

Dorothy Menasco

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Sent: Thursday, August 14, 2008 2:31 PM
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Subject: Docket Nos. 070691-TP/080036-TP - Verizon Florida LLC's Response in Opposition to Motion to Strike
Attachments: 070691 080036 VZ FL Response to Motion to Strike 8-14-08.pdf



The attached filing is submitted in Docket Nos. 070691-TP/080036-TP on behalf of Verizon Florida LLC by

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The attached .pdf document consists of a total of 12 pages (cover letter-1 page, Response in Opposition-9 pages, and Certificate of Service-2 pages).

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August 14, 2008 – VIA ELECTRONIC MAIL

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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 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
Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone

Dear Ms. Cole:

Enclosed for filing in the above-referenced matters is Verizon Florida LLC's Response
in Opposition to Motion to Strike. Service has been made as indicated on the Certificate
of Service. If there are any questions regarding this filing, please contact me at (678)
259-1449.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

tas

Enclosures

DOCUMENT NUMBER-DATE

07257 AUG 14 08

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and request for emergency relief) Docket No. 070691-TP
against Verizon Florida LLC for anticompetitive) Filed: August 14, 2008
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)

In re: Complaint and request for emergency relief) Docket No. 080036-TP
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 Comcast Phone)
of Florida, LLC d/b/a Comcast Digital Phone)

**VERIZON FLORIDA LLC'S RESPONSE
IN OPPOSITION TO MOTION TO STRIKE**

Verizon Florida LLC ("Verizon") opposes the complainants'¹ motion to strike portions of Verizon's testimony concerning (i) the facilities-based competition that Verizon faces in Florida, particularly from the cable companies, and (ii) the aggressive retention marketing programs Comcast and Bright House have employed in Florida. That testimony relates directly to the issues identified in the Second Order Modifying Procedure ("Second Order"),² as CDP and Bright House recognized when they offered their own testimony addressing those same subjects. The complainants' contention that the Second Order somehow precludes the parties from presenting such evidence mischaracterizes the order, which says nothing about what evidence may be presented on the issues it identified. The complainants' other arguments concerning lack of

¹ The complainants are Bright House Networks Information Services (Florida) LLC and Bright House Networks, LLC (collectively, "Bright House") and Comcast Phone of Florida LLC d/b/a Comcast Digital Phone ("CDP"). CDP is the CLEC affiliate of Comcast Cable Communications, LLC ("Comcast"). The motion to strike initially was filed by CDP and later joined by Bright House.

² Order No. PSC-08-0344-PCO-TP (May 28, 2008).

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FPSC-COMMISSION CLERK

personal knowledge and hearsay are equally without merit. The motion to strike should be denied.

I. BACKGROUND

A. Procedural Background

The complainants seek to prevent Verizon from implementing the retention marketing program that has been stopped by the FCC's cease-and-desist order³ (which Verizon has appealed to the D.C. Circuit). Complainants seek this relief under Florida statutes and a Commission rule concerning anticompetitive practices, discrimination and number porting. The Second Order identified four broad issues to be addressed in this case:

1. Is Verizon obtaining an undue or unreasonable advantage by marketing a customer when receiving a local service request to port a subscriber's telephone number for Bright House or Comcast, in violation of Section 364.10(1)? If so, how is Verizon doing so?
2. Does Verizon timely complete porting of a subscriber's telephone number upon request of Bright House or Comcast, pursuant to Rule 25-4.082, F.A.C.?
3. Is Verizon's retention marketing program for voice customers anti-competitive, in violation of Section 364.01(4)(g)? Why or why not?
4. What action, if any, should the Commission take with respect to Verizon's retention marketing program?

Verizon addressed these issues in direct testimony filed on May 30, 2008 and rebuttal testimony filed on July 25, 2008. Complainants' motion requests the Commission to strike portions of the Direct Testimony of Alan Ciamporcero and the Rebuttal Testimony of Michelle Robinson (who adopted Mr. Ciamporcero's Direct Testimony).

³ Memorandum Opinion and Order, *Bright House Networks, LLC v. Verizon California Inc.*, File No. EB-08-MD-002, FCC 08-159 (rel. June 23, 2008).

B. The Parties' Testimony

As relevant here, the direct testimony adopted by Ms. Robinson discusses the increasing importance of service bundling in the Florida communications market; the substantial numbers of voice customers the cable companies have won; their well-established video and broadband customer bases; and competition Verizon faces from other service providers.⁴ As she concludes:

. . . Verizon's program is being implemented in a highly competitive environment in which many facilities-based providers are trying to win customers' business. The competition between Verizon on the one hand and Bright House and Comcast on the other is especially vigorous, with each competitor offering bundles of voice, data and video service and informing its customers of those service offerings through retention marketing programs. Bright House and Comcast are well-established and enjoying success in the Florida telephone market, while Verizon has experienced substantial line losses. Although Bright House and Comcast might prefer less competition from Verizon, there can be no serious argument that Verizon's retention marketing has any impact on its competitors' ability to compete for, win and retain customers.⁵

This conclusion also is supported by the rebuttal testimony of Verizon's economic expert, Jeffrey Eisenach.⁶

CDP witness Beth Choroser also discusses the Florida market. She notes that "Comcast has invested billions of dollars in upgrading its cable television facilities to create a national network through which it also can offer retail voice telephone services and high-speed Internet access as well as advanced video services." She further states that Comcast "currently provides Voice over Internet Protocol ("VoIP") services to the public" and "competes primarily for residential telephone service customers throughout Florida wherever its facilities based network has been deployed." Although by its own

⁴ Ciamporcero Direct at 10-13.

⁵ *Id.* at 17.

⁶ Eisenach Rebuttal at 28-30.

reckoning Comcast is now the fourth largest residential telephone company in the United States,⁷ Ms. Choroser states that “Comcast is a new entrant into what remains largely a monopoly market for voice services in Florida.”⁸ She contends, based exclusively on reported ILEC and CLEC access line data, that the Florida market “is still dominated by the ILECs” and that “there is an extreme dearth of true facilities-based competition.”⁹ With this testimony as background, she opines that whatever the short-term benefits of Verizon’s retention marketing program, “over the long term allowing such marketing practices is harmful to competition and thereby reduces customer choice and benefits.”¹⁰ The other witnesses for the complainants express similar views concerning the long-run impact of Verizon’s program.¹¹ Verizon’s testimony described above responds to those contentions.

In the Ciamporcero direct testimony adopted by Ms. Robinson, she notes that Bright House and Comcast both engage in their own retention marketing programs that affect voice customers and describes recent statements Comcast has made about the particularly aggressive nature of its retention marketing program.¹² In response, Ms. Choroser stated that “however aggressive Comcast may be about its video services and bundled service packages, Comcast has no intention of engaging in any illegal retention marketing such as Verizon has done in this case.”¹³ Likewise, Bright House witness Frenberg denied that Bright House engages in retention marketing that is similar to

⁷ Ciamporcero Direct at 11.

⁸ Choroser Direct at 5.

⁹ *Id.* at 6.

¹⁰ *Id.* at 11.

¹¹ See, e.g., Frenberg Direct at 8; Bazelon Direct at 5.

¹² *Id.* at p. 14-17.

¹³ Choroser Rebuttal at 12.

Verizon's retention marketing program.¹⁴ He further stated that "[t]he only time we engage in efforts to retain a customer with a pending port-out is when the customer, on his or her own, calls BHN to cancel their BHN service."¹⁵ In Ms. Robinson's rebuttal, she points out that this approach permits Bright House to engage in retention marketing for voice customers when customers with bundled services call to cancel their video service.¹⁶ She further states that Bright House's approach is more aggressive than Verizon's, because while Verizon typically reached out to customers through direct mail, Bright House makes its pitch during the required call customers must make to cancel their video service.¹⁷

II. ARGUMENT

The motion to strike should be denied because the testimony in question is relevant to the issues in this case and addresses opposing testimony on the same subjects. Despite the complainants' attempts to mischaracterize the Second Order, it does not preclude parties from presenting evidence on facilities-based competition from the complainants and others, nor does it prevent them from offering evidence about the cable companies' Florida retention marketing programs. The other grounds raised by CDP and Bright House – lack of personal knowledge and hearsay – are equally groundless.

¹⁴ Frendberg Direct at 5.

¹⁵ *Id.* at 7.

¹⁶ Robinson Rebuttal at 6-7.

¹⁷ *Id.* at 7.

A. The Challenged Testimony Is Relevant

The parties disagree about whether Verizon's retention marketing program will harm competition in the long run, a subject that relates to Issue 3 concerning whether Verizon's program is anticompetitive. Verizon's testimony demonstrates that competition cannot possibly be harmed by Verizon's program because the Florida market is highly competitive and the cable companies in particular are large and well-established with rapidly growing voice businesses that have not been significantly affected by Verizon's program. CDP takes a radically different view, contending that competition is still in the early stages and that it could somehow be undermined if the program is not terminated. Complainants do not even argue that Verizon's testimony is irrelevant to the question of competitive impact, nor do they attempt to explain why Verizon should not be able to respond to their testimony on this point.

The parties also disagree about whether the cable companies engage in retention marketing that is similar to Verizon's program. Verizon's testimony describes the cable retention marketing programs and explains that they actually are more aggressive than Verizon's. Bright House's and Comcast's deployment of similar programs supports Verizon's positions on Issue 1 (preferential treatment),¹⁸ Issue 3 (anticompetitive conduct)¹⁹ and Issue 4 (action to be taken by the

¹⁸ Evidence of the cable companies' retention marketing programs demonstrates that Verizon's program does not give it an undue or unreasonable advantage because the parties are engaging in similar conduct.

¹⁹ The fact that the cable companies engage in retention marketing themselves – and indeed in practices that are considerably more aggressive than those about which Bright House and CDP complain – is relevant to complainants' claim that Verizon's program is anticompetitive. Retention marketing cannot be *anticompetitive* when Verizon engages in it, yet *competitive* when the cable companies engage in it themselves. The cable companies' own actions in the marketplace are highly relevant to determining whether Verizon's comparable actions are anticompetitive or unfair to the cable companies. Moreover, Verizon's retention marketing does not take place in a vacuum, but in a competitive environment in which the cable companies' marketing practices play just as significant a role in defining the marketplace norms.

Commission).²⁰ CDP and Bright House have been unwilling to disclose fully how their programs operate, but have acknowledged the existence of those programs and claimed that they are legal and different than Verizon's program. Complainants again do not argue that Verizon's testimony is irrelevant or seek to explain why Verizon should not be able to address the complainants' testimony on the same subject.

B. Complainants' Challenges to the Testimony Are Groundless

Complainants contend that the Second Order "expressly excluded" the subjects addressed in the testimony they seek to strike. This argument mischaracterizes the Second Order, which identified broadly defined issues and did not rule on whether evidence concerning Verizon's facilities-based competitors and the cable companies' retention marketing programs would be admissible to address those issues.²¹ Indeed, because no testimony had been filed when the Second Order had been issued, it would have been impossible for the pre-hearing officer to make such a ruling. Moreover, in deciding not to add Verizon's issues "at this time," the Second Order made no ruling on the relevance of the cable companies' retention marketing practices then or in the future to the broad issues identified in the order. And although the Second Order stated that it should serve as guidance for discovery, it did not rule on whether particular discovery requests concerning retention marketing by cable companies would be allowed, much

The Commission must take that environment and those practices into account when evaluating the complainants' claims that only Verizon's practices are anticompetitive.

²⁰ The cable company's retention marketing is relevant to whether the Commission should take any action in this case because granting the requested relief would place Verizon at a competitive disadvantage by prohibiting its retention marketing program while allowing the cable companies' retention marketing practices to continue unabated. Such relief not only would harm Verizon, but also customers, who would be prevented from receiving accurate information about available service packages and pricing incentives at a meaningful time – after the customers have initially decided to cancel their Verizon service but before they have yet left Verizon's network when they can still consider available options before they would require another inconvenient network connection or reconnection.

²¹ If the Second Order had excluded evidence concerning the issues Verizon proposed, that would mean that evidence about Verizon's retention marketing program would have to be excluded, because one of the issues Verizon sought to add concerned its own program.

less whether evidence of such retention marketing would be permitted at the hearing. The complainants' attempt to exclude evidence of Verizon's facilities-based competitors is even more far-fetched because Verizon did not seek to add issues dealing with that subject.

The other arguments for exclusion are just as groundless. The complainants argue that Ms. Robinson lacks personal knowledge of the cable companies' video and broadband marketing practices. Ms. Robinson has worked for Verizon (and its predecessor, GTE) for ten years, holding a variety of management positions in public policy and government relations. Before assuming her current position as president of Verizon's southeast region, she was senior vice president for Verizon's southern region.²² In those positions she has been in a position to observe the industry and learn of industry practices, including those of Verizon's competitors. Complainants are certainly free to explore the basis of Ms. Robinson's testimony on cross-examination, but they are wrong to suggest there is an insufficient foundation for her testimony. Not only does she have personal knowledge of the communications industry, but she may testify about her opinions and the technical and other specialized knowledge supporting those opinions based on her knowledge, experience, and education.²³ Finally, complainants acknowledge that Verizon may present hearsay testimony to supplement or explain other evidence, but assert that such supplementation is not permissible because evidence of their marketing practices has been excluded from the case. Because such evidence has not been excluded, as explained above, complainants' hearsay objection is meritless.

²² Robinson Rebuttal at 1.

²³ See Fl. Stat. 90.702.

For the foregoing reasons, complainants' motion to strike should be denied.

Respectfully submitted on August 14, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail on
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