 (footnotes omitted, emphasis added).

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<sup>6</sup> *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Forbearance, 14 FCC Rcd 14409, ¶ 76 (1999) ("CPNI Reconsideration Order").



From paragraph 78, Bright House cites the following:

We agree with SBC and Ameritech that section 222(b) is not violated if the carrier has independently learned from its retail operations that a customer is switching to another carrier; in that case, the carrier is free to use CPNI to persuade the customer to stay, consistent with the limitations set forth in the preceding section. We thus distinguish between the “wholesale” and the “retail” services of a carrier. If the information about a customer switch were to come through independent, retail means, then a carrier would be free to launch a “retention” campaign under the implied consent conferred by section 222(c)(1). *Id.* at ¶ 78 (footnotes omitted).

Bright House asserts that it does not rely on federal law in its Petition, and that the Commission is not bound by federal law in enforcing Florida’s prohibitions on anticompetitive and unfair conduct. [Response, pages 9-11]

Bright House argues that there is no reason to stay this case. No relevant argument was put forth by Bright House in its Response, other than there was no active complaint filed with the FCC at the time: “A proceeding at the FCC would only begin when and if Bright House files a complaint there, which it has not yet done.” [Response, page 14]. At the time of filing Bright House’s Response on December 13, 2007, the only active process at the FCC was an unproductive mediation session that was held on December 10, 2007. It has only been since December 10, 2007, that the FCC’s Market Disputes Resolution Division of the Enforcement Bureau, authorized Bright House to file an Accelerated Docket complaint<sup>7</sup>; a pre-complaint conference was held before the FCC’s Enforcement Bureau. Not until February 11, 2008, did Bright House file its Accelerated Docket formal complaint with the FCC.

### **Staff Analysis:**

#### **Standard of Review**

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When “determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side.” *Id.* The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

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<sup>7</sup> See FCC, Enforcement Bureau, Market Disputes Resolution Division, Letter dated January 7, 2008, Re: Dispute Concerning Verizon’s Customer Retention Marketing Practices

It appears that there is at least one factual allegation at issue between the parties. Bright House alleges in its Petition that it presents information to Verizon by means of a wholesale, carrier-to-carrier, ordering document - a local service request (LSR). Verizon argues that this information comes to its *retail* operations, because when it receives an LSR for local number porting (LNP) from Bright House, Verizon then issues a *retail* disconnect order to ensure the customer's *retail* service is discontinued at the appropriate time. Verizon emphasizes that this comprises a *retail* loss notification and disconnect request. This, in itself, defeats the Motion to Dismiss.

Staff believes that Verizon fails to demonstrate that, when accepting all of Bright House's allegations of material fact as facially correct, the Petition still fails to state a cause of action for which relief can be granted. Verizon's argument that it possesses retail information, independently and properly obtained by its retail operations, is just that - argument with Bright House's factual allegation based on Verizon's own interpretation of the process by which it receives the information. At best, Verizon simply proposes an alternate fact. This, in and of itself, does not dispel Bright House's alleged fact that it provides information to Verizon's wholesale side, which is then used by Verizon's retail operations to engage in illegal retention marketing. The remainder of Verizon's arguments rely on the premise that Verizon is using appropriate *retail* information in its retention marketing program. Staff believes that some of Verizon's arguments may involve legal and/or policy matters that could implicate a disputed issue of material fact. At the very least, however, staff believes that to make a valid analysis and a well-reasoned judgment on these arguments will require further fact finding through discovery in the continuation of this proceeding before presenting them for the Commission's decision.

Upon review of the parties' arguments and consistent with previous Commission decisions, staff recommends that Verizon's Motion to Dismiss be denied, because Bright House's Petition does state a cause of action upon which relief may be granted and there is insufficient support by Verizon for its argument that the case should be dismissed because Bright House has filed a complaint under federal law with the FCC.

Verizon's independent reason for dismissing Bright House's Petition is that it should not be allowed to pursue claims here and at the FCC simultaneously. Verizon bases this argument for dismissal on the possibility that the FCC will rule before the Commission does and the efforts and resources used here will have been wasted; or the Commission might rule first and possibly create a conflict between federal and state law, or even be subject to federal preemption if the FCC rules to the contrary.

Staff is unaware of any proscription against proceeding through state law claims before this Commission and simultaneously proceeding at the FCC with its complaint that Verizon has violated specific prohibitions of federal law and seeking damages pursuant to 47 U.S.C., Sections 206-08. Neither has Verizon cited to any legal basis for such proscription. Staff knows of no legal or policy requirement to dismiss this Petition because of the possibility of conflicts arising or resources "wasted." Staff believes that Verizon's Motion to Dismiss must fail on this independent ground, as well.

**Issue 3:** Should the Commission grant Verizon's Motion in the Alternative - - to grant a Stay of these proceedings pending resolution of the matter filed with the FCC?

**Recommendation:** No. The Commission should not grant a stay of these proceedings pending resolution of the matter filed with the FCC. **(R. MANN)**

**Staff Analysis:** The Commission should not grant a stay pending resolution of the matter filed with the FCC.

Verizon argues that if Bright House's Petition is not dismissed, the proceedings before this Commission should be stayed. Verizon contends that a stay would allow the FCC the opportunity to clarify the application of federal law to the marketing practices at issue here.

Bright House alleged that at the time of filing its Petition, it had lost between 500 and 1,000 customers who had signed up with Bright House, but whose minds were changed by Verizon's retention marketing efforts. Further, Bright House alleged that it continues to lose more customers every day to Verizon's retention marketing and that the current number of customers lost translates into lost revenues of over \$2,000,000 over the next several years.

The Commission has previously recognized that abeyance of a PIU dispute pending the outcome of a federal proceeding with substantially the same parties and issues would advance the Commission's policies regarding judicial economy and avoid the possibility of inconsistent federal and state rulings.<sup>8</sup> Nonetheless, it is within the Commission's sound discretion to determine whether to grant or deny a stay based on the particular circumstances of the case before it.

Staff believes that the circumstances here militate against granting a stay pending resolution of the federal claim. On December 10, 2007, an unsuccessful mediation session was attended by the parties before the FCC staff. By letter dated January 7, 2008, the FCC's Market Disputes Resolution Division of the Enforcement Bureau, authorized Bright House to file an Accelerated Docket complaint.<sup>9</sup> On February 11, 2008, Bright House filed its Accelerated Docket complaint. The FCC's Accelerated Docket procedure provides a 60-day deadline from the date of filing for FCC action. Staff notes that the Accelerated Docket Rule provides: "If it appears at any time that a proceeding on the Accelerated Docket is no longer appropriate for such treatment, Commission staff may remove the matter from the Accelerated Docket either on its own motion or at the request of any party." Title 47 Code of Federal Regulations, Section 1.730. This allows for the possibility that the proceeding before the FCC could continue for much longer than the 60 days provided for in the Enforcement Bureau's Accelerated Docket.

Staff believes that a stay of these proceedings before the Commission would be inappropriate, considering the apparent prejudice that would befall Bright House and its

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<sup>8</sup> Order No. PSC-02-0081-PCO-TP, In re: Complaint by BellSouth Telecommunications, Inc. against Global Crossing Telecommunications, Inc. regarding practices in reporting percent interstate usage for compensation for jurisdictional access services, Docket No. 011378-TP (January 14, 2002).

<sup>9</sup> See FCC, Enforcement Bureau, Market Disputes Resolution Division, Letter dated January 7, 2008, Re: Dispute Concerning Verizon's Customer Retention Marketing Practices.

customers by an avoidable delay in the processing of its complaint before the Commission. There is no certainty that an FCC decision will resolve this dispute or provide guidance or clarification for the Commission in addressing Verizon's retention marketing program. Neither is there certainty that conflict or inconsistency will arise between state and federal law without a stay in this proceeding. There is not even certainty that the proceeding before the FCC will result in a decision within sixty days. The alleged prejudice to Bright House and its customers in this matter does appear certain, however.

If the Commission agrees with staff on Issues No. 2 and No. 3, staff does not intend to allow the Commission's or the parties' resources to simply be wasted while Bright House's federal complaint travels through the FCC's accelerated hearing process. Staff intends to request that the Prehearing Officer issue an Order Establishing Procedure requiring Verizon to promptly file its answer to Bright House's Petition and setting timetables for discovery and other prehearing procedures. Staff recommends that the Commission deny the alternative motion for a stay pending resolution of the matter filed with the FCC.

**Issue 4:** Should this Docket be closed?

**Recommendation:** No. If the Commission approves staff's recommendation in Issue 2, this Docket should be held open pending further proceedings. **(R. MANN)**

**Staff Analysis:** If the Commission approves staff's recommendation in Issue 2, this Docket should be held open pending further proceedings.