

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: October 29, 2009

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Murphy, Morrow) *CSB*
Division of Regulatory Compliance (Beard) *CSB*
Division of Service, Safety & Consumer Assistance (Moses) *AMJ*

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, 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: 11/10/09 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\070691.RCM.DOC

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Case Background

On November 16, 2007, Bright House Networks Information Services (Florida) LLC, and Bright House Networks, LLC (together, "Bright House") filed its Complaint and Request for Emergency Relief ("Petition") with the Florida Public Service Commission ("Commission"). Bright House alleged that Verizon Florida, LLC, ("Verizon") was engaging in anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, Florida Statutes (F.S.), and is failing to facilitate the transfer of customers' numbers to Bright House upon request, contrary to Rule 25-4.082, Florida Administrative Code (F.A.C.). The Commission opened Docket No. 070691-TP to address Bright House's complaint.

On January 10, 2008, Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone ("Comcast") filed its Complaint and Request for Emergency Relief, with the Commission alleging that Verizon was engaging in anticompetitive behavior and violating the same Florida Statutes and Commission Rule as alleged by Bright House in Docket No. 070691-TP. The Commission opened Docket No. 080036-TP to address Comcast's complaint.

Bright House had previously raised similar issues before the Federal Communications Commission ("FCC"). On February 11, 2008, Bright House and Comcast filed a formal Accelerated Docket complaint with the FCC.

By Order No. PSC-08-0213-FOF-TP, Commission Docket Nos. 070691-TP and 080036-TP were consolidated for hearing. Procedural Order No. PSC-08-0235-PCO-TP was issued on April 10, 2008, in the consolidated dockets.

On June 23, 2008, the FCC issued its Memorandum Opinion and Order, FCC 08-159, which directed Verizon to cease its retention marketing program. Verizon subsequently petitioned the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") for review of the FCC's Order. On August 7, 2008, Verizon filed a Motion for Continuance of the proceeding in the consolidated Commission dockets. By Order No. PSC-08-0552-PCO-TP, issued on August 20, 2008, the Commission's Procedural Order was amended to grant Verizon's August 7, 2008 Motion for a Continuance. On February 10, 2009, the D.C. Circuit denied Verizon's petition for review of the FCC's June 23, 2008 Order.

In response to a query from Commission staff, petitioners Bright House and Comcast, as well as respondent Verizon, have stated that the consolidated dockets can be closed at this time.

Discussion of Issues

Issue 1: Should these dockets be closed?

Recommendation: Yes. These dockets should be closed. **(Murphy)**

Staff Analysis:

On September 24, 2009, Commission staff asked the parties whether any issues remain to be resolved in these dockets and suggested that, in the absence of such issues, staff would recommend that the dockets be closed. In a response dated that same day, Bright House replied:

As far as Bright House is concerned, this docket can be closed. Some state-specific legal and policy questions remain unresolved, but at this point they are academic because the federal courts have sustained the FCC's ruling banning the conduct about which we were complaining. While we reserve our right to file a new case in the future if conditions should change, again, at this point this docket can be closed.

On September 25, 2009, Verizon replied: "Verizon agrees that the dockets may be closed."

On September 29, 2009, Comcast replied: "Comcast agrees that the Comcast docket can now be closed without prejudice. Comcast reserves the right to initiate a new proceeding in the future if there are circumstances that merit the initiation of such a proceeding."

Staff believes that the petitioners' agreement that the dockets can be closed is akin to a voluntary dismissal. A plaintiff's right to take a voluntary dismissal is absolute. Fears v. Lunsford, 314 So.2d 578, 579 (Fla. 1975). Once a timely voluntary dismissal is taken, the trial court loses its jurisdiction to act on a matter. Randle Eastern Ambulance Service, Inc. v. Vasta, 360 So.2d 68, 69 (Fla. 1978). A voluntary dismissal by a party under these circumstances is without prejudice. See Rule 1.420(1), Florida Rules of Civil Procedure.

Thus, staff recommends that Docket Nos. 070691-TP and 080036-TP should be closed.