

**Ruth Nettles**

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**From:** Ann Bassett [abassett@lawfla.com]  
**Sent:** Tuesday, August 12, 2008 3:26 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** Docket Nos. 070691 and 080036  
**Attachments:** 2008-08-12, 070691 and 080036, Comcast's Response to Verizon's Motion for Continuance.pdf

The person responsible for this electronic filing is:

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The Docket Nos are:

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

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 11

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

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August 12, 2008

**VIA ELECTRONIC FILING**

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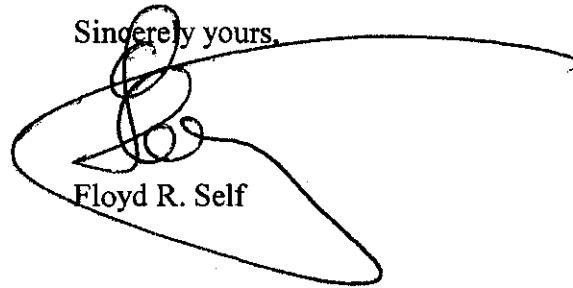
Re: Docket Nos. 070691-TP and 080036-TP

Dear Ms. Cole:

Enclosed for filing on behalf of Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone is an electronic version of Comcast Phone of Florida, L.L.C.'s Response to Verizon Florida LLC's Motion for Continuance 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

DOCUMENT NUMBER - DATE  
07153 AUG 12 08  
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**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

Dated: August 12, 2008

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

Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone ("Comcast"), hereby files this Response to Verizon Florida LLC's ("Verizon") August 7, 2008, Motion for Continuance ("Verizon Motion"), and states that the Verizon Motion fails to state any basis for a continuance of these consolidated proceedings. Circumstances have not changed since this Commission last considered a Verizon request to stay or postpone these proceedings, and the points raised by Verizon are still very speculative, and such speculation is not a sufficient basis for a continuance. Comcast urges this Commission to again deny Verizon's latest attempt to delay this proceeding, and states as follows:

**BACKGROUND**

1. The Complaint filed by Comcast in January 2008 alleges that the retention marketing activities engaged in by Verizon violate Sections 364.01(4), 364.3381, and 364.10, Florida Statutes, and Rule 25-4.082, Florida Administrative Code, which relate to this

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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 is grounded upon this Commission's authority under Florida law. Thus, these consolidated dockets are centered and based exclusively upon Verizon's conduct under Florida law.

2. Verizon has tried numerous procedural pleadings to dismiss, stay, or expand the scope of these proceedings, and when each of those efforts has failed, it has sought reconsideration of each, which has also been denied in due course by the full Commission. Verizon now seeks to once again have this Commission do what it has argued and lost, and reargued and lost – to continue this case until November or thereafter. Verizon's theory for this continuance is the same theory that it has used again and again – and failed with again and again: that the posture of the federal case is now poised to completely resolve this state law case. However, at no time has Verizon ever offered any authority or explanation, including in this latest pleading, as to how the separate federal case is somehow dispositive, controlling, or otherwise relevant to this Commission's exercise of its exclusive jurisdiction duties under Florida law.

3. In this latest pleading, Verizon relies first on the fact that the FCC has issued an order directing Verizon to cease its retention marketing program and it is in compliance with the FCC's Order. Under Verizon's reasoning, if the FCC's Order is upheld, "the complaints in this case will be moot and, if a hearing has been held, it will have been a waste of time." Verizon Motion, at 1-2.

4. While such an argument may have superficial appeal, the current suspension of the retention marketing program is just another step along a long road of delay. As Verizon

acknowledges, it has filed an appeal of the FCC's Order and the continued prosecution of that appeal demonstrates that Verizon refuses to permanently terminate its illegal program unless ordered and affirmed on appeal. But regardless of what happens at the federal level, a federal decision will not resolve the Florida state law claims raised before this Commission. Accordingly, there is still *no reason* for this Commission to order a continuance of these proceedings, and the Commission's duty under Florida law requires that it proceed with the hearing now scheduled for August 28-29, 2008.

## ARGUMENT

5. As Comcast has raised in response to prior Verizon pleadings, 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” (emphasis added). 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).

6. The violations raised by Comcast and Bright House are based upon the clear statutory requirements of Sections 364.01(4)(g), 364.3881(3), and 364.10(1), Florida Statutes, that fall within this exclusive grant of legislative authority as well as Rule 25-4.082, Florida Administrative Code. Again, this Commission is the sole entity under Florida law with the jurisdiction and authority to determine whether there has been any violation of the Commission's statutes and rules. There is simply no statutory basis or judicial economy theory under the present facts and circumstances that merits a continuation of this case especially with the hearing now less than three weeks away.

7. Verizon reports that it has ceased the retention marketing at issue in this complaint because the FCC has ordered it to stop. Thus, Verizon asserts, “Complainants obtained that relief from the FCC.” Verizon Motion, at 1. But the problem with this statement is that the federal case is not over. As Verizon very plainly states in the second paragraph of its motion, “Verizon contested the FCC Order by filing a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit.” This means that Verizon has not accepted the FCC’s decision and that it is fighting to have the Court of Appeals reverse the FCC so it can continue to engage in retention marketing. Accordingly, and as discussed below, the procedural posture of the federal case combined with the fact that the claims at issue before this Commission are based upon state law, leave this Commission with no other course but to continue on with its own proceedings.

8. Comcast acknowledges that if Verizon is unsuccessful in reversing the FCC’s order on appeal, then Verizon will certainly be prohibited as a matter of *federal* law from engaging in its retention marketing program. While the ultimate termination of Verizon’s retention marketing program will certainly be the correct end result, the mere termination of the retention marketing program does not answer whether the retention marketing program violates *Florida* law. A final decision at the federal level does not in and of itself absolve the Florida Public Service Commission of its obligation to consider whether Verizon’s conduct violates Florida law under this Commission’s exclusive jurisdiction. Should Verizon ultimately prevail at the federal level, it will again engage in the retention marketing program. It is therefore critical that this Commission reach a decision regarding the legality of the retention marketing program under Florida law. Comcast is not interested in wasting this Commission’s valuable

resources, or its own. But given the present status of the federal proceedings, there is no legal basis at this time for suspending this state law case.

9. Further, the outcome of the federal proceedings is just as speculative today as the last time this Commission heard argument on this same question only a few weeks ago. Although, the FCC issued an order rejecting its Enforcement Bureau's recommended decision there are additional steps along the road of this federal case before a final, dispositive, non-appealable decision is reached. As Verizon's own motion demonstrates, while an expedited briefing schedule has been granted, it could be days, weeks, months, or even years before the federal court decides the case. Moreover, if Verizon loses at the Court of Appeals, it may seek a review at the Supreme Court. There is no authority for this Commission to rely upon Verizon's speculative predictions as to outcomes or timing and to deny what we do know with certainty – this Commission has a hearing scheduled in this matter to consider the state law claims raised by Comcast and Bright House on August 28-29<sup>th</sup>, with ongoing discovery and other normal trial preparations in the next two weeks.

10. What this Commission cannot lose sight of is that if the Court of Appeals reverses the FCC, then Verizon has every intention of restarting its retention marketing program. In that case, Comcast will be exactly where it is today – in need of this Commission's determination as to whether Verizon's conduct violates Florida law. If we suspend the present hearing schedule to await the court's decision, and if the FCC is reversed, then Comcast and Bright House will be back before you asking to pick up with the state law case. However, while we don't know when that might be, it nevertheless seems very safe to assume that this Commission's schedule would not permit the parties to have a hearing within three weeks of such a request. In the meantime,

Verizon would be free to engage in its retention marketing program to the detriment of Comcast, Bright House, and Florida consumers.

11. Verizon's request for a continuance also fails to consider another potential outcome of the federal court case – the court could remand the case back to the FCC for further proceedings. Under such a scenario, and depending upon the substance of the court's ruling, the court and/or the FCC may or may not under such circumstances lift the current order that required Verizon to immediately stop its retention marketing program. On a remand, the case would certainly proceed for many more months, and possibly another round of appeals. Again, in the event of a remand and the restart of Verizon's retention marketing program, the prejudice to Comcast's ability to then get this Commission to immediately reengage its Florida case is highly unlikely, and in the meantime Verizon could again be engaging in its illegal retention marketing program.

12. Verizon has requested that this proceeding be continued only until November or as soon thereafter as possible. It is unclear, however, how or why Verizon chose November. While briefing in the federal Court of Appeals case is scheduled to be completed on September 22<sup>nd</sup>, no oral argument has been scheduled and there is no indication of when the Court of Appeals will issue a decision. It is therefore highly speculative to choose November as the conclusion of a continuance. Will Verizon seek a further continuance in November if no Court of Appeals decision has been issued? In light of this Commission's clear duty to proceed under Florida law, indefinitely suspending this case or engaging in piecemeal suspensions (that likely amount to an indefinite suspension) would deny Comcast due process.

13. It is important to once again note that Verizon has not cited to any authority that demonstrates, suggests, or even hints at the possibility that any ultimate outcome at the federal



level preempts, controls, or otherwise impacts this Commission's ability to determine as a matter of state law whether Verizon's conduct violates state law. Certainly if the FCC's Order to Verizon to cease its retention marketing program is upheld the correct remedy will be achieved but there will not be any binding Florida law determination by the sole entity charged with the exclusive jurisdiction to decide what is required by Florida law and what further actions, if any, may be appropriate.

14. In addition to its claims regarding the federal retention marketing case, Verizon also argues that because New York and Pennsylvania have suspended their state law proceedings that these other states are somehow controlling over this Commission. However, there are significant factual and legal distinctions between Florida and those two other states. With respect to New York, neither Comcast or Bright House are parties to those proceedings, so what other carriers decide based upon the status of their cases is their decision, and one that is certainly not binding on this Commission.

15. As for the Pennsylvania case, Comcast is a party to the case but the law and procedural status of that proceeding are vastly and significantly different than Florida. Most significantly, there is little procedural record in the Pennsylvania case, whereas in Florida we have had an issues identification conference, both direct and rebuttal testimony have been prefiled, the parties have engaged in extensive discovery, there have been numerous procedural pleadings and subsequent orders, depositions are scheduled to commence this Wednesday, August 13<sup>th</sup>, and the hearing is scheduled for less than three weeks away – for August 28-29<sup>th</sup>. Significant Comcast, Bright House, Verizon, and Commission resources have been expended to date in this matter and the parties and Staff are in the final stages of preparing for the hearings at the end of this month. Finally, the postponement of the Pennsylvania case is not determinative

of what happens in Florida and this case is certainly not at the point where a continuance is necessary or appropriate.

16. Lastly, a continuance at this point in this proceeding would not serve the interests of administrative economy or conserve resources. As has been discussed at length, the potential outcome of the federal proceeding remains speculative and any continuance of this proceeding now would likely be more costly and time consuming to the parties and Commission if and when the case were restarted. Nothing about this case has occurred within a short time, and restarting the case quickly is no guarantee. As the Commission is well aware, the Bright House complaint was filed November 16, 2007 and the Comcast complaint on January 10, 2008 – so even a continuance and restart in November would still put a final decision off until more than a year after the respective complaints were filed. Justice delayed is justice denied. Although Verizon is presently under order to not engage in retention marketing, Comcast still needs for this Commission to fulfill its statutory obligation and determine whether Verizon's conduct violates Florida law.

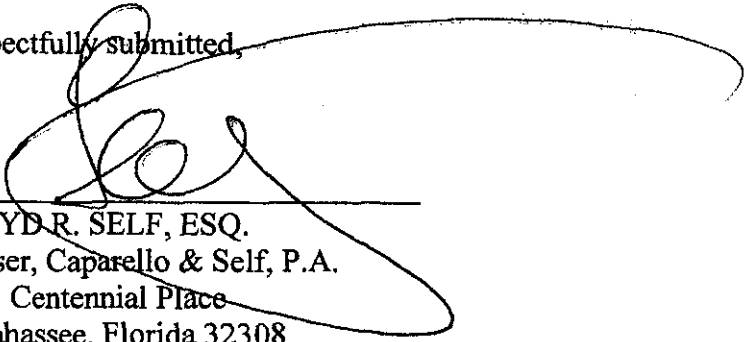
### **CONCLUSION**

The Motion for Continuance filed by Verizon fails to identify any legal basis for continuing these state law proceedings that are within this Commission's exclusive jurisdiction. The status of the federal retention marketing proceeding does not effect this Commission's statutory and affirmative obligation to issue a decision in this proceeding which is based solely on Florida law. Further, while Verizon may now be under an FCC Order that prohibits it from engaging in its retention marketing program, when there might be a final, non-appealable decision at the federal level remains highly speculative. In addition, Verizon's contention that

the procedural schedules of complaint proceedings in other states should somehow influence this Commission's obligations under Florida law is misguided at best.

For the reasons stated above Comcast respectfully requests that the Commission maintain the current procedural schedule and proceed to with the regularly scheduled hearing on August 28-29, 2008.

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 12<sup>th</sup> day of August, 2008 upon the following:

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