

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: March 6, 2008

TO: Office of Commission Clerk (Cole)

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

RE: 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: 03/18/08 – Regular Agenda – Motion to Dismiss – Oral Argument Not Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\080036.RCM.DOC

Case Background

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 (“Petition”). Comcast 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 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”). Verizon also filed on February 4, 2008, its Request for Oral Argument on the Motion. Verizon alleges that Comcast’s complaint should be dismissed because it has failed to state a claim for which relief can be granted. Verizon also seeks dismissal, or in the alternative a stay, on the independent ground that Comcast has already put the same issues before the Federal Communications Commission (“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.

On February 11, 2008, Comcast filed its Opposition to the Motion of Verizon Florida, LLC to Dismiss Complaint or, in the Alternative, Stay Proceedings. On February 12, 2008, Comcast filed its Amended Opposition to Verizon’s Motion (“Response”). Comcast argues that Verizon’s motion should be rejected, as Comcast has stated a claim for which relief can be granted.

At the Commission’s regularly-scheduled Agenda Conference on March 4, 2008, the Commission denied Verizon’s Motion to Dismiss and Alternative Motion to Stay the proceedings during the pendency of Bright House’s complaint before the FCC’s Bureau of Enforcement, in 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. Bright House and Comcast raise the same issues and allege essentially the same facts in their respective complaints against Verizon.

On March 6, 2008, Verizon withdrew its Request for Oral Argument.

Staff’s recommendation addresses Verizon’s Motion to Dismiss.

Discussion of Issues

Issue 1: Should the Commission grant Verizon's Motion to Dismiss Comcast's Petition for failing to state a claim for which relief can be granted or alternatively, to dismiss the Petition for the independent reason that Comcast should not be allowed to pursue collateral claims before this Commission and the FCC simultaneously?

Recommendation: No. Staff recommends that Verizon's primary Motion to Dismiss, as well as its alternative reason to dismiss, be denied, because Comcast's Petition does state a cause of action upon which relief may be granted and Verizon has presented no sufficient basis to conclude that dismissal for Verizon's stated independent reason would be appropriate. **(R. Mann)**

ARGUMENTS

Verizon's Motion to Dismiss

Verizon alleges that Comcast's complaint should be dismissed because it has failed to state a claim for which relief can be granted. Verizon also seeks dismissal, or in the alternative a stay, on the independent ground that Comcast has already put the same issues before the FCC, giving rise to inefficient and wasteful proceedings. [Motion, page 1]

Verizon contends that its retention marketing program is lawful under state and federal law and is also pro-competitive. Verizon asserts that contrary to Comcast's allegation that Verizon is misusing information received by its wholesale operations, Verizon depends solely on information that it receives due to its role as a retail services provider. [Motion, pages 1, 2]

Verizon states that for the purposes of its Motion, it takes Comcast's factual allegations at face value. Verizon asserts that Comcast is not a Verizon wholesale customer. Rather, Comcast uses its own facilities to compete with Verizon, and Comcast acknowledges that it does not use Verizon unbundled network elements or resell services, and it co-locates with Verizon only for the purpose of exchanging traffic. [Motion, page 3]

First, Verizon asserts that, in accordance with industry standards, when Verizon receives a local service request (LSR) for local number porting (LNP) from Comcast, Verizon issues a retail disconnect order to ensure that the customer's retail service is discontinued at the appropriate time. In response to the *retail* loss notification and disconnect request, Verizon provides additional information to the customer to assist him or her in deciding whether to leave or remain with Verizon. If a customer chooses to remain, Verizon may, at the customer's request, stop the disconnection and porting activity. [Motion, pages 5, 6]

Verizon contends that the design of its systems to generate a retail service disconnect request upon receipt of an LNP request is a convenience for the customer. This assures coordination of the porting-out of the customer's telephone number and disconnection of the retail service. If it were necessary for the departing customer to ask Verizon to discontinue service, Verizon states it undoubtedly would have the right to engage in retention marketing.

Thus, when a new facilities-based provider submits an LNP request on a retail customer's behalf, the new carrier is necessarily acting as the customer's agent, both for purposes of submitting an instruction to disconnect the customer's retail service at a specific time and for purposes of initiating a number port. Absent such an agency relationship, the new carrier would have no independent authority to ask Verizon to cancel service. Accordingly, Verizon argues, it is acting on *retail* information obtained from retail disconnect orders. [Motion, pages 6, 7]

Second, Verizon argues that pursuant to Section 364.01(4)(b), Florida Statutes, the Commission is charged with encouraging competition. Verizon asserts that, consistent with this responsibility, the Commission must allow an ILEC to respond to an offering that a competitive provider makes to one of its customers:

Nothing contained in this section [364.051] shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, nonbasic services in a specific geographic market or to a specific customer by deaveraging the price of any nonbasic service, packaging nonbasic services together or with basic services, using volume discounts and term discounts, and offering individual contracts. However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers. Section 364.051(5)(a)2, Florida Statutes.

Verizon asserts that its retention marketing program enables it to meet the offerings of Comcast and other competitors who are not Verizon's wholesale customers. Verizon argues that its retention marketing thus complies with Florida law and is in agreement with the legislature's directive to the Commission to promote competition. [Motion, page 8]

Third, Verizon asserts that the Commission's jurisdiction in this case is limited to the application of state law, as the Commission has recognized in *BellSouth Carrier-to-Carrier Information Order*.¹ Verizon further states, however, that:

In the *BellSouth Key Customer Tariffs Order*² and *BellSouth Carrier-to-Carrier Information Order* relied upon by Comcast, the Commission predicated jurisdiction on state law, but looked to the FCC's *CPNI Reconsideration Order*³

¹ *In re: Complaint by Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. regarding BellSouth's alleged use of carrier-to-carrier information*, Docket No. 030349-TP, Order No. PSC-03-1392-FOF-TP (December 11, 2003) ("*BellSouth Carrier-to-Carrier Information Order*").

² *In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional tariffs and for investigation of BellSouth's promotion price and marketing practices by Florida Digital Network, Inc.*, Docket No 020119-TP et al., Order No. PSC-03-0726-TP (June 19, 2003) ("*BellSouth Key Customer Tariffs Order*").

³ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Forbearance, 14 FCC Rcd 14409, 14445, ¶ 67 (1999) ("CPNI Reconsideration Order").

and *2003 Slamming Order*⁴] to ascertain the rules for winback and retention marketing programs that it will apply under state law. [Motion, page 9 at Footnote 26; page 10]

Fourth, Verizon argues that the Commission's approach above, of seeking guidance from federal law makes two points: 1) The Commission "must ensure that its decisions do not conflict with applicable Federal law. Thus, if federal law specifically permits the challenged conduct, the Commission must deny the claim;" and 2) "[b]ecause the Commission has not found that Florida law creates any requirements beyond those imposed by the FCC, if the Commission determines that Verizon's retention marketing program does not violate the FCC's requirements, Verizon's program also should be found to comply with Florida law." [Motion, page 10]

Verizon argues that the FCC rules specifically permit the use of Customer Proprietary Network Information (CPNI) in Verizon's retention marketing efforts, because Verizon legitimately learns of an imminent customer switch through its retail operations. That is, Verizon argues that the CPNI it receives from Comcast is by virtue of its role as a *retail* service provider, not through its provision of wholesale service or network facilities to Comcast. [Motion, pages 11, 12]

Fifth, Verizon denies that its retention marketing efforts violate Section 222(b) of the Telecommunications Act because Verizon's *retail* operations independently and properly obtain notice of a customer's decision to cancel retail service, and Verizon's marketing representatives do not make use of another carrier's information in their marketing efforts. Verizon states that it provides no wholesale services to Comcast in connection with the processing of an LNP request. Verizon argues that there is thus no carrier-to-carrier service involved that would violate the prohibition of Section 222(b), against retention marketing when a carrier gains notice of the imminent cancellation of a customer through the provision of carrier-to-carrier service. [Motion, pages 12, 13]

Sixth, Verizon argues that it does not violate the FCC's *2003 Slamming Order*, which placed restrictions on the use of carrier change information for marketing purposes by the "executing carrier." Verizon argues that the information used in its retention marketing comes from the *retail* service disconnect order it issues and Verizon is not the "executing carrier" in the LNP process. Instead, Verizon disconnects the customer's service and prepares the number for porting, but the neutral LNP database administrator effects the actual porting. The change in the carrier is actually effected by Comcast when it enables its voice product at the customer's premises and the number porting administrator, as requested by Comcast, instructs its computers to direct any carrier's calls to the customer's number to Comcast's switch. [Motion, pages 13, 14]

Additionally, Verizon argues that Comcast's complaint should be dismissed for the independent reason that Comcast has filed a complaint with the FCC. Verizon asserts that

⁴ *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 5099, ¶ 27 (2003) ("2003 Slamming Order").

because this Commission in its orders has interpreted Florida law by looking to the FCC's federal retention marketing requirements, a decision by the FCC almost certainly would be dispositive of Comcast's issues. Further, Verizon argues, because Comcast has filed its complaint in the FCC's Accelerated Docket, the Enforcement Bureau is expected to issue a decision within 60 days of Comcast's filing and, thus, litigation efforts and resources expended before the Commission would be wasted. Alternatively, Verizon states that the Commission should stay these proceedings while the FCC clarifies the application of federal law to Verizon's retention marketing practices. [Motion, page 17]

Comcast's Response in Opposition

Comcast asserts that it has stated a claim for which relief can be granted. Comcast has alleged that Verizon takes information that it receives entirely from its wholesale-side interactions with Comcast and uses it to initiate its retail marketing efforts. Comcast has alleged that Verizon admits this use and acknowledges that it receives advance notice of imminent customer disconnection from Comcast, not from Verizon's own efforts. Comcast has alleged that Verizon admits that it then engages in retention marketing efforts based on that advance notice. [Response, pages 1, 2]

Comcast also alleges that Verizon's conduct falls directly within the scope of the two Commission orders cited previously in this recommendation (*BellSouth Key Customer Tariffs Order* and *BellSouth Carrier-to-Carrier Information Order*). Comcast alleges that Verizon is violating Sections 364.01(4)(g), and 364.10(1), Florida Statutes, and is violating Rule 25-4.082, Florida Administrative Code, by failing to facilitate the porting of numbers. [Response, page 3]

First, Comcast presents the factual allegation that Verizon receives information from Comcast, and that this is not through its retail side, but by means of a wholesale, carrier-to-carrier, ordering document (LSR). Comcast must coordinate this LSR and LNP process with Verizon to ensure the protection of the retail customer's service. Comcast asserts that the LSR and LNP process are wholesale-level activities. Comcast alleges that Verizon uses this advance notice of wholesale, proprietary, information to engage in retention marketing efforts. [Response, pages 3, 9]

Second, Comcast asserts that Verizon is wrong to state that Florida law, and specifically Section 364.051, Florida Statutes, supports its retention marketing efforts. Comcast argues that Verizon misreads Section 364.051, Florida Statutes. Comcast asserts that this statute relates to price-based regulation, and that Section 364.051(5)(a)2, Florida Statutes, cited by Verizon, specifically addresses whether a regulated carrier is allowed to lower its rates for non-basic services to match the rates offered by competitors. Comcast asserts that its Petition, however, complains not of Verizon's prices, but of its marketing practices and Verizon's attempts to retain customers of its basic services. Comcast notes that the Commission's own precedent makes it clear that this section of the statute relates to pricing rather than marketing practices. Comcast notes that this statute also articulates that the Commission retains its overarching obligation to protect the competitive process from abuses: "However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice" Section 364.051(5)(a)2, Florida Statutes. [Response, pages 3-5]

Third, Comcast argues that the Commission is not limited to enforcing federal restrictions in applying state law. Comcast states that Verizon is wrong to assert that “if federal law permits the challenged conduct, the Commission must deny the claim.” Comcast states that the Commission has jurisdiction over Verizon’s marketing practices as they relate to intrastate services and that that authority does not derive in any way from federal law. Comcast further asserts that state law prohibits all anticompetitive and unfair carrier practices. [Response, page 5]

Fourth, Fifth, Sixth, (restated) Comcast asserts that Verizon’s discussion of the FCC’s CPNI rules is irrelevant. Comcast has not made any allegations regarding the relation of Verizon’s action to federal law. Rather, Comcast argues, its Petition establishes a cause of action based in state law. [Response, page 6]

Comcast argues that there is no reason to stay this case. Comcast believes that Verizon’s retention marketing efforts also violate federal law and that Comcast is thus entitled to file a complaint with the FCC, seeking damages from Verizon pursuant to 47 U.S.C., Sections 206-208. Further, Comcast asserts that its pursuit of a federal action is of no relevance to this separate cause of action before the Commission, which is based entirely on Florida law. Comcast argues that the Commission can enforce federal law, including that dealing with anti-competitive behavior in Florida. Comcast cites to the FCC’s *Third Report and Order and Third Further Notice of Proposed Rulemaking*, wherein “the FCC has specifically stated that individual states are ‘uniquely qualified to assess the local competitive landscape and determine whether additional safeguards are necessary.’” [Response, pages 6, 7]

Staff Analysis:

Standard of Review

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When “determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side.” Id. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

It appears that there is at least one factual allegation at issue between the parties. Comcast alleges in its Petition that it presents information to Verizon by means of a wholesale, carrier-to-carrier, ordering document - - a local service request (LSR). Verizon argues that this

information comes to its *retail* operations; that Comcast is not a Verizon wholesale customer; and that when it receives an LSR for local number porting (LNP) from Comcast, Verizon issues a *retail* disconnect order to ensure the customer's *retail* service is discontinued at the appropriate time. Verizon emphasizes that this comprises a *retail* loss notification and disconnect request, and it is in response to this retail loss notification that Verizon provides additional information to the customers. The existence of this disputed factual allegation, in Verizon's argument, defeats Verizon's Motion to Dismiss.

Staff believes that Verizon fails to demonstrate that, when accepting all of Comcast's allegations of material fact as facially correct, Comcast's Petition fails to state a cause of action for which relief can be granted. Verizon's argument that it possesses retail information that has been independently obtained by its retail operations, is just that - - an argument with Comcast's factual allegation that is based on Verizon's interpretation of the process by which it receives the information. At best, Verizon simply proposes an alternate fact to Comcast's alleged fact, which, when taken as facially correct, states a cause of action. Comcast alleges that it provides information to Verizon's wholesale side and that this information is then used by Verizon's retail operations to engage in illegal retention marketing. Comcast, in turn, asserts that this creates a cause of action under the prohibition in Chapter 364, F.S., against anticompetitive behavior.

The remainder of Verizon's arguments rely on its basic premise that Verizon is using independently obtained *retail* information in its retention marketing program. Staff believes that some of Verizon's arguments may involve legal and/or policy matters that might also implicate disputed issues of fact. Staff believes, however, that to make a valid analysis of and a well-reasoned judgment on these arguments will require further information gathering through discovery during this proceeding before presenting them for the Commission's consideration.

Upon review of the parties' arguments and consistent with previous Commission decisions, staff recommends that Verizon's Motion to Dismiss be denied because Comcast's Petition, on its face, does state a cause of action upon which relief may be granted. Further, Verizon has provided insufficient support in its argument of the independent reason to dismiss Comcast's Petition. Verizon argues that Comcast should not be allowed to pursue claims both at the Commission and at the FCC simultaneously. Verizon bases this argument on the premise that the Commission has interpreted Florida law by looking to the FCC's federal retention marketing requirements and the FCC's decision would thus almost certainly be dispositive, and its anticipation that the FCC will rule before the Commission does and hence the efforts and resources used in litigating the case before the Commission will have been wasted.

Staff is unaware of any proscription against Comcast proceeding with a claim based entirely in state law before this Commission and simultaneously proceeding at the FCC with its complaint that Verizon has violated specific prohibitions of federal law and seeking damages pursuant to federal law. Verizon has not cited any legal basis for such proscription. Staff knows of no legal or policy requirement to dismiss this Petition because of the possibility of resources "wasted." Accordingly, staff believes that Verizon's Motion to Dismiss must fail on this independent ground, as well.

Issue 2: Should the Commission grant Verizon's Motion in the Alternative - - to grant a Stay of these proceedings pending resolution of the matter filed with the FCC?

Recommendation: No. The Commission should not grant a stay of these proceedings pending resolution of the matter filed with the FCC. **(R. Mann)**

Staff Analysis: The Commission should not grant a stay pending resolution of the matter filed with the FCC.

Verizon argues that if Comcast's Petition is not dismissed, the proceedings before this Commission should be stayed. Verizon contends that a stay would allow the FCC the opportunity to clarify the application of federal law to the marketing practices at issue here.

Comcast alleged that at the time of filing its Petition, it had lost a significant number of customers who had signed up with Comcast, but whose minds were changed by Verizon's retention marketing efforts. Further, Comcast alleged that it continues to lose significant numbers of customers to Verizon's retention marketing and that these current and future lost customers represent significant lost revenues.

The Commission has previously recognized that abeyance of a PIU dispute pending the outcome of a federal proceeding with substantially the same parties and issues would advance the Commission's policies regarding judicial economy and avoid the possibility of inconsistent federal and state rulings.⁵ Nonetheless, it is within the Commission's discretion to determine whether to grant or deny a stay based on the particular circumstances of the case before it.

Staff believes that the circumstances in this case militate against granting a stay, in light of the apparent prejudice that would befall Comcast by an avoidable delay in the processing of its complaint before the Commission. On February 11, 2008, Comcast filed its Accelerated Docket complaint with the FCC, which provides a 60-day deadline for an FCC decision from the date of filing the complaint. Staff notes, however, that the Accelerated Docket Rule provides: "If it appears at any time that a proceeding on the Accelerated Docket is no longer appropriate for such treatment, Commission staff may remove the matter from the Accelerated Docket either on its own motion or at the request of any party." Title 47 Code of Federal Regulations, Section 1.730. This allows the possibility that the federal proceeding could continue for much longer than the anticipated 60 days.

Additionally, there is no certainty that an FCC decision will resolve this dispute or provide clarification for the Commission in addressing Verizon's retention marketing program. The alleged prejudice to Comcast in this matter seems clear, however. Accordingly, staff recommends that the Commission deny Verizon's alternative motion for a stay pending resolution of the matter filed with the FCC.

⁵ Order No. PSC-02-0081-PCO-TP, In re: Complaint by BellSouth Telecommunications, Inc. against Global Crossing Telecommunications, Inc. regarding practices in reporting percent interstate usage for compensation for jurisdictional access services, Docket No. 011378-TP (January 14, 2002).

Docket No. 080036-TP

Date: March 6, 2008

Issue 3: If the Commission approves staff's recommendation in Issue 1, should the Commission consolidate this Docket No. 080036-TP, with 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?

Recommendation: Yes. If the Commission approves staff's recommendation in Issue 1, the Commission should consolidate this Docket No. 080036-TP, with Docket No. 070691-TP, Bright House's Complaint against Verizon **(R. Mann)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, the Commission should consolidate this Docket No. 080036-TP, with Docket No. 070691-TP, Bright House's Complaint against Verizon.

Staff recommends consolidating Dockets No. 080036-TP and No. 070691-TP. None of the parties objects to consolidating the two dockets. In both cases, the petitioner is a facilities-based provider of telecommunications services in Verizon's service territory. Both petitioners have filed a complaint against Verizon, alleging that Verizon is violating Florida law in its retention marketing efforts. In the two cases, the issues are identical and the alleged circumstances are substantially similar. As a result, staff believes that administrative efficiencies will be gained by a single proceeding.

Issue 4: Should this Docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 1, this Docket should remain open pending further proceedings. **(R. Mann)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, this Docket should be held open pending further proceedings.