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BY ELECTRONIC FILING

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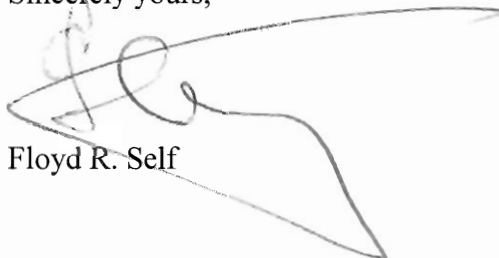
Re: Docket Nos. 070691-TP and 080036-TP

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 to Add Issues Concerning Retention Marketing Practices 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

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

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

**COMCAST PHONE OF FLORIDA, L.L.C.'S RESPONSE IN OPPOSITION TO
VERIZON FLORIDA LLC'S MOTION TO ADD ISSUES**

Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone ("Comcast"), hereby files this Response In Opposition to Verizon Florida LLC's ("Verizon") Motion to Add Issues Concerning Retention Marketing Practices ("Verizon Motion"), and states that the Verizon Motion should be denied on the basis that the Motion requests that issues be added to the hearing in this docket that are outside of the regulatory jurisdiction of the Commission, and are irrelevant to the issue of whether the retention marketing program developed by Verizon as an incumbent local exchange telecommunications company ("ILEC") in response to a customer-initiated telephone number porting request constitutes an anticompetitive practice under Chapter 364, Florida Statutes, and the rules of this Commission. In support of this opposition, Comcast states as follows:

1. The issues Verizon is attempting to inject are outside the jurisdiction of this Commission and without any probative value in the disposition of the Comcast and Bright House

Complaints. The Florida Legislature has declared that cable television services are exempt from this Commission's jurisdiction, in recognition of the determination by the Congress that cable television services are regulated exclusively by the Federal Communications Commission. Section 364.02(14)(f); 47 U.S.C. § 522.¹ Therefore, Verizon's attempt to inject issues beyond the scope of the Commission's jurisdiction should be summarily rejected.

2. Standing alone, this complete lack of any authority over the cable and broadband services Verizon is now attempting to include in this proceeding should be sufficient to deny Verizon's request. However, it is also clear that cable and broadband services and markets are not illustrative, material, or in any way relevant in determining whether Verizon's use of information derived from a legally required *telephone* number porting process are violative of the statutes and rules of this Commission. The issues Verizon would bring in include services that have completely different service characteristics, regulatory oversight, technical and operational requirements, and marketing practices. These services offer nothing probative or germane as to whether Verizon's retention marketing during a telephone number port is proper.

3. What is relevant is that the Legislature has granted this Commission exclusive jurisdiction to regulate the local exchange telecommunications services and practices at issue in these consolidated dockets. In that regard, the Legislature has empowered the Commission to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint." Section 364.01(4)(g), Florida Statutes. In addition, the Legislature has recognized the state's interest in fostering competition with regard to local exchange telecommunications services in order to

¹ As if to reinforce its point, Verizon continually refers to Comcast and Bright House as "cable companies" failing, of course, to recognize that the petitioners are CLECs complaining about telephone service, and that if the issue was about cable services the complaints would not be before this Commission. Indeed, the very cable television marketing and service issues Verizon is now attempting to inject in this case are the subject of a petition Verizon has filed at the FCC, which does have the jurisdiction to hear such matters.

“transition from the monopoly provision of local exchange service to the competitive provision thereof,” and to provide “appropriate regulatory oversight to protect consumers and provide for the development of fair and effective competition.” Section 364.01(3), Florida Statutes.

4. The Complaint filed by Comcast on January 10, 2008, alleges that the retention marketing activities engaged in by Verizon for customers that are in the process of having their local telephone number ported from Verizon to Comcast violate Sections 364.01(4), 364.10, and 364.3381, Florida Statutes, as well as the rules of this Commission. The Bright House Complaint filed on November 16, 2007 makes the same state law allegations. The basis for the Complaints is that Verizon is using information derived from the carrier-to-carrier relationship that Comcast and Bright House, respectively, have with Verizon during the number porting process to engage in retention marketing to those very same customers *before* Verizon fulfills its legal obligations to port the telephone number to Comcast or Bright House pursuant to the choice of the *customer*.

5. The violations raised by Comcast and Bright House are grounded upon the express 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.” 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 to telecommunications services 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).

6. Verizon’s additional issues represent a fundamental misunderstanding of the role of the Commission to ensure that local exchange telecommunications services are subject to a competitive environment. The Commission’s continuing oversight authorized by the Legislature was in part to offset the effects of the historic monopoly that had been granted to the local exchange telephone companies, including Verizon, which had, for more than a century, been granted exclusive franchises for local exchange service. But more fundamentally, the Legislature’s directive to the Commission to continue to “[e]nsure that all providers of telecommunications services are treated fairly” was to ensure that customers were protected from practices that might appear to be beneficial in the short term but which in the long run undermine competition and could result in the local service market becoming a de facto monopoly to the detriment of customers.² Section 364.01(4)(g), Florida Statutes.

7. The fact that Comcast, Bright House, and Verizon deploy, and market other services and comply with different regulations for those services administered by a federal regulatory agency is not probative with respect to the limited question as to whether Verizon’s retention marketing program triggered by a request to port a customer’s telephone number violates Florida law. If Verizon is right, then the Commission should consider the marketing of wireless voice services, wireless data services, cable television programming, custom calling features, ancillary voice telephone services, long distance services, cable versus satellite services,

² If Verizon was truly concerned with its customers “receiving accurate information about available service packages and pricing incentives,” it could make that information available through any number of means at any time **prior** to the request to port the customer’s telephone number. However, since Verizon only makes such information available **after** a customer has found a better deal, and offers not-so-subtle bribes in the form of American Express gift cards – which are wholly unrelated to service and pricing – it becomes clear that Verizon is not so much concerned with its customers receiving a fair shake as it is in squelching competition from CLECs.

and everything and anything these companies offer. But these other services are not any more relevant or probative of Verizon's conduct regarding its number porting than the cable and broadband services that Verizon has asked to include. While the Legislature has granted to the Commission exclusive jurisdiction to address the matters enumerated in Chapter 364, this Commission does **not** have jurisdiction to make any determination of business practices in markets it does not regulate, and such practices are, as a matter of law, irrelevant to and not probative of *any* issue in this proceeding.

8. Verizon asserts that its program is perfectly legal, and does not use information provided to it to effectuate a service request as a database for contacting the exiting customers in order to give "incentives" for them to remain with Verizon. Verizon's argument flies directly in the face of at least three Commission orders, which found such a practice to be anticompetitive and illegal.³

³ The orders are:

a) *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-02-0875-PAA-TP (June 28, 2002), in which the Commission noted with approval FCC Order 99-223, in which the FCC held that "win-back" campaigns are a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. . . . However, **once a customer is no longer obtaining service from the ILEC**, the ILEC must compete with the new service provider to obtain the customer's business. (e.s.)

Order No. PSC-02-0875-PAA-TP at p.17. The Commission then cited FCC Order 99-223, which stated that [w]e conclude that competition is harmed if *any* carrier uses carrier-to-carrier information, such as switch or PIC orders, to trigger retention marketing campaigns, and consequently prohibit such actions accordingly 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. . . . [w]here 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).

Order No. PSC-02-0875-PAA-TP at pp.20-21. The Commission ultimately declined to impose a "waiting period" in large measure due to BellSouth's region-wide 10 day waiting period after the conversion of the customer to the CLEC was complete. Order No. PSC-02-0875-PAA-TP at pp.21-22.

b) *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*

9. Despite the previous Commission orders, Verizon argues that if its retention program is anti-competitive, then “similar” practices in other unregulated and non-jurisdictional markets must also be uncompetitive. Thus, under a theory of equitable “unclean hands,” Verizon is trying to argue that these other companies cannot complain about Verizon’s regulated telephone service retention marketing practices. But this is a red herring. This Commission cannot turn a blind eye to practices that clearly lie within this Commission’s jurisdiction. Section 364.01(3), Florida Statutes, provides in pertinent part that:

Communications activities that are not regulated by the Florida Public Service Commission, including, but not limited to, VoIP, wireless, and broadband, are subject to this state's generally applicable business regulation and deceptive trade practices and consumer protection laws, as enforced by the appropriate state authority or through actions in the judicial system. This chapter does not limit the availability to any party of any remedy or defense under state or federal antitrust laws. . . . The Legislature further finds that the transition from the monopoly provision of local exchange service to the competitive provision thereof will require appropriate regulatory oversight to protect consumers and provide for the development of fair and effective competition, but nothing in this chapter shall limit the availability to any party of any remedy under state or federal antitrust laws.

Network, Inc., Docket No. 020119-TP et al., Order No. PSC-03-0726-FOF-TP (June 19, 2003), in which the Commission reaffirmed the basis and the decision established in Order No. PSC-02-0875-PAA-TP.

c) *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). In that order, although it dealt with the less problematic issue of **regaining** customers after the transfer is complete, rather than **retaining** customers before the transfer is complete, the Commission cited FCC Order 03-42 that:

to the extent that the retail arm of an executing carrier obtains carrier change information through its normal channels in a form available throughout the retail industry, **and after the carrier change has been implemented** (such as in disconnect reports), we do not prohibit use of that information in executing carriers’ winback efforts.

Order No. PSC-03-1392-FOF-TP at. p. 9 (emphasis supplied). The Commission found the BellSouth program to be compliant, in large measure on the fact that BellSouth winback marketing did not commence until 10 days **after** the transfer of the customer was complete. If marketing within 10 days after a transfer of service is not in the best interests of customers, then certainly any marketing before the transfer of service must not be in the public interest.

Thus, if Verizon has issues with the conduct of any company related to VoIP, wireless, cable, or broadband services, it has remedies. They are just not available in this proceeding.⁴

10. Verizon's reliance on the legislatively mandated *Report on the Status of Competition in the Telecommunications Industry* for 2005 and 2006 is misplaced. Those reports were required by the Legislature to provide an annual assessment of the status of competition in the telecommunications industry, and a "detailed exposition" of six specified issues all of which relate to the provision of *telephone service*. Section 364.386, Florida Statutes. Neither the statute nor the reports themselves were intended to expand the regulatory jurisdiction of the Commission, nor were they intended to create non-jurisdictional factors to be considered by the Commission in determining whether a practice is anticompetitive when applied to efforts to allow CLECs to competitively and effectively market their services. As the 2006 Report notes:

Chapter 364, Florida Statutes, sets forth the principles by which the Florida Public Service Commission (FPSC or Commission) regulates wireline telecommunications companies. Regulation is primarily focused on traditional local telephone companies, known as incumbent local exchange companies (ILECs). Competitors to the ILECs, known as competitive local exchange companies (CLECs), and interexchange companies (IXCs) are subject to minimal regulation. The Commission does not regulate wireless telecommunications, broadband services, or Voice over Internet Protocol (VoIP) services.

Report on the Status of Competition in the Telecommunications Industry as of May 31, 2006 at p.5. To that same end, the Commission does not report to the Legislature on cable television services, since even the Legislature recognizes that such services are exclusively regulated by the FCC and irrelevant to voice telephone service. Section 364.02(14)(f), Florida Statutes.

11. To the extent the *Report* stands for anything beyond a status report to the Legislature regarding the state of competition in the voice telephone market, it is that the ILECs

⁴ In fact, Verizon has already petitioned the FCC to change the transfer of customer practices for cable television customers.

are held to a higher standard than are CLECs as a result of their historically favored status in the marketplace. It does not, as Verizon asserts, stand for the proposition that all marketing practices for all services, regulated and unregulated, jurisdictional and non-jurisdictional, must be identical.

12. Verizon also relies on the Commission's order in *In re: Petition for relief from carrier-of-last-resort (COLR) obligations pursuant to Florida Statutes 364.025(6)(d) for two private subdivisions in Nocatee development, by BellSouth Telecommunications, Inc.*, Order Granting Petition for Relief from Carrier-of-Last-Resort Obligation, Docket No. 060822-TL, Order No. PSC-07-0862-FOF-TL (October 26, 2007) ("COLR Order") as authority for the Commission to consider non-jurisdictional matters in its assessment of whether a regulated practice is anticompetitive. A review of the Order reveals that it does not stand for that broad construction of the Commission's powers and duties.

13. The COLR Order construed the obligation of an ILEC to act as a carrier of last resort under Section 364.025(6)(d), Florida Statutes. That statute provides that a local exchange carrier that serves as a carrier-of-last-resort "may seek a waiver of its carrier-of-last-resort obligation from the Commission for good cause shown based on the facts and circumstances of provision of service to the multitenant business or residential property." The statute does not define "good cause shown." In that case, AT&T was precluded from offering any service in the Nocatee development other than voice telephone service. All other services, including broadband and cable, were the subject of an exclusive agreement with an alternative provider, although the alternative provider could offer voice service. In addition, Nocatee refused to make any financial contribution to offset AT&T's cost to deploy its network facilities into the development.

14. The Commission's narrow decision was based upon a number of factors, including an objective demonstration that AT&T would not be able to recover its investment in extending its landline voice telephone network for 12½ years or more. That period was 2.5 times the normal 5 year period indicative of an economically reasonable return. Thus, the Commission determined that it would be uneconomic to require AT&T to serve as the voice telephone service carrier of last resort. The Commission found other factors to be relevant, but took pains to note that:

We emphasize that while we consider the facts identified in our specific findings and holdings in the body of this order to be significant in our determination of good cause, they are significant within the context of the totality of the facts and circumstances of this specific case. These same facts, if found in future cases may or may not carry the same significance, depending on the totality of the circumstances attendant to each individual future case.

COLR Order, at p.3, fn.1.

15. In the final analysis, the Commission granted the COLR waiver because it found that AT&T would not be able to recover its investment in providing local telephone service. The fact that there was some information in the record regarding broadband and cable telephone service went only to demonstrating that if all potential revenue streams were combined AT&T would be willing to serve the development. In other words, *to determine whether telephone service should be provided by AT&T, the Commission considered the cost of telephone service.* Verizon is attempting to do something entirely different. Here, Verizon is trying to argue that its conduct in porting phone numbers should be found legal because of the way regulated and unregulated services other than telephone service are marketed. These non-telephone services tell you nothing relevant as to whether Verizon's use of information derived from a customer initiated telephone number porting request violates the Commission's rules, orders, or statute.

16. Based on the foregoing, it is clear that issues related to marketing practices for services or activities that are not within the regulatory jurisdiction of the Commission, and evidence pertaining to such practices, is not relevant to the issue of whether Verizon's retention marketing program prior to completing a number port is anticompetitive under Chapter 364.

17. Section 120.569(2)(g), Florida Statutes, provides, in pertinent part, that "[i]rrelevant . . . evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." As such, the irrelevant information that Verizon seeks to introduce into this proceeding is required by Chapter 120 to be excluded.

18. While it is generally accepted that the Administrative Procedures Act applies a more relaxed standard for admissibility of evidence in an administrative proceeding than would be applied in a judicial case, it is clear that evidence unrelated to any issue properly before an agency is not admissible to prove or support any issue within the agency's jurisdiction. As has been held by the First DCA:

We reject the appellee's contention that even if the testimony was not relevant, it was nonetheless admissible under the provisions of Section 120.58(1)(a), Florida Statutes. That section provides a relaxed standard for the admissibility of evidence in administrative proceedings, but it specifically provides a threshold requirement that "[i]rrelevant . . . evidence shall be excluded, . . ." Here, the evidence complained of was clearly irrelevant and failed to meet this threshold requirement.

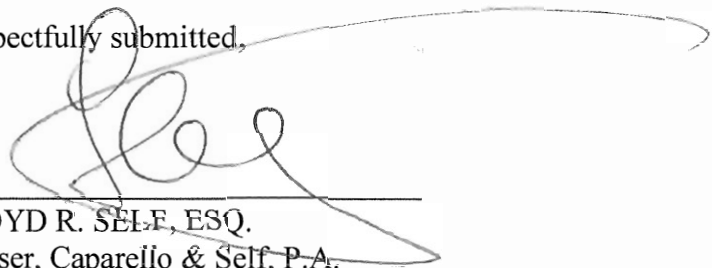
Department of Professional Regulation v. Wise, 575 So.2d 713, 715 (Fla. 1st DCA 1993) (the reference to section 120.58(1)(a) in this case is now codified at Section 120.569(2)(g)). For the foregoing reasons, the issues that Verizon seeks to inject into this proceeding are not relevant to

any issue properly within the Commission's jurisdiction, and therefore neither the issues nor evidence related thereto should be included or admitted in this proceeding.

V. Conclusion

The Motion to Add Issues Concerning Retention Marketing Practices filed by Verizon does nothing more than ask the Commission to exceed its legislatively delegated authority by applying non-jurisdictional issues to jurisdictional matters. The relief requested in the Motion is not only facially invalid, but it fails to take into account the legislative goals served by disallowing anticompetitive marketing practices to be employed by a dominant ILEC against a CLEC. If Verizon believes that other companies are acting unfairly in marketing unregulated and non-jurisdictional services, it has other remedies. Those other remedies do not include adding issues to this proceeding that are irrelevant and not probative. Thus, Verizon's Motion to Add Issues Concerning Retention Marketing Practices should be denied and Verizon should be directed to not include testimony regarding broadband and cable services and that discovery regarding these matters is also not permitted.

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 2nd, day of May, 2008 upon the following:

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