Dorothy Menasco

From: Ann Bassett [abassett@lawfla.com]
Sent: Thursday, April 24, 2008 4:52 PM
To: Filings@psc.state.fl.us
Subject: Docket No. 080036-TP
Attachments: 2008-04-24, 080036, Comcast Response to Verizon's Motion for Reconsideration.pdf

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The Docket No. is 080036-TP - Complaint and request for emergency relief against Verizon Florida, L.L.C. 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 Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone.

This is being filed on behalf of Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone

Total Number of Pages is 15

Comcast Phone of Florida, L.L.C.'s Response to Verizon Florida LLC's Motion for Reconsideration

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April 24, 2008

BY ELECTRONIC FILING
Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 080036-TP

Dear Ms. Cole:

Enclosed for filing on behalf of Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone ("Comcast") is an electronic version of Comcast Phone of Florida, L.L.C.'s Response to Verizon Florida LLC's Motion for Reconsideration in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

FRS/amb
Enclosure
cc: Parties of Record

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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
In re: Complaint and request for emergency relief against Verizon Florida, L.L.C. 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 Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone. /	Docket No. 080036-TP Filed: April 24, 2008

COMCAST PHONE OF FLORIDA, L.L.C.'S RESPONSE TO VERIZON FLORIDA LLC'S MOTION FOR RECONSIDERATION

Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone ("Comcast"), hereby files this Response to the Verizon Florida LLC ("Verizon") April 17, 2008, Motion for Reconsideration ("Verizon Motion"), and states that the Verizon Motion should be denied as untimely, that the basis for the Motion is completely groundless and without any legal effect, and that the proceedings before this Commission have not and are not preempted by the Federal Communications Commission. In support of this opposition, Comcast states as follows:

I. Verizon's Motion for Reconsideration is Untimely

1. On March 24, 2008, in Docket No. 070691-TP (the Bright House case) the Commission entered its Order Granting Request for Oral Argument, and Denying Motion to Dismiss Complaint or, in the Alternative, Stay Proceedings. Order No. PSC-08-0180-FOF-TP

(Bright House Case Order). This Order did not serve to bring this proceeding to a close. Verizon is now seeking reconsideration of this Order as a part of its Motion.

2. On April 2, 2008, in Docket No. 080036-TP (the Comcast Case) the Commission entered its Order Denying Motion to Dismiss, Denying Request For Stay, and Consolidating the Comcast Case with the Bright House Case. Order No. PSC-08-0213-FOF-TP (Comcast Case Order). The Order did not serve to bring this proceeding to a close. Verizon is now seeking reconsideration of this Order as well as a part of its Motion.

3. The Bright House Case Order and the Comcast Case Order are each non-final orders. Section 120.52(7), Florida Statutes; *Western and Southern Financial Group v. Howe*, 933 So.2d 675 (Fla. 1st DCA 2006); *Ford v. Agency for Persons with Disabilities*, 932 So.2d 294, (Fla. 4th DCA 2005); *Hill v. Division of Retirement*, 687 So.2d 1376 (Fla. 1st DCA 1997).

4. Rule 25-22.0376, Florida Administrative Code, entitled "Reconsideration of Non-Final Orders," provides in pertinent part that "[a]ny party who is adversely affected by a non-final order may seek reconsideration by the Commission panel assigned to the proceeding by filing a motion in support thereof within 10 days after issuance of the order."[1]

5. The instant Verizon Motion was filed on April 17, 2008. The Verizon Motion was filed 24 days after the Commission's Order denying the Bright House Complaint, and 15 days after the Commission's Order denying the Comcast Complaint.[2] Verizon offers no

[1] Since the time limits established in Rule 25-22.0376, F.A.C. are calculated on filing the motion within 10 days of issuance of the non-final order, and are not dependant on "service" of the non-final order, the procedural rules *allowing for five additional days "when service is made by U.S. Mail" do not apply to motions for reconsideration.* See Rule 28-106.103, F.A.C. Thus, any motion for reconsideration of the Commission's April 2, 2008 Order was due to be **filed** by no later than April 12, 2008.

[2] Verizon has also cited Rule 25-22.060, F.A.C. as authority for its Motion. That rule is entitled "Motion for Reconsideration of Final Orders." As set forth herein, none of the Commission's Orders are Final Orders. Thus, Rule 25-22.060, F.A.C. is not applicable to the two non-final orders that are the subject of its Motion.

authority under which the Commission should ignore its valid procedural rules to "accept [its] motion out of time." Verizon's Motion is untimely and must, as a matter of law, be denied.[3]

II. The Commission has Exclusive Jurisdiction to Resolve a Complaint Alleging a Violation of Florida Law

6. The Complaint filed by Comcast in January alleges that the retention marketing activities engaged in by Verizon violate Sections 364.01(4), 364.3381, and 364.10, Florida Statutes. The Bright House Complaint filed last November makes the same state law allegations. Neither complaint before this Commission seeks a ruling regarding the interpretation or application of federal law. Similarly, the complaint filed by Comcast and Bright House at the FCC raises only federal law claims and there are no state law issues raised by the federal complaint.

7. The jurisdiction of the Florida Public Service Commission with respect to the authority granted to it by the Florida Legislature in Chapter 364, Florida Statutes, is not concurrent or primary, but rather ***exclusive***. Section 364.01(2), Florida Statutes, provides that "[i]t is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies." The Florida Supreme Court has recognized this exclusive grant of jurisdiction on many different occasions. *See, e.g., Sprint-Florida, Inc. v. Jaber*, 885 So.2d 286, 291-292 (Fla. 2004); *Florida Interexchange Carriers Association v. Beard*, 624 So.2d 248, 251 (Fla. 1993).

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[3] Verizon's attempt to seek reconsideration of the Commission's Order Establishing Procedure, Order No. PSC-08-0235-PCO-TP, raises no issue that would form the basis for reconsideration. Rather, Verizon objects to the establishment of a procedural schedule, which includes the filing of testimony and the scheduling of a hearing in August, that would move this Commission's proceeding forward without staying it pending a resolution of the FCC proceeding. The Verizon Motion with respect to reconsideration of the Order Establishing Procedure is thus entirely derivative of the denial of its previous motions to dismiss the two Complaints and raises no independent substantive basis for reconsideration.

8. The violations raised by Comcast and Bright House are well pled and grounded upon the authority granted to this Commission. Section 364.01(4)(g), Florida Statutes, provides in pertinent part that "[t]he commission ***shall*** exercise its exclusive jurisdiction in order to [e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior." (emphasis added).

9. Further, Section 364.3881(3), Florida Statutes, provides that "[t]he commission shall have continuing oversight jurisdiction over cross-subsidization, predatory pricing, or other similar anticompetitive behavior and may investigate, upon complaint or on its own motion, allegations of such practices."

10. Finally, Section 364.10(1), Florida Statutes, provides that "[a] telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

11. Thus, this Commission is the sole entity with the jurisdiction and authority to determine whether the acts described in the Complaint are "anti-competitive" as that term is applied under Florida law. Indeed, the Florida Supreme Court has gone so far as to declare that if there is "at least a colorable claim that the matter under consideration falls within its exclusive jurisdiction" then the Commission "must be allowed to act." *Florida Public Service Commission v. Bryson*, 569 So.2d 1253, 1255 (Fla. 1990); see also, *Public Service Commission v. Fuller*, 551 So.2d 1210 (Fla. 1989).

12. Thus, unlike other state regulatory commissions or the FCC, this Commission must resolve those complaints sounding in Florida law, and may not defer or abdicate its exclusive jurisdiction. As such, this Commission, and this Commission only, has the jurisdiction

and duty to exclusively resolve the violations of Florida law raised by Comcast and Bright House.

13. The Verizon Motion ignores the differences between Florida and federal law and the claims raised before this Commission versus those raised before the FCC. The Verizon Motion takes the imaginative approach of taking the Comcast and Bright House state law claims and converting them into completely unrelated federal law claims and then arguing to this Commission that a non-binding FCC staff recommendation is "authority" for this Commission to reconsider and stay this proceeding until the FCC acts. This Commission should not be swayed by this misrepresentation of the Comcast and Bright House claims.

14. First and foremost, the basis for the Verizon Motion is a "Recommended Decision" of the FCC's Enforcement Bureau. Given the fact that this is only a recommended decision, and without any authoritative or dispositive legal authority, the Recommended Decision cannot be a basis for any action by this Commission. Pursuant to the FCC's own rules, this document is not a final action of the FCC. 47 C.F.R. § 1.730(h)-(i). As this Commission will recognize, a final order may reflect an entirely different outcome than a staff recommendation.

15. The fact that Verizon relies upon a staff recommendation should be sufficient enough basis to deny the Verizon Motion. However, Verizon takes the next step and argues that the final determination by the FCC as to whether Verizon's retention marketing program violates Sections 222(a) and 222(b) of the federal Telecommunications Act of 1934, as amended, at such time as it comes, will be dispositive of whether the program is anti-competitive under Florida law. This argument is akin to this Commission relying upon a Georgia PSC staff

recommendation or even a Georgia Commission final order regarding an interpretation of Georgia law, and is completely without merit.

16. In an attempt to rescue its position, Verizon tries to argue that this Commission's construction of state law has been, or is somehow linked to the FCC's construction of its statutes. However, the cases Verizon relies upon involve factually different circumstances and thus legally different issues than those presented by the Comcast and Bright House complaints. In the Key Customer Promotional Tariffs case, the issue was not retention marketing, as is the case here which involves actions by Verizon to stop a customer from changing carriers *before* the switch takes place, but rather regain marketing, which involves getting a customer to switch back to the prior carrier *after* the customer has been switched to the new carrier.[4] The issues in the Supra Complaint also involved win back marketing *after* a customer had switched away from BellSouth, and not retention marketing before a customer is switched away from Verizon as is the case here.[5] Also, the Supra Complaint cited by Verizon expressly raised violations of Section 222 of the federal Act.[6] Thus, the orders relied upon by Verizon are irrelevant to the Comcast and Bright House complaints at issue in the instant proceedings.

17. The Florida Legislature has provided this Commission with the exclusive jurisdiction to hear and resolve complaints raised under Chapter 364 such as those raised by Comcast and Bright House in their respective complaints. The FCC Enforcement Bureau *Recommended Decision is not legal authority for any action by this Commission, and even if it* is adopted by the FCC it will still have no legal effect on these consolidated dockets. The FCC final determination of the effect of federal law in its proceeding is not going to answer whether

[4] Docket Nos. 020119-TP, 020578-TP, 021252-TP, Order No. PSC-03-0726-FOF-TP, 40-44. Verizon cites this order in footnote 9 of its Motion.
[5] Docket No. 030349-TP, Order No. PSC-03-1392-FOF-TP. Verizon also cites this order in footnote 9 of its Motion.
[6] *Id.*, at 3.

under *Florida law* Verizon's retention marketing practices are anti-competitive. With a late August hearing now scheduled in this matter, by the time the Commission rules on the complaints nearly a year will have passed since the Comcast Complaint was filed and even longer since the Bright House Complaint was filed. Justice delayed is justice denied. Comcast respectfully requests the Commission dismiss this untimely and wasteful Motion and proceed to address the merits of this case without any further delay.

III. The FCC Has Not Preempted This Commission's Ability to Consider and Resolve These Complaints

18. Verizon has intimated that the Commission may not make a determination as to whether its retention marketing program constitutes anti-competitive behavior if that determination conflicts in any way with the FCC's construction of Section 222. Verizon's Motion, at ¶¶ 13-15, argues that the Commission is bound by the FCC in determining the legality of Verizon's retention marketing. In fact, Verizon went so far as to state that "[w]ere the Commission to interpret section 222, on which it has relied as the sole determinant of Florida law in this area, differently than the FCC, it would set up a clear conflict with the FCC's interpretation of its own statute." In effect, Verizon is arguing that the FCC has preempted this area of law, and that this Commission may take no action that would conflict with the FCC's position, currently in the form of a Recommended Decision that may or may not be adopted.

19. Verizon is clearly laboring under the impression that the Commission serves as nothing more than an entity existing to parrot the position of the FCC, and that the Commission has no ability to craft a construction of Chapter 364, Florida Statutes, in a manner that advances the intent of the Florida Legislature to prohibit anti-competitive behavior in any form. The basic flaw in Verizon's argument is that the Commission is not being asked to determine whether Verizon's program violates Section 222. Rather, the Commission is being asked to determine if

Verizon's use of information provided to it in the context of the carrier-to-carrier relationship to port a customer's phone number to the new carrier, may be used *before* the port occurs to engage in retention marketing under Florida law. The FCC's disposition of the federal retention marketing complaint currently before it will not preempt this Commission from finding whether Verizon's current and ongoing activity is "anticompetitive activity" under Florida law.

20. The Florida Supreme Court has had the opportunity to establish the parameters for a determination of whether a field of state regulation has been preempted by the Federal government. In *State v. Rubio*, 967 So.2d 768 (Fla. 2007), the Court held that:

> for preemption to apply defendants must be able to show that any impediment to the purpose and objectives of the federal statute's purposes caused by the state statute **must be "severe" and not merely "modest."** *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 665, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003). This impediment **must "seriously compromise important federal interests."** *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 389, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983). We stated in *Harden:* Federal preemption of a state law is "strong medicine," and is "not casually to be dispensed." [*Pharm. Research & Mfrs. of Am. v. Concannon,* 249 F.3d 66, 75 (1st Cir.2001)] (quoting *Grant's Dairy [v. Comm'r*], 232 F.3d [8,] 18 [1st Cir.2000]). This is especially true when the federal statute creates a program, such as Medicaid, that utilizes "cooperative federalism." "Where coordinated state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one." *Id.* (quoting *Wash. Dep't of Soc. & Health Servs. v. Bowen,* 815 F.2d 549, 557 (9th Cir.1987)); *see also Pharm. Research & Mfrs. of America v. Walsh,* 538 U.S. 644, 665, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003) ("The presumption against federal preemption of a state statute designed to foster public health has special force when it appears . . . that the two governments are pursuing common purposes.") (e.s.)

Id. at 773-774, quoting from *State v. Harden,* 938 So.2d 480 (Fla.2006), *cert. denied,* --- U.S. ----, 127 S.Ct. 2097, 167 L.Ed.2d 812 (2007).

21. Similarly, the FCC has addressed the issue of preemption, and has established a general rule that:

> When considering preemption, we must begin with two constitutional provisions. The tenth amendment provides that any powers which the constitution either does not delegate to the United States or does not prohibit the states from exercising are reserved to the states. These are the police powers of the states. The Supremacy Clause, however, provides that the constitution and the laws of the United States shall supersede any state law to the contrary. Article III, Section 2. Given these basic premises, state laws may be preempted in three ways: First, Congress may expressly preempt the state law. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Or, Congress may indicate its intent to completely occupy a given field so that any state law encompassed within that field would implicitly be preempted. Such intent to preempt could be found in a congressional regulatory scheme that was so pervasive that it would be reasonable to assume that Congress did not intend to permit the states to supplement it. *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Finally, preemption may be warranted when state law conflicts with federal law. Such conflicts may occur when "compliance with both Federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142, 143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Furthermore, federal regulations have the same preemptive effect as federal statutes. *Fidelity Federal Savings & Loan Association v. de la Cuesta, supra.*

In the Matter of Federal preemption of state and local regulations pertaining to Amateur radio facilities, FCC Docket 85-506, 101 F.C.C.2d 952 (September 19, 1985).

22. The Florida Supreme Court decision in *Rubio*, and the FCC decision in *Amateur radio facilities* are entirely consistent with the scope of the preemption doctrine as set forth in *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 106 S.Ct. 1890 (1986). In that case, the Supreme Court was asked to determine whether Congress had intended for federal standards to prempt state standards pertaining to certain interstate telecommunications services

and the depreciation of telecommunications plants and facilities. The Court found that rather than creating federal preemption, Section 152 of the Federal Telecommunications Act of 1934 operates as a substantial jurisdictional limitation on federal powers. 476 U.S., at 373. The Supreme Court even went so far as to state that the federal-state relationship is "naturally reconciled to define a national goal of the creation of a rapid and efficient phone service, and to enact a *dual* regulatory system to achieve that goal." 476 U.S., at 370 (emphasis in original). The Court's analysis in *Louisiana Public Service Commission* is equally applicable in this case.

23. As it relates to the regulation of telecommunications, there is and can be no question that Congress has not expressly preempted state law in this matter. Moreover, with respect to the Florida statutes at issue in this proceeding, there has been no action by the Congress or the FCC to completely occupy the questions raised by the complaints, nor is there any basis for concluding that this Commission's jurisdiction has even been implicitly preempted. Rather, as with the Medicaid program discussed in *Rubio*, the regulation of telecommunications has always involved "coordinated state and federal efforts [ ] within a complementary administrative framework, and in the pursuit of common purposes," thus triggering "[t]he presumption against federal preemption of a state statute . . . when it appears . . . that the two governments are pursuing common purposes." *Rubio* at 773-774.

24. In determining the scope of this Commission's jurisdiction, jurisdiction that the Florida Legislature and Supreme Court have found to be exclusive, there is no finding and no remedy being sought here that would constitute a direct conflict with any Federal statute or decision of the FCC. As set forth previously, Section 222 is not directly analogous to Sections 364.01, 364.10, or 364.3381, Florida Statutes, and the Commission is not being called upon to construe, apply, or penalize Verizon for violation of federal law. Even with respect to the

Federal statute having potential similarity to the state law claims raised by these complaints,, i.e. Section 201(b), the Recommended Decision did not construe that statute but rather recommended further proceedings by the FCC without a decision. However, even a determination by the FCC with respect to Section 201(b), now or later, will not be dispositive or necessarily even relevant to this Commission's interpretation of the state statutory claims at issue in this proceeding. Therefore, there is no conflict between an exercise of the Commission's jurisdiction to interpret and construe state law, and certainly not an impediment to the purpose and objectives of the federal statute's purposes that would be "'severe' and not merely 'modest.'"

25. As is clear from the decisions and actions of the Congress and the FCC, there has not been any preemption of this proceeding by the FCC. The claims raised here are well pled under state law, and there is no direct or implied preemption, nor is such preemption likely to occur in the current FCC complaint proceeding. Accordingly, there is no basis for a dismissal or stay of these proceedings, and Verizon's Motion should be denied.

IV. The Recommended Decision has no Effect on these Proceedings

26. Verizon has addressed the FCC Enforcement Bureau's Recommended Decision as though it carries the full force and effect of law. However, the Recommended Decision is merely a recommendation, and has no more effect than any other non-final agency action that can undergo change before it becomes final.[7] The Recommended Decision has no final or precedential weight whatsoever, and should not form the basis for a rehearing in this matter even if adopted by the FCC.

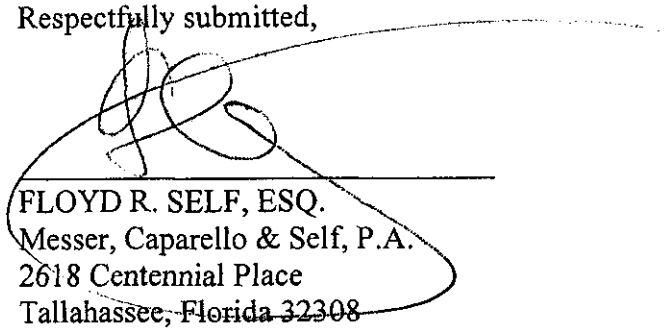
[7] As set forth herein, the standards for consideration by the Commission under Chapter 364 are not equivalent to the Federal standards in Section 222 of the Telecommunications Act of 1934, as amended, especially as limited and narrowed in the Recommended Decision. Thus, even if the Recommended Decision is adopted as final action by the FCC, the Commission should proceed with a determination of whether Verizon's retention marketing program is "anti-competitive behavior" under Florida law.

27. Verizon, which is currently benefiting from its illegal retention marketing program, would be more than happy to have the Commission sit idly by while awaiting the FCC decision. Such further delay is not warranted. If the FCC ultimately finds Verizon's actions unlawful under federal law and orders Verizon to cease such marketing, that decision would be sufficient to require Verizon to cease its practices. On the other hand, if the FCC fails to order Verizon to stop its marketing practices under the standards established in Section 222, such a decision would not preclude this Commission from finding Verizon's conduct unlawful under Chapter 364 and ordering Verizon to cease such practice. Likewise, an FCC decision to proceed to rulemaking on the Section 201(b) question does not constitute a sufficient basis for staying these proceedings since that statute has different language than the Florida statutes at issue here. Since this case involves a determination of the proper construction of state law, delay of any sort is neither necessary nor appropriate.

V. Conclusion

The Motion for Reconsideration filed by Verizon is untimely, fails to raise any issue as to the FCC's proposed action that was not considered by the Commission previously, and fails to raise any issue that would serve to diminish the Commission's exclusive jurisdiction in favor of federal preemption. Thus, Verizon's Motion for Reconsideration should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served by Electronic Mail (*) and/or U. S. Mail this 24th day of April, 2008 upon the following:

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