BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.	DOCKET NO. 070691-TP ORDER NO. PSC-08-0180-FOF-TP ISSUED: March 24, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER GRANTING REQUEST FOR ORAL ARGUMENT, AND DENYING MOTION TO DISMISS COMPLAINT OR, IN THE ALTERNATIVE, STAY PROCEEDINGS

BY THE COMMISSION:

I. 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 (F.S.), and is failing to facilitate the transfer or customers' numbers to Bright House upon request, contrary to Rule 25-4.082, Florida Administrative Code (F.A.C.).

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.

II. Oral Argument

On December 6, 2007, Verizon filed its Request for Oral Argument, pursuant to Rule 25-22.0022, F.A.C. Verizon stated that it believed oral argument would help this Commission in developing a complete understanding of how Florida law concerning retention marketing applies to facilities-based competition. Verizon stated that oral argument would also assist us in determining whether a stay is appropriate in light of Bright House's parallel challenge to Verizon's retention marketing program filed with the FCC. Bright House did not object to oral argument on Verizon's Motion.

We granted Verizon's Request for Oral Argument, but limited argument to five minutes for each party.

III. Motion to Dismiss

Verizon's Argument

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.

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.

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.

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.

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.

Second, Verizon argues that pursuant to Section 364.01(4)(b), F.S., we are charged with encouraging competition. Verizon asserts that, consistent with this responsibility, this 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 complies with Florida law and is in agreement with the legislature's directive to this Commission to promote competition.

Third, Verizon asserts that our jurisdiction in this case is limited to the application of state law, as we have recognized in *BellSouth Carrier-to-Carrier Information Order.*[1] Verizon further states, however, that:

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[1] 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).

> In the *BellSouth Key Customer Tariffs Order*[2] 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*[3] and *2003 Slamming Order*[4] to ascertain the rules for winback and retention marketing programs that it will apply under state law.

Fourth, Verizon argues that our 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."

Verizon argues that the FCC rules specifically permit the use of Customer Proprietary Network Information (CPNI) in Verizon's retention marketing efforts under the circumstances here, because Verizon legitimately learns of an imminent customer switch through its retail operations. 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.

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.

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

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[2] 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").

[3] 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").

[4] *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").

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.

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 our 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. Verizon argues that if the FCC renders a decision first, the efforts before this Commission will be wasted. If this Commission rules first, there is a risk that there might be a conflict between federal and state law.

Bright House's Response

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.

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), F.S., and is violating Rule 25-4.082, F.A.C., by failing to facilitate the porting of numbers.

Addressing Verizon's arguments numbered one through six, above, Bright House presents first its allegation that Verizon receives information from Bright House, and that this is not through Verizon's 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.

Second, Bright House asserts that Verizon is wrong to state that Florida law, and specifically Section 364.051, F.S., supports its retention marketing efforts. Bright House argues that Verizon misreads Section 364.051, F.S. Bright House asserts that this statute relates to price-based regulation, and that Section 364.051(5)(a)2, F.S., 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 our own precedent makes it clear that this section of

the statute relates to pricing rather than marketing practices. Bright House also notes that this statute articulates that we retain our 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, F.S.

Third, Bright House argues that we are 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 we have 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 this 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, the scope of Florida Law is broader than federal law.

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.

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 this 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).[5] In paragraph 77, the FCC stated in part,

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[5] 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").

> 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).

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 this Commission is not bound by federal law in enforcing Florida's prohibitions on anticompetitive and unfair conduct.

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).

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. The existence of this disputed allegation in Verizon's argument defeats Verizon's Motion to Dismiss.

Verizon fails to demonstrate that, when accepting all of Bright House's material allegations 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 simply an argument with Bright House's allegation based on Verizon's own interpretation of the process by which it receives the information. At best, Verizon merely proposes an alternate fact. This alternate fact does not dispel Bright House's allegation that it provides information to Verizon's wholesale side, and that this information 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. Some of Verizon's arguments may involve legal and/or policy matters that could implicate a disputed issue of material fact. To make a well-reasoned judgment on these arguments, however, requires fact finding through the continuation of this proceeding before this Commission.

Verizon asserts the independent argument that Bright House 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 this Commission does and the efforts and resources used here will have been wasted; or that we might rule first and possibly create a conflict between federal and state law, or even be subject to federal preemption if the FCC makes a later, contrary ruling.

We know of no proscription against Bright House proceeding through its state law claims before this Commission and simultaneously proceeding through 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. Verizon has not cited to any legal basis for such proscription. Nor is there a legal or policy requirement to dismiss this Petition because of the possibility of conflicts arising or resources "wasted." Verizon's Motion to Dismiss must fail on this independent ground, as well.

Upon careful review of the parties' written and oral arguments and consistent with our previous decisions, we deny Verizon's Motion to Dismiss, because we find that Bright House's Petition does state a cause of action upon which relief may be granted. We find further that there is insufficient support by Verizon in its argument that this case should be dismissed because Bright House has filed a complaint under federal law with the FCC.

V. Motion to Stay Proceedings

Verizon's Argument

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 retention marketing practices at issue here. Verizon argues that to move forward in this case now would be wasteful for the parties and this Commission. Verizon asserts that while this Commission has jurisdiction to decide these kinds of disputes under Florida law, we must act consistently with federal law, as our prior rulings have made clear. Verizon believes that there is a great risk, if we try to get out in front of the FCC, of issuing a ruling that would be inconsistent with a later ruling by the FCC.

Bright House's Response

Bright House argues that there is no reason to stay this case. Bright House alleges that by November 2007, 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. Bright House further alleges that it continues to lose customers every day to Verizon's retention marketing and that these lost customers translate into lost revenues of over $2,000,000 over the next several years. Bright House asserts that this impacts its business and interferes with its ability to acquire capital and roll out new services. Also, while there are some individual customers who may benefit from Verizon's retention marketing efforts, Bright House believes there is a broader public interest concern that the process of competition is being subverted.

Analysis

It is within our discretion to determine whether to grant or deny a stay based on the particular circumstances of the case before us. We have carefully considered the circumstances here, which involve an issue, or issues, of state law, and we deny Verizon's motion to stay these proceedings. Accordingly, this docket shall remain open and our staff shall work with the parties to discuss how the docket should proceed and bring a recommendation to the Prehearing Officer.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Verizon's Request for Oral Argument is hereby granted. It is further

ORDERED that Verizon's Motion to Dismiss is hereby denied. It is further

ORDERED that Verizon's Alternative Motion to Stay Proceedings is hereby denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 24th day of March, 2008.

ANN COLE
Commission Clerk

(S E A L)

HFM

DISSENT

Commissioner Katrina J. McMurrian dissents with respect to the majority's decision to deny Verizon's request for a stay of the proceeding (Issue 3) with the following opinion:

Consistent with my comments during the Commission's consideration of the matter on March 4, 2008, I support a reasonable stay of our proceeding in this docket. The FCC's action may ultimately prove helpful to our deliberation and may allow for more efficient use of the Commission's resources. Furthermore, I do not believe that granting a reasonable stay period would have any detrimental impact on consumers, nor do I believe that such a decision would serve as an abdication of our jurisdiction or our responsibilities in any manner.

Accordingly, I must respectfully dissent from the majority's decision to deny Verizon's request for a stay of these proceedings pending resolution of the matter filed with the FCC (Issue 3). With respect to all other issues addressed herein, I concur with the majority.

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.