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June 16, 2008

VIA 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 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 for Reconsideration or Clarification in the above referenced dockets.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

FRS/amb
Enclosure
cc: Parties of Record

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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 16th day of June, 2008 upon the following:

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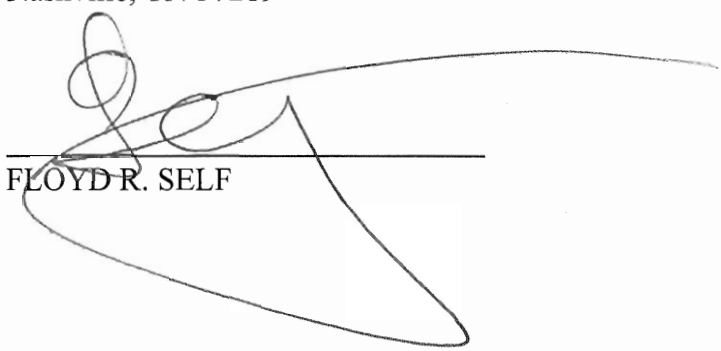

FLOYD R. SELF

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

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

Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone ("Comcast"), hereby files this Response to the Verizon Florida LLC's ("Verizon") June 9, 2008, Motion for Reconsideration or Clarification ("Verizon Motion"), and states that the Verizon Motion is completely groundless and should be denied. In support of this opposition, Comcast states as follows:

BACKGROUND

1. 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, which relate to this Commission's role in preventing anticompetitive behavior and

ensuring that customers, as well as providers of telecommunications services, are treated fairly. The Bright House Complaint, filed last November, raises the same allegations and are grounded upon this Commission's authority under Florida law.

2. 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).

3. 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."

4. 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."

5. 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."

6. Thus, this Commission is the sole entity under Florida law with the jurisdiction and authority to determine whether the acts described in the Complaint are "anti-competitive" as that term is applied to telecommunications service providers.

7. On April 25, 2008, Verizon filed its Motion to Add Issues in which it sought to have issues related to marketing practices for unregulated services, namely cable television and broadband internet service, included in the scope of discovery for this docket. It is clear, however, that this Commission has no jurisdiction over matters relating to cable television and broadband internet service. Sections 364.011, 364.013, 364.02(14), Florida Statutes. In light of this fact, the Commission properly limited the scope of discovery solely to a service that it does regulate -- telecommunications services -- when it entered its Second Order Modifying Procedure. ("Second Order") In entering that Order, the Prehearing Officer made clear that this decision would serve as a limit on the scope of discovery. To wit, "I have reviewed Verizon's motion and the responses in opposition. At this time, I am unconvinced of the need to broaden the scope of the Issues List beyond the four modified issues attached. This decision should also serve as guidance for discovery." In light of this Commission's clear intent, as evidenced by the Second Order, to properly limit the scope of discovery to those issues in this docket over which it has jurisdiction, namely telecommunications services, there is nothing to clarify.

STANDARD OF REVIEW

8. Verizon admits that the standard to be applied to a Motion for Reconsideration "is whether the motion identifies a point of fact or law which was overlooked or the Commission failed to consider in rendering its decision," citing *Stewart Bonded Warehouse 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). As such, there must be a showing of cause to support a request for reconsideration. *Stewart Bonded Warehouse,* at 318.

9. The Court in *Diamond Cab* construed a motion for reconsideration of a non-final order as directly analogous to a motion for rehearing of a final order and held that

> 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 the order. (citations omitted)

Diamond Cab at 891; see also Henry P. Trawick, Jr., *Trawick's Florida Practice and Procedure*, § 15:4 (2007-2008 ed.).

10. Similarly, the First DCA held that "[t]he purpose of a motion for rehearing is to give the trial court an opportunity to consider matters which it failed to consider or overlooked," and in denying the motion stated that "[t]he motions below merely set forth matters **which had previously been considered** by the trial court." (e.s.) *Pingree* at 162.

11. In more recent opinions analyzing the purpose of a motion for rehearing, opinions entered to counter the abuse of parties filing motions as a matter of course, as has Verizon in this proceeding, the courts have held that "[m]otions for rehearing are strictly limited to calling an appellate court's attention -- without argument -- to something the appellate court has overlooked or misapprehended. 'The motion for rehearing is not a vehicle for counsel or the party to continue its attempts at advocacy.'" (citation omitted) *Cleveland v. State*, 887 So.2d 362, 364 (Fla. 5th DCA 2004). Similarly, the Fourth District has held "[a]t this late date, it should not require another opinion restating that [challenging the correctness of our decision] is not the function of a motion for rehearing." *Barnes v. State*, 743 So.2d 1105, 1113 (Fla. 4th DCA 1999).

12. In what is the most comprehensive and frequently cited opinion as to the proper scope of a motion for rehearing or clarification, the Fourth DCA held:

> From our experience, most motions for rehearing or clarification contain a condensed version of all or some of the points previously argued. Frequently, such motions urge the court to reconsider matters previously considered....
>
> This leads to our first point: counsel should carefully and seriously consider the necessity or desirability of asking the court to rehear a case.
>
> Shortly after the district courts of appeal were established, Judge Wigginton, in *State v. Green,* 105 So.2d 817 (Fla. 1st DCA 1958), *cert. discharged,* 112 So.2d 571 (Fla.1959), addressed the function of a motion (then petition) for rehearing and noted:
>
> > Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.
>
> 105 So.2d at 818, 819.
>
> We recommend that counsel carefully review Judge Wiggington's well articulated views in *Green* prior to filing a motion for rehearing. We subscribe to those views and urge counsel to file a motion only where careful analysis indicates a point of law or a fact which the court has overlooked or misapprehended, or where clarification of a written opinion is essential. Counsel should not use such motion as a vehicle to reargue the merits of the court's decision or to express displeasure with its judgment.

Whipple v. State, 431 So.2d 1011, 1013 (Fla. 2d DCA 1983).

13. The Fourth DCA's opinion in *Whipple*, and the comprehensive analysis contained therein, has been the subject of legal commentary on the role and scope of motions for

rehearing. Although directed to appellate motions for rehearing, the standards and analysis discussed are directly applicable to motions for reconsideration of non-final orders.

> In short, an attorney should file a motion for rehearing only after "objectively" and "carefully" analyzing the law and the opinion of the court, if any. "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 [motion] for rehearing should be filed."

Robert Alfert, Jr., *Appellate Motions for Rehearing: When Is Enough Really Enough?* Florida Bar Journal, Vol. LXXIII, No.4 (April 1999)

ANALYSIS

14. Despite the Florida Supreme Court's admonition against using a motion for reconsideration "as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order," (*Diamond Cab*, *supra*) the Motion for Reconsideration filed by Verizon does nothing **but** express disagreement with the Commission's outcome of the case.

15. Indeed, the Motion for Reconsideration is literally a verbatim restatement of its original Motion to Add Issues.

a. Section I of the Motion for Reconsideration – "Introduction" is almost identical - down to the footnotes - to Section I of the Motion to Add Issues – "Introduction." Section III of the Motion for Reconsideration – "The Parties' Retention Marketing Practices" is, with one inexplicably minor change,[1] identical to Section II of the Motion to Add Issues – "The

[1] The **only** change occurs in the second sentence of Section III of the Motion for Reconsideration, which is changed from the corresponding sentence of Section II of the Motion to Add Issues as follows: "Retention marketing is triggered after an order to disconnect a customer's retail service is received by Verizon's retail operations, which often occurs several days before the disconnect is scheduled to happen ~~in advance~~." Otherwise the section is word-for-word identical.

Parties' Retention Marketing Practices." Section IV of the Motion for Reconsideration – "Proposed Issues" is almost identical to Section III of the Motion to Add Issues – "Proposed Issues." Section V of the Motion for Reconsideration – "The Commission Should Reconsider the Order and Add the Proposed Issues" is, with another of Verizon's inexplicably minor changes,[2] identical to Section IV of the Motion to Add Issues – "The Proposed Issues Should Be Added."

16. Section II of the Motion for Reconsideration adds to the Motion to Add Issues only in that it describes the Second Order and the standard of review. The Section lists three "developments" that it contends should compel the Commission to reconsider its Second Order. The first is that Comcast and Bright House are complying with the Second Order in its discovery responses; the second is that Bright House has filed testimony consistent with the allegations in its Complaint; and the third is the release of an internet magazine article that parrots the same arguments made in Verizon's Motion to Add Issues. Section II of Verizon's Motion for Reconsideration adds nothing to the arguments previously presented to the Commission, and does not form the basis for reconsideration of the Commission's Second Order.

17. Finally, Section VI of the Motion for Reconsideration requests that Second Order be "clarified" so as to allow for discovery related to the legally irrelevant marketing practices for wholly unregulated cable television and broadband internet services. There is no reason for the "clarification." The Second Order is clear that discovery is to be limited to regulated activities

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[2] Again, the **only** change has absolutely no substantive effect, and the only purpose for the change may be so that Comcast and Bright House cannot say the sections are absolutely identical. The only change in Section IV of the Motion for Reconsideration from the Section III of the Motion to Add Issues is in the first paragraph as follows: "... (ii) Verizon's program must be viewed in light of the competition it faces, which includes the extensive retention marketing practices ~~programs~~ employed by Bright House and Comcast ... and (iii) the Commission should not grant requested relief (here termination of Verizon's program) that would lock into place an artificial and anticompetitive regulatory bias in favor of cable marketing practices ~~unlevel playing field~~, ..." Otherwise the 4+ page section is word-for-word identical.

within the scope of the four issues. Fishing expeditions in the guise of discovery will not be allowed. The Second Order is clear, and further clarification is unnecessary.

18. As set forth herein, the argument advanced in the Motion for Reconsideration is a direct restatement of argument contained in Verizon's original Motion to Add Issues. In fact, to characterize the argument as a "restatement" is charitable, as the Motion for Reconsideration consists almost exclusively of block-quotes lifted verbatim from the Motion to Add Issues.[3] Extensive reargument of fully briefed and argued issues as engaged in by Verizon serves no proper purpose, and is not the proper purpose of a motion for reconsideration under Rule 25-22.0376, F.A.C.

19. Verizon is asking the Commission to simply "change its mind" without submitting anything new, which would violate the standard in *Stewart Bonded Warehouse v. Bevis, supra.* In that case, the Commission reversed itself on a motion for reconsideration, without new evidence or argument being presented. The Court, in reversing the Commission's order on reconsideration, held that:

> The granting of a petition for reconsideration should not be based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review. . . . The only basis for reconsideration noted in the instant cause was the reweighing of the evidence discussed above. This is not sufficient.

Stewart Bonded Warehouse v. Bevis at 317.

20. Since the Commission should deny the Motion for Reconsideration based on the fact that Verizon merely reargues issues fully presented to and considered by the Commission, and since Verizon has added nothing new to its arguments, Comcast has not engaged in a point-

[3] The only changes to the sections that keep them from being absolutely identical are either purely cosmetic, or are the equivalent of randomly inserting the phrase "and we really, REALLY mean it so you should agree with us" throughout the Motion for Reconsideration.

by-point reargument of the substance of the issues. Should the Commission choose to take up the matter anew, Comcast relies on its Response in Opposition to Verizon Florida LLC's Motion to Add Issues files on May 2, 2008.

CONCLUSION

The Motion for Reconsideration filed by Verizon fails to identify a point of fact or law which was overlooked or the Commission failed to consider in issuing its Second Order Modifying Procedure. Thus, there is no valid basis under the rules of the Commission and relevant caselaw for any reconsideration of the Second Order Modifying Procedure, and Verizon's Motion for Reconsideration should be denied.

Respectfully submitted,

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