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 ORDER NO. PSC-08-0549-PCO-TP ISSUED: August 19, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER DENYING ORAL ARGUMENT
AND DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

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 ("Bright House 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. Docket No. 070691-TP was opened to consider this Complaint.

On December 6, 2007, Verizon filed its Motion to Dismiss Complaint or in the Alternative, Stay Proceedings ("Motion to Dismiss Bright House Complaint") and its Request for Oral Argument. On December 13, 2007, Bright House filed its Response in Opposition.

On February 11, 2008, Bright House, along with Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone ("Comcast") filed their formal Accelerated Docket complaint with the FCC. This federal complaint was filed pursuant to Section 208 of the Communications Act of 1934, as amended ("Act") and claimed that Verizon is violating Sections 222(a) and (b), and 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 Complaint. On March 24, 2008, Order No. PSC-08-0180-FOF-TP was entered, reflecting that decision.

On January 10, 2008, Comcast filed with the Commission its Complaint and Request for Emergency Relief ("Comcast Complaint"), reflecting the same allegations as the Bright House Complaint. Docket No. 080036-TP was opened to consider the Comcast Complaint.

On February 4, 2008, Verizon filed its Motion to Dismiss Complaint or, in the Alternative, Stay Proceedings ("Motion to Dismiss Comcast Complaint"). On February 11, 2008, in addition to filing with the FCC, Comcast also filed its Opposition to Verizon's Motion, and on February 12, 2008, Comcast filed its Amended Opposition to Verizon's Motion.

At the Commission's regularly-scheduled Agenda Conference on March 18, 2008, the Commission denied Verizon's Motion to Dismiss Comcast Complaint and ordered that Dockets 070691-TP and 080036-TP be consolidated. On April 2, 2008, Order No. PSC-08-0213-FOF-TP was issued, reflecting that decision.

On April 10, 2008, Order No. PSC-08-0235-PCO-TP, Order Establishing Procedure, was issued, 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, No. PSC-08-0213-FOF-TP, and No. PSC-08-0235-PCO-TP, ("Motion for Reconsideration"). Verizon also requested oral argument. On April 24, 2008, Bright House and Comcast separately filed responses in opposition.

On June 17, 2008, at the Commission's regularly scheduled Agenda Conference, the Commission denied Verizon's Motion for Reconsideration of the three Commission Orders. An order reflecting this decision was issued on July 16, 2008.

On April 25, 2008, Verizon filed its Motion to Add Issues, seeking to add three issues to this docket related to all three parties' marketing practices of the unregulated services of broadband internet service and cable television, and to allow discovery regarding those services. On May 2, 2008, Bright House and Comcast separately filed responses in opposition.

On May 28, 2008, the Prehearing Officer issued Order No. PSC-08-0344-PCO-TP, Second Order Modifying Procedure, which denied Verizon's Motion to Add Issues. On June 9, 2008, Verizon filed its Motion for Reconsideration or Clarification of the Second Order

Modifying Procedure ("Motion for Reconsideration or Clarification") and its Request for Oral Argument.

On June 17, 2008, Comcast filed untimely, its Response in Opposition to Verizon's Motion and its Request for Oral Argument. With no objection from Verizon, we accepted Comcast's Response for consideration. On June 17, 2008, Bright House filed its Notice of Joinder in Comcast's Response.

The Commission has jurisdiction over this matter for purposes of addressing Verizon's Motion for Reconsideration or Clarification of Order No. PSC-08-0344-PCO-TP, Second Order Modifying Procedure, pursuant to Rule 25-22.0376, Florida Administrative Code.

Verizon's Motion for Reconsideration

Verizon asserts that the complaints of Bright House and Comcast both allege that Verizon's regulations and retention marketing practices "clearly constitute an anticompetitive practice that is harmful to competitive providers and to Florida consumers." Verizon argues that in order for us to evaluate these complaints, we "must consider the competitive environment in which Verizon's program takes place, which includes the *more aggressive marketing practices of the complainants themselves*" (emphasis in original).

Verizon argues that retention marketing practices cannot be anticompetitive when Verizon engages in it, yet competitive when Bright House and Comcast engage in it. Further, there is a competitive environment in which the retention marketing of all three parties takes place and the Commission "must take that environment and those practices into account when evaluating" the two complaints of Verizon's alleged anticompetitive behavior. Verizon also expresses concern that if we prohibit "its retention marketing program while allowing the cable companies' retention marketing practices to continue unabated," both Verizon and its customers would be harmed.

Verizon asserts that while this Commission does not have authority to regulate the cable companies' retention marketing practices, it "may *allow discovery* and *consider evidence* concerning their practices when, as here, they are highly relevant to the claims Bright House and Comcast" bring to this Commission. Thus, we should reconsider the Second Order Modifying Procedure and add Verizon's proposed issues or, at least clarify the Second Order Modifying Procedure to ensure that it allows discovery on the retention marketing practices of Bright House and Comcast.

Verizon asserts that the Prehearing Officer denied its Motion to Add Issues without providing a rationale for the decision, stating simply that "[a]t this time, I am unconvinced of the need to broaden the scope of the Issues List beyond the four modified issues attached." And further, that "[t]his decision should also serve as guidance for discovery." Verizon relates the standard of review for a motion for reconsideration, which is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision. Verizon explains that without a rationale from the Prehearing Officer, it does not know which points of fact or law the Prehearing Officer may have overlooked, nor will

the Commission, on review of this Motion, be able to determine whether the ruling or the Second Order Modifying Procedure is correct. Pursuant to that explanation, Verizon presents from its Motion to Add Issues the parties' arguments, along with a recounting of "a number of recent developments" that emphasize the need for the additional issues and necessity of discovery on these issues.

The first recent development related by Verizon is that Bright House and Comcast have already objected to Verizon's discovery requests, citing the Second Order Modifying Procedure as authority. Second, Bright House has filed testimony denying that it engages in the same type of retention marketing practice as that of Verizon, for which Verizon believes it should be allowed to rebut with the aid of discovery. Third, Verizon cites to a recent internet magazine article which, Verizon alleges, confirms that Bright House and Comcast engage in retention marketing that is "substantively identical" to Verizon's practices. With respect to the third development, Verizon reiterates its arguments from its Motion to Add Issues; that is, "customers benefit from retention marketing," that "the complaints of Bright House and Comcast are designed to impose an artificial regulatory constraint on Verizon," and that "communication service bundles" are key elements in the retention marketing competition.

Verizon repeats its description of the retention marketing practices of all three parties that it provides in its Motion to Add Issues. It also includes the three issues which were denied in the Second Order Modifying Procedure:

1. What are the retention marketing practices of Verizon for voice customers, broadband customers and cable customers?

2. What are the retention marketing practices of Bright House for voice customers, broadband customers and cable customers?

3. What are the retention marketing practices of Comcast for voice customers, broadband customers and cable customers?

Verizon repeats its argument from its Motion to Add Issues, asserting that the issues are relevant because retention marketing cannot be competitive for one side yet anticompetitive for the other; Verizon's practices must be viewed in the context of the competition that exists; and the relief requested by the complaints would create "an artificial and anticompetitive regulatory bias in favor of" Bright House and Comcast. Verizon elaborates on the context of the competition, explaining that both sides are "pursuing double and triple play customers who want to receive multiple, bundled services at discounted prices. And they both actively market their services in a number of ways, including through retention marketing" and retention marketing for any one of the three services affects all three, including voice service.

Verizon also argues that this Commission has in the past obtained and reviewed information regarding unregulated services when it has been relevant to the issue before us. Verizon cites to our annual reports to the Legislature, which include data on Voice over Internet Protocol ("VoIP") and other unregulated services, in order to present a more complete picture of the Florida telecommunications industry. Verizon also points out that the Commission has

considered evidence of the availability of VoIP from other non-regulated providers in Docket No. 060822-TL, regarding a request for relief from Carrier-of-Last-Resort obligations.

Verizon repeats that we should not grant relief to Bright House and Comcast that would secure an unfair advantage for them, and emphasizes that even if the issues requested by Verizon are not added, we should not foreclose discovery on the retention marketing programs of all three parties. Verizon asserts that, at a minimum, "the Order should be clarified so that it does not prohibit such discovery."

Comcast's Response (Joined by Bright House)

Comcast agrees with the standard of review for a motion for reconsideration stated by Verizon but also cites to additional authority. For example, in Stewart Bonded Warehouse v. Bevis, 294 So. 2d 315, 318 (Fla. 1974), the court stated that "there must be a showing of cause to support a request for reconsideration." Similarly, Comcast asserts that in Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981), the court 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.*

Comcast adds that more recently, in Cleveland v. State, 887 So. 2d 362, 364 (Fla. 5th DCA 2004, the court 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)

Comcast states that Verizon's Motion for Reconsideration "is literally a verbatim restatement of its original Motion to Add Issues." Comcast asserts that the numbered Sections I, III, IV, and V of Verizon's Motion for Reconsideration are essentially identical to Verizon's sections in its Motion to Add Issues, with few and minor changes. Comcast notes that Section II of the Motion for Reconsideration adds only a description of the Second Order Modifying Procedure and the standard of review, as well as listing "three 'developments' that [Verizon] contends should compel the Commission to reconsider its Second Order [Modifying]." The first development is that "Bright House and Comcast are complying with the Second Order [Modifying Procedure]" in their discovery responses; second, that they have filed testimony consistent with the allegations in their complaints; and third, Verizon references the internet magazine article. Comcast argues that the Motion for Reconsideration or Clarification adds nothing to what has already been provided to us and "does not form the basis for reconsideration of the Commission's Second Order [Modifying Procedure]".

Regarding Verizon's alternative request for clarification of the restriction on discovery placed by the Second Order Modifying Procedure, Comcast argues that there is no reason for

clarification. Comcast asserts that the Second Order Modifying Procedure "is clear that discovery is to be limited to regulated activities within the scope" of the four issues on the Issues List attached to the Second Order Modifying Procedure.

Comcast returns to the court's cautionary words:

> 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.

Comcast concludes that there is no valid basis for reconsideration of the Second Order Modifying Procedure and that the Motion should be denied.

Analysis and Decision

We denied oral argument, as Verizon provided no reason why oral argument would aid this Commission in understanding and evaluating this matter. Verizon did not identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in assessing Verizon's Motion to Add Issues that oral argument would help clarify.

Standard of Review

The standard of review for a motion for reconsideration, often cited by this 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, where the court stated:

[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.

> 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 . . . .

Diamond Cab, 146 So. 2d at 891.

In Jaytex Realty, the court set forth the limited nature of motions for reconsideration, stating:

> 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 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.

Jaytex, 105 So. 2d at 818.

Furthermore, the court explained that it is not necessary to respond 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.

Jaytex, 105 So. 2d at 819.

The Prehearing Officer is not required to explicate the reasoning on each argument posited by Verizon. See, Jaytex Realty, supra. In the Second Order Modifying Procedure, the Prehearing Officer stated, "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." While this pronouncement may not provide the point-by-point accounting of each matter contained in the Motion to Add Issues that Verizon might wish to see, Verizon cannot, from the Second Order Modifying Procedure "draw the conclusion that the matters not discussed were not considered" by the Prehearing Officer. The Prehearing Officer has unequivocally confirmed that she reviewed the Motion to Add Issues, as well as the Responses to the Motion to Add Issues. She has expressed her conclusion from her reading of those filings. She was not convinced that Verizon's proposed issues, which would include services over which this Commission has no authority, should be added to broaden the scope of this case.

Verizon has essentially resubmitted its Motion to Add Issues as a Motion for Reconsideration and Clarification and endeavored to justify this action by asserting that it cannot point to a question of law or fact which, had it been considered, would require a different decision. The unequivocal rejection by the Prehearing Officer of Verizon's arguments to add issues and to conduct the discovery it wishes, does not allow Verizon to restate the entirety of its arguments under the guise of a motion for reconsideration or clarification by this whole Commission. Verizon has failed to meet the requirements of the standard of review for a motion for reconsideration by identifying a point of fact or law which was overlooked or which this Commission failed to consider in rendering its Second Order Modifying Procedure. It is not appropriate for Verizon to reargue matters that have already been considered by the Prehearing Officer. See, Sherwood v. State, supra, citing Jaytex Realty. Accordingly, we deny Verizon's Motion for Reconsideration or Clarification.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Verizon's Request for Oral Argument is hereby denied. It is further

ORDERED that Verizon's Motion for Reconsideration or Clarification is hereby denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 19th day of August, 2008.

ANN COLE
Commission Clerk

(S E A L)

HFM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is non-final in nature, may request (1) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Citizens of the State of Florida v. Mayo, 316 So.2d 262 (Fla. 1975), states that an order on interim rates is not final or reviewable until a final order is issued. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.