State of Florida

Public Service Commission

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

DATE: June 5, 2008

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Mann)
Division of Competitive Markets & Enforcement (Beard, Casey, Hallenstein)

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.

Docket No. 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.

AGENDA: 06/17/08 – Regular Agenda – Motion For Reconsideration – Oral Argument Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

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

Case Background

On November 16, 2007, Bright House Networks Information Services (Florida) LLC and Bright House Networks, LLC (together, "Bright House") filed their Complaint and Request for

Emergency Relief ("Complaint"). 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 of 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 to Dismiss Bright House's Complaint") and its Request for Oral Argument on the Motion. Verizon alleged that Bright House's complaint should be dismissed because it fails to state a claim for which relief can be granted. Verizon also sought dismissal, or in the alternative, a stay on the independent ground that Bright House had already put the same issues before the Federal Communications Commission ("FCC"), 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 ("Bright House Opposition"). Bright House argued that Verizon's Motion to Dismiss Bright House's Complaint 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. This federal complaint was filed with the FCC's Enforcement Bureau, pursuant to Section 208 of the Communications Act of 1934, as amended ("Act") and claims that Verizon is violating Sections 222(a) and (b), and Section 201(b) of the Act.

At the Commission's regularly-scheduled Agenda Conference on March 4, 2008, the Commission denied Verizon's Motion to Dismiss Bright House's Complaint and its alternative motion to stay the proceedings during the pendency of Bright House's complaint before the FCC's Bureau of Enforcement, and Order No. PSC-08-0180-FOF-TP was entered on March 24, 2008, codifying the decision (Bright House Order).

On January 10, 2008, Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone ("Comcast") filed with the Commission its Complaint and Request for Emergency Relief ("Complaint"). Comcast also alleges that 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 customers' numbers to Comcast upon request, contrary to Rule 25-4.082, Florida Administrative Code.

On February 4, 2008, Verizon filed its Motion to Dismiss Complaint or, in the Alternative, Stay Proceedings ("Motion to Dismiss Comcast's Complaint"). Verizon alleged that Comcast's complaint should be dismissed because it failed to state a claim for which relief can be granted. Verizon also sought dismissal, or in the alternative a stay, on the independent ground that Comcast had already put the same issues before the FCC, thus giving rise to the potential for inefficient and wasteful proceedings before the Commission.

On February 11, 2008, Comcast filed its formal Accelerated Docket complaint with the FCC. This federal complaint was filed with the FCC's Enforcement Bureau, pursuant to Section 208 of the Communications Act of 1934, as amended ("Act") and claims that Verizon is violating Sections 222(a) and (b), and Section 201(b) of the Act. On that date, Comcast also

filed its Opposition to Verizon's Motion. On February 12, 2008, Comcast filed its Amended Opposition to Verizon's Motion ("Comcast Opposition"). Comcast argued that Verizon's motion should be rejected, because Comcast had stated a claim for which relief can be granted.

At the Commission's regularly-scheduled Agenda Conference on March 18, 2008, the Commission denied Verizon's Motion to Dismiss Comcast's Complaint and its alternative motion to stay the proceedings during the pendency of Comcast's complaint before the FCC's Bureau of Enforcement. On April 2, 2008, the Commission issued Order No. PSC-08-0213-FOF-TP, Order codifying its decision (Comcast Order).

On April 10, 2008, the Prehearing Officer issued Order No. PSC-08-0235-PCO-TP (Order Establishing Procedure), setting controlling dates in Dockets No. 070691-TP and 080036-TP, including dates for filing testimony.

On April 17, Verizon filed its Motion for Reconsideration of Commission Orders No. PSC-08-0180-FOF-TP and No. PSC-08-0213-FOF-TP, denying Verizon's Motions to Dismiss Bright House's and Comcast's Complaints, and Order No. PSC-08-0235-PCO-TP, Order Establishing Procedure (Motion for Reconsideration). On April 17, 2008, Verizon also filed its Request for Oral Argument.

On April 24, 2008, Bright House filed its Opposition to Verizon's Motion for Reconsideration ("Bright House's Response"). On April 24, Comcast also filed its Opposition to Verizon's Motion for Reconsideration ("Comcast's Response").

The Commission has jurisdiction over this matter for purposes of addressing Motions for Reconsideration pursuant to Rule 25-22.060 and Rule 25-22.0376, Florida Administrative Code.

Discussion of Issues

Issue 1: Should the Commission grant Verizon's Motion for Oral Argument on its Motion for Reconsideration?

Recommendation: Yes. Staff recommends that the Commission grant Verizon's Motion for Oral Argument on its Motion for Reconsideration. If the Commission grants oral argument, staff recommends that the Commission allow five minutes per side for argument. **(Mann)**

Staff Analysis: Verizon submits that oral argument would help the Commission to assess the impact on this matter of the FCC Enforcement Bureau's Recommended Decision, in which the Bureau concluded that Verizon's retention marketing program does not violate Section 222 of the Telecommunications Act of 1934, as amended. Although Verizon stated in its Motion for Oral Argument that it had been informed that both parties objected to its oral argument request, neither party filed such objection. Accordingly, unless the Commission declines to grant Verizon's Motion for Oral Argument, staff recommends that both sides be allowed five minutes per side for argument.

Issue 2: Should the Commission grant Verizon's Motion for Reconsideration of Commission Orders No. PSC-08-0180-FOF-TP and No. PSC-08-0213-FOF-TP, Orders Denying Verizon's Motions to Dismiss Bright House's and Comcast's Complaints, respectively, and Order No. PSC-08-0235-PCO-TP, Order Establishing Procedure?

Recommendation: No. The Commission should deny reconsideration of the orders. **(Mann)**

Staff Analysis:

Standard of Review

The standard of review for a motion for reconsideration, often cited by the Commission in considering motions for reconsideration, is:

> Whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. See, Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959), citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817(Fla. 1st DCA 1958).[1]

Verizon cites Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962). In Diamond Cab, the Court stated:

> The purpose of a petition for rehearing is merely to bring to the attention of the trial court, or in this instance, the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance. . . . It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or order. . . .

Id. at 891.

In State ex. Rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1959), the court sets forth the limited nature of motions for reconsideration. In Jaytex, the court stated:

> The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision. Judges are human and subject to the frailties of humans. It follows that there will be occasions when a fact, a controlling decision or a

[1] Order No. PSC-07-0783-FOF-EI, issued September 26. 2007, in Docket No. 050958-EI, In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause by Tampa Electric Company; Order No. PSC-07-0561-FOF-SU; issued July 5, 2007, in Docket No. 060285-SU, In re: Application for increase in wastewater rates in Charlotte County by Utilities, Inc. of Sandalhaven; Order No. PSC-06-1028-FOF-EU, issued December 11, 2006, in Docket No. 060635-EU, In re: Petition for determination of need for electrical power plant in Taylor County By Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee.

> principle of law even though discussed in the brief or pointed out in oral argument will be inadvertently overlooked in rendering the judgment of the court. There may also be occasions when a pertinent decision of the Supreme Court or of another District Court of Appeal may be rendered after the preparation of briefs, and even after oral argument, and not considered by the court. It is to meet these situations that the rules provide for petitions for rehearing as an orderly means of directing the court's attention to its inadvertence.

Id. at 818.

Furthermore, the court explained that it is not necessary to respond in its opinion to every argument and fact raised by each party, stating:

> An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered.
>
> It is not the purpose of these remarks to discourage the filing of petitions for rehearing in those cases in which they are justified. If we have, in fact, inadvertently overlooked something that is controlling in a case we welcome an opportunity to correct the mistake. But before filing a petition for rehearing a member of the bar should, as objectively as his position as an advocate will permit, carefully analyze the law as it appears in his and his opponent's brief and the opinion of the court, if one is filed. It is only in those instances in which this analysis leads to an honest conviction that the court did in fact fail to consider (as distinguished from agreeing with) a question of law or fact which, had it been considered, would require a different decision, that a petition for rehearing should be filed.

Id. at 819.

Argument

Verizon's Motion

Verizon asserts that its Motion for Reconsideration is based on the FCC Enforcement Bureau's Recommended Decision issued April 11, 2008, which concluded that the FCC should deny the cable companies' claims concerning Verizon's retention marketing program that had been accepted for accelerated consideration. The Bureau found that Verizon's retention marketing program does not violate Section 222 of the Act, which addressed the use of carrier proprietary information. Verizon asserts that the FCC bases its retention marketing rulings on Section 222, and that the Commission, in turn, has relied exclusively on those rulings when determining what retention marketing prohibitions apply under Florida Law. Thus, "[a]ssuming the Recommended Decision is approved by the FCC, that ruling would bear directly on the Commission's previous retention marketing rulings and on the reasoning employed by the Commission in the Bright House and Comcast Orders." [Motion, pp. 1, 2]

Verizon also relates that the Bureau recommended that the FCC issue a Notice of Proposed Rulemaking (NPRM) "regarding consumer and competitive benefits of customer retention marketing practices." The Bureau stated that "[g]iven the prevalence of intermodal and bundled service competition, we recommend that such an NPRM conclude that customer retention marketing practices be made consistent across all platforms." Verizon asserts that if the FCC issues the recommended NPRM, it would be expressing its intention to adopt unified rules that would apply not only to telecommunications carriers, but also to cable companies. Thus, a Commission decision here imposing retention marketing restrictions on Verizon would "work at cross-purposes with the rule uniformity that would be the objective of the NPRM recommended by the Bureau." [Motion, p. 3]

Verizon asserts that it seeks reconsideration in this case because:

(1) the reasoning of the Bright House and Comcast Orders conflicts with the Recommended Decision;

(2) a ruling by the Commission in this case that restricted Verizon's retention marketing program would conflict with the recommended NPRM; and

(3) Commission precedent establishes that Florida law concerning retention marketing is based on the FCC's rulings interpreting Section 222, which the Recommended Decision concludes Verizon has not violated.

Verizon states that in its Motions to Dismiss Bright House's and Comcast's Complaints, it noted that the Commission has consistently interpreted Florida law as conforming to applicable federal law when it has resolved retention marketing issues. "Indeed, the Commission has looked exclusively to FCC decisions interpreting Section 222 to determine the retention marketing rules it should apply." [Verizon Motion, p.4] Verizon asserts that it argued in its two Motions to Dismiss that the complaints should be dismissed because Verizon's retention marketing program complies with Section 222. Further, Verizon asserts that it alternatively requested a stay in its Motions to Dismiss, arguing that a stay would provide the FCC with an opportunity to clarify federal law on Verizon's marketing practices before the Commission proceeded further. [Verizon Motion, p. 4]

Verizon states that the FCC Enforcement Bureau's "Recommended Decision, which was issued after the Bright House and Comcast Orders denying Verizon's motions to dismiss and the Order Establishing Procedure, is a point of law that bears directly on the Commission's rulings in question." [Verizon Motion, p. 8] Verizon also states that its Motion for Reconsideration is filed outside the 15-day period provided by the Bright House Order for requesting reconsideration, but requests that the Commission either accept its Motion out of time, or reconsider its Orders denying dismissal of Bright House's and Comcast's Complaints on the Commission's own motion. Bright House notes, however, that "[i]n any event, the Commission may provide the relief requested as to Bright House through its reconsideration of the Order Establishing Procedure." [Verizon Motion, pp. 8, 9]

Verizon argues that the Bureau's "Recommended Decision warrants reconsideration of the Bright House and Comcast Orders and the Order Establishing Procedure for at least three reasons."

> First, retention marketing by telecommunications carriers is governed by an extensive body of federal law comprised primarily of Section 222 and FCC rules and orders. If adopted by the FCC, the Recommended Decision would substantially clarify this body of law by determining that Section 222(b) does not apply to carriers like Verizon when they are competing against facilities-based providers like Bright House and Comcast . . . . The Bright House and Comcast Orders do not take these clarifications into account and instead rely on the principle developed under Section 222(b) that information about a customer's plans to switch to another carrier only may be used for marketing purposes when legitimately obtained by the retail operations of the carrier seeking to retain the customer. Because the Bureau has concluded that Verizon has not violated Section 222 under the circumstances at issue in this case, the information triggering Verizon's retention marketing efforts was obtained legitimately and the Commission's reasoning therefore conflicts with the Recommended Decision.
>
> Second, the Bureau's recommended NPRM would call for consistent retention marketing rules across platforms. If the Commission proceeds to make retention marketing rulings in this case that only apply to Verizon, its approach would be at odds with the uniform federal rules called for by such an NPRM.
>
> Third, the Florida statutory provisions on which Bright House and Comcast rely are of general application and (unlike Section 222) do not specifically address the use of information provided by another carrier. The Commission has consistently interpreted Florida law, including 364.01(4)(g), Florida Statutes, as tracking the FCC's rules and orders interpreting Section 222. Assuming the FCC agrees with the Bureau that Section 222(b) does not apply to the retention marketing at issue here and that Verizon has not violated Sections 222(a) or (b), the Commission should, consistent with this prior interpretation of Florida law, dismiss the Complaints. Were 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.

[Verizon Motion, pp. 9, 10]

Bright House's Response

Bright House responds that there has been no mistake of fact or law in the Commission's Orders; rather, Verizon simply points out matters that were previously considered by the Commission. Bright House asserts that the FCC staff recommendation comprises information that was thoroughly and completely discussed at oral argument before the Commission at its March 4, 2008 Agenda Conference. [Bright House Response, p. 3] Bright House states that it specifically addressed that the federal law at issue before the FCC contained some "specific, 'technical' requirements that [do] not exist in Florida law." Consequently, even if the FCC determined that Sections 222(a) and (b), were not violated, Verizon's retention marketing practices would still violate the Florida law upon which Bright House's case before the Commission is based. [Bright House Response, p. 3] The Commission considered Verizon's arguments "suggesting that the FCC's rulings somehow control how this Commission exercises

its powers under Florida law" to determine what is anticompetitive or discriminatory in Florida, and rejected Verizon's motion to dismiss or stay the proceedings. [Bright House Response, pp. 4, 6] Bright House emphasizes that the possibility of the action by the FCC Enforcement Bureau, in its recommendation to the FCC, does not constitute any new or unanticipated development that would warrant reconsideration. [Bright House Response, p. 7]

Bright House also points out that Verizon's Motion for Reconsideration, with respect to Bright House, is not timely, since Commission Order No. PSC-08-0180-FOF-TP was issued March 24, 2008, and Verizon's Motion for Reconsideration was filed on April 17, 2008. The 24-day lapse does not comply with the requirements of Rule 25-22.060, F.A.C., which mandates that a motion for reconsideration must be filed within 15 days of the issuance of the Order.

Comcast's Response

Comcast responds that Verizon's Motion is untimely as to Comcast, because it was filed 15 days after the issuance of Commission Order No. PSC-08-213-FOF-TP, denying Verizon's Motion to Dismiss Comcast's Complaint. [Comcast Response, p. 2] Comcast, in a footnote, addresses that portion of Verizon's Motion seeking reconsideration of Commission Order No. PSC-08-0235-PCO-TP (Order Establishing Procedure):

> 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.

[Comcast Response, p. 3, fn. 3]

Comcast points out that the Commission's jurisdiction pursuant to Chapter 364, F.S., is not concurrent, but exclusive. §364.01(2), F.S. The Florida Supreme Court has recognized the grant of exclusive jurisdiction. See, e.g., Sprint-Florida, Inc. v. Jaber, 885 So.2d 286, 291-292 (Fla. 2004); Florida Interexchange Carriers Ass'n v. Beard, 624 So.2d 248, 251 (Fla. 1993). [Comcast Response, p. 3] Comcast asserts that the Commission is the sole entity with jurisdiction and authority, as well as the duty, to determine whether Verizon's actions complained of in Comcast's and Bright House's Complaints are anticompetitive in violation of Florida law. [Comcast Response, pp. 4, 5]

Comcast emphasizes that the basis for Verizon's Motion for Reconsideration is a "'Recommended Decision' of the FCC's Enforcement Bureau." It is not even final agency action of the FCC under 47 C.F.R. section 1.730(h)-(i), and cannot be the basis for action by the Commission. An FCC order may reflect an entirely different outcome. [Comcast Response, p. 5]

Comcast distinguishes the cases Verizon relies on in its argument that the Commission's construction of Florida law is linked to the FCC's construction of its statutes. Comcast points out that two of the cases dealt with win-back marketing, rather than retention marketing, which is at issue in Comcast's and Bright House's complaints and that one of those cases expressly alleged violations of Section 222 of the federal Act. Comcast suggests that "the orders relied on by Verizon are irrelevant" to the issues in this proceeding. [Comcast Response, p. 6, fns. 4-6]

Further, Comcast argues that Verizon is wrong to argue that the FCC has preempted the area of law at issue in Comcast's and Bright House's complaints, asserting as Verizon does "that the 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." [Comcast Response, p. 7] Comcast points out that 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." [Comcast Response, p. 8] Comcast cites to case law regarding federal preemption of state law, both from the Florida Supreme Court, as well as the FCC. From these cases, Comcast concludes that "[a]s it relates to the regulation of telecommunications . . . Congress has not expressly preempted state law in this matter;" and that "there has been no action by the Congress or the FCC to completely occupy the questions raised by the complainants, nor is there any basis for concluding that this Commission's jurisdiction has even been implicitly preempted." [Comcast Response, pp. 8-10] Comcast asserts that the complainants here seek "no finding and no remedy . . . that would constitute a direct conflict with any Federal statute or decision of the FCC." [Comcast Response, p. 10]

Comcast reiterates that the Bureau's Recommended Decision "has no more effect than any other non-final agency action that can undergo change before it becomes final. 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." [Comcast Response, p. 11] Further,

> [I]f 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 the statute has different language than the Florida statutes at issue here.

[Comcast Response, p. 12]

Analysis

Staff recommends that the Commission deny Verizon's request for reconsideration of the Bright House and Comcast Orders. Staff also recommends that the Commission deny Verizon's request to reconsider Order No. PSC-08-0235-PCO-TP, Order Establishing Procedure.

Staff recommends that the Commission dismiss as untimely Verizon's Motion for Reconsideration of Order No. PSC-08-0180-FOF-TP, regarding Bright House. Verizon concedes that its Motion for Reconsideration with respect to the Bright House Complaint was filed untimely. Order No. PSC-08-0180-FOF-TP was issued March 24, 2008, and provided 15 days to file for reconsideration, citing to Rule 25-22.060, F.A.C. Verizon's Motion was filed 24 days later, on April 17, 2008. Staff believes that Verizon's Motion does not establish a sound basis to either accept its Motion out of time or to reconsider Verizon's Motion to Dismiss Bright House's Complaint on the Commission's own motion.

Staff disagrees with Comcast's claim that Verizon's Motion for Reconsideration of the Comcast Order, was also filed untimely. The Order specifically provided 15 days to file for reconsideration, and Verizon met that 15-day requirement.

Staff notes that this is a consolidated docket. Staff recommends that Verizon's Motion for Reconsideration of the Bright House Order be dismissed as untimely. However, the same analysis that staff applies to the Comcast Order, would also apply to the Bright House Order. Also, as Verizon states in its Motion for Reconsideration, consideration of the Order Establishing Procedure would impact Bright House, as well as Comcast.

Staff agrees with Bright House's and Comcast's arguments that the FCC Enforcement Bureau's recommended decision does not constitute a sound basis for this Commission to reconsider its Orders. Verizon's Motion for Reconsideration of the Comcast Order, does not meet the standard for reconsideration. Verizon does not identify a point of law or fact which the Commission overlooked or failed to consider in reaching its decision. The Bureau's recommendation to the FCC advocating that the FCC take particular actions, of interpreting Verizon's retention marketing practices as lawful, and of issuing an NPRM with the Bureau's desired outcome, is not "a point of law that bears directly on the Commission's rulings." Staff believes that Verizon is incorrect in asserting that it is. The Recommended Decision is not final agency action pursuant to 47 C.F.R., section 1.730(h)-(i). It is simply a non-final staff recommendation to the FCC that the FCC issue final agency action.

Nonetheless, Verizon bases its request for reconsideration on the proposition that:

(1) the reasoning of the Bright House and Comcast Orders conflicts with the Recommended Decision;

2) a ruling by the Commission in this case that restricted Verizon's retention marketing program would conflict with the recommended NPRM; and

(3) Commission precedent establishes that Florida law concerning retention marketing is based on the FCC's rulings interpreting Section 222, which the Recommended Decision concludes Verizon has not violated.

[Motion, p.3] Not one of these three reasons forming the basis for Verizon's request for reconsideration amounts to a material fact or point of law that has been overlooked or not considered by the Commission in rendering its decisions. Not one constitutes "a question of law or fact which, had it been considered, would require a different decision." State ex Rel. Jaytex Realty Co. v. Green, 105 So. 2d 817, 819 (Fla. 1st DCA 1959)

Verizon's arguments are predicated on its speculation that the FCC will adopt its Bureau's recommendation, rather than modify that recommendation, or even reject it outright. The FCC staff recommendation carries no precedential or final weight. Verizon must ask that the Commission speculate along with it: "Assuming the Recommended Decision is approved by the FCC, that ruling would bear directly on the Commission's previous retention marketing rulings and on the reasoning employed by the Commission in the Bright House and Comcast Orders." [Motion, pp. 1, 2] Irrespective of whether the Commission agrees that such an FCC ruling "would bear directly" on the Commission's prior rulings and the reasoning employed in its two Orders, staff believes that it is of no significance if the Commission's actions or reasoning conflicts with the Bureau's non-final recommendation to the FCC.

Even Verizon's argument that the Bureau's "Recommended Decision warrants reconsideration of the Bright House and Comcast Orders and the Order Establishing Procedure for at least three reasons" presupposes that the recommendation itself has no precedential or legal weight. Verizon posits that first, "[i]f adopted by the FCC," the recommendation would clarify the body of federal law pertaining to retention marketing; second, that a Commission ruling on Verizon's retention marketing may conflict "with the uniform federal rules called for by [the Bureau's recommended] NPRM;" and third, that "[a]ssuming the FCC agrees with the Bureau" that Section 222(b) does not apply to Verizon's retention marketing, the Commission should dismiss the complaints. All three of these reasons given by Verizon are based on its speculation of future occurrences.

Furthermore, as Bright House points out, the Bureau's recommendation to the FCC "comprises information that was thoroughly and completely discussed at oral argument" at the Commission's March 4, 2008, Agenda Conference. The Commission considered Verizon's arguments at that time and then rejected Verizon's Motion to Dismiss or stay the proceedings.

Regarding Commission Order No. PSC-08-0235-PCO-TP, staff believes that Verizon has not raised an issue which would form a basis for the Commission's reconsideration of the Order Establishing Procedure in this matter. Verizon's objection is to the procedural schedule which

was ordered by the Prehearing Officer to move the proceeding forward after the dockets were assigned. Verizon, in its Motions to Dismiss, requested a stay of the procedural schedule pending resolution of the FCC proceeding. Verizon's motion for reconsideration of the Order Establishing Procedure is entirely derivative of the Commission's denial of Verizon's Motions to Dismiss or, alternatively stay the proceedings, and raises no independent, substantive basis for reconsideration of that order.

Conclusion

Accordingly, staff recommends that the Commission dismiss as untimely Verizon's Motion for Reconsideration of Commission Order No. PSC-08-0180-FOF-TP, denying Verizon's Motion to Dismiss Bright House's Complaint, as explained in the analysis above.

Staff also recommends that the Commission deny Verizon's Motion for Reconsideration of Commission Order No. PSC-08-0213-FOF-TP, denying Verizon's Motion to Dismiss Comcast's Complaint, because Verizon does not identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering that decision.

Finally, staff recommends that the Commission deny Verizon's Motion for Reconsideration of Commission Order No. PSC-08-0235-PCO-TP, Order Establishing Procedure, because it is entirely derivative of the Commission's denial of Verizon's motions to dismiss, Verizon has not raised any independent, substantive basis for reconsideration, and Verizon has not identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering this order.

Issue 3: Should this docket be closed?

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

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