

Dulaney L. O'Roark III  
Vice President & General Counsel, Southeast Region  
Legal Department



5055 North Point Parkway  
Alpharetta, Georgia 30022

Phone 678-259-1449  
Fax 678-259-1589  
de.oroark@verizon.com

April 25, 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 Motion to  
Add Issues Concerning Retention Marketing Practices. 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

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Enclosures

**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: April 25, 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 MOTION TO ADD ISSUES  
CONCERNING RETENTION MARKETING PRACTICES**

Verizon Florida LLC ("Verizon") moves that the Commission grant its request to add to the issues list in this case the issues identified below concerning the retention marketing practices of Verizon and the complainants'<sup>1</sup> cable companies.<sup>2</sup> These issues are highly relevant to claims the complainants have included in their challenges to Verizon's practices. Including them will ensure that the Commission decides this matter on a complete record and will serve to avoid disputes over the proper scope of discovery concerning the cable companies' own actions in the marketplace.<sup>3</sup>

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<sup>1</sup> The complainants are Bright House Networks Information Services (Florida) LLC and Bright House Networks, LLC (collectively, "Bright House") and Comcast Phone of Florida LLC ("Comcast").

<sup>2</sup> In accordance with Rule 28-106.204(3), counsel for Verizon conferred with counsel for Bright House and Comcast at the issue identification conference concerning Verizon's request to add these issues. The parties agreed that Verizon would file this motion to address its request and that Bright House and Comcast would respond to the motion by May 2, 2008.

<sup>3</sup> Verizon notes that this motion addresses matters that the Commission may not need to reach if Verizon's pending Motion for Reconsideration is granted.

## I. INTRODUCTION

Bright House and Comcast both claim that Verizon's retention marketing program is anticompetitive. The Bright House and Comcast complaints allege that Verizon's program violates section 364.01(4)(g), Florida Statutes (requiring the Commission to exercise its jurisdiction to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint") and 364.3381(3), Florida Statutes (giving the Commission jurisdiction "over cross-subsidization, predatory pricing, or other similar anticompetitive behavior"). Bright House and Comcast claim that it is "plainly anticompetitive" for Verizon to use advance knowledge that a customer is leaving them to engage in retention marketing.<sup>4</sup> And both their complaints make the identical allegation that "Verizon's 'regulations and practices' surrounding its retention marketing efforts clearly constitute an anticompetitive practice that is harmful to competitive providers and to Florida consumers."<sup>5</sup> To evaluate these claims, the Commission must consider the competitive environment in which Verizon's program takes place, which includes marketing practices that are common in the industry.

The fact that the cable companies<sup>6</sup> engage in retention marketing themselves – and indeed in practices that are considerably more aggressive than those about which Bright House and Comcast complain – is obviously relevant here. Central among their claims is the explicit allegation that Verizon's retention marketing is "anticompetitive." But retention marketing cannot be *anticompetitive* when Verizon engages in it, yet

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<sup>4</sup> Bright House Complaint ¶ 20; Comcast Complaint ¶ 19.

<sup>5</sup> Bright House Complaint ¶ 24; Comcast Complaint ¶ 28.

<sup>6</sup> Bright House Networks, LLC, the Bright House cable company, is a party to this case. Comcast did not name its cable affiliate as a party, but Comcast is obviously also serving the interests of its cable affiliate here.

*competitive* when the cable companies engage in it themselves. Thus 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. The Commission must take that environment and those practices into account when evaluating the complainants' claims that only Verizon's practices are "anticompetitive." The Commission also must consider the truly anticompetitive effect of the relief Bright House and Comcast are requesting, which 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 canceled 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.

Bright House and Comcast cannot have it both ways: they cannot invoke the Commission's jurisdiction to challenge Verizon's retention marketing program as "anticompetitive" while attempting to prevent the Commission from considering the marketplace standard set in part by the cable companies' own retention marketing practices. Although the Commission may not have jurisdiction to *regulate* the cable companies' retention marketing, it certainly may *allow discovery* and *consider evidence*

concerning their practices when, as here, they are highly relevant to the claims Bright House and Comcast have themselves brought to the Commission. The Commission therefore should add the proposed issues below to ensure that it focuses on all relevant marketing practices and considers the pertinent evidence so it can fairly evaluate the claims and defenses in this case.

Verizon describes its own and the cable companies' retention marketing practices below, followed by the issues that Verizon seeks to add and discussion of why their inclusion is appropriate.

## **II. THE PARTIES' RETENTION MARKETING PRACTICES**

The retention marketing program that is the subject of the complaints in this case was developed as one aspect of Verizon's efforts to compete effectively against rival providers of bundles of voice and other services, particularly cable providers. Retention marketing is triggered after an order to disconnect a customer's retail service is received by Verizon's retail operations, which often occurs several days in advance. Verizon attempts to reach out to those customers who have not already spoken with a Verizon retail representative, sending an overnight letter alerting customers to Verizon's competitive offers and asking them to call if they want to learn more. Thus the customer herself chooses whether to follow up to learn more from Verizon before her service is disconnected. If the customer calls Verizon in response to the retention marketing letter, the Verizon representative asks her why she is disconnecting and informs her about available service packages and promotional offers, in an attempt to persuade the customer to stay. With this new information, some customers decide that they are

better off keeping their Verizon services. These retention marketing efforts have had some success because Verizon provides consumers with accurate information about Verizon's service offerings that they may not have had at the time that they initially decided to switch providers and because the program provides consumers substantial benefits in the form of financial incentives to remain with Verizon.

The cable companies likewise engage in retention marketing when Verizon has attracted one of their customers, but in a more aggressive way that does not give the customer the choice of whether to listen to a retention marketing pitch. Unlike Verizon, which must allow a competitive service provider to cancel Verizon's telephone service on a customer's behalf, cable operators typically require customers personally to call them directly to cancel their cable or broadband service.<sup>7</sup> Thus instead of giving the customer the choice of whether to listen to retention information, the cable companies force them to, merely in order to cancel service. This more aggressive retention marketing program gives the cable operator a guaranteed final opportunity to persuade the customer not to switch her services (including voice service), and to offer incentives for the customer to remain with the cable operator. The Bright House and Comcast cable companies acknowledged in the FCC retention marketing case that they "typically require customers to contact them directly to cancel video or broadband Internet access service." They further admitted that "[w]hen customers call [them] directly to cancel video or broadband Internet access service, [they] offer such customers incentives to

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<sup>7</sup> Verizon has filed a petition at the FCC challenging the cable companies' refusal to accept cancellation orders from competing video providers on behalf of customers who have chosen to switch their service provider.

remain customers in some instances.”<sup>8</sup> A significant percentage of Verizon winbacks that involve a number port are canceled before the migration is completed, which suggests that the cable companies’ retention marketing efforts are successful and extensive. Verizon will seek to develop further information about these practices from Bright House and Comcast during discovery in this case.

### III. PROPOSED ISSUES

At the issue identification meeting, Verizon proposed the inclusion of the following issues concerning the parties’ retention marketing practices:

1. What are the retention marketing practices of Verizon Florida LLC (“Verizon”) for voice customers, broadband customers and cable customers?
2. What are the retention marketing practices of Bright House Networks Information Services (Florida), LLC and Bright House Networks, LLC (collectively, “Bright House”) for voice customers, broadband customers and cable customers?
3. What are the retention marketing practices of Comcast Phone of Florida, LLC and Comcast Corporation (collectively, “Comcast”) for voice customers, broadband customers and cable customers?

Staff did not add these issues, citing concerns about their relevance. For the reasons discussed below, Verizon respectfully submits that these issues are not only highly relevant, but essential to a fair evaluation of claims raised by the cable companies themselves. They should be added to the issues list.<sup>9</sup>

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<sup>8</sup> *In re: Bright House Networks, LLC v. Verizon California, Inc.*, Letter from Matthew A. Brill, File No. EB-08-MD-002 (March 6, 2008).

<sup>9</sup> Verizon raised a number of other issues at the issue identification meeting, including whether a prohibition of Verizon’s retention marketing program would violate the First Amendment. By not raising those issues in this motion, Verizon does not waive them, but rather reserves the right to argue them within the other issues that have been identified for consideration.

#### IV. THE PROPOSED ISSUES SHOULD BE ADDED

The issues Verizon has requested concerning the parties' retention marketing practices are relevant to the claims in this case for at least three reasons: (i) retention marketing cannot be *competitive* when engaged in by cable companies, but *anticompetitive* when engaged in by Verizon; (ii) Verizon's program must be viewed in light of the competition it faces, which includes the retention marketing practices employed by Bright House and Comcast, and the marketplace norms reflected in those practices; and (iii) the Commission should not grant requested relief (here, termination of Verizon's program) that would lock into place an unlevel playing field, in this case by prohibiting Verizon's retention marketing program while leaving the complainants' cable companies free to continue their own retention marketing.

A. Retention Marketing Cannot Be *Competitive* When Engaged in By Cable Companies and *Anticompetitive* When Engaged in by Verizon

Bright House and Comcast seek to continue their own aggressive retention marketing efforts at the same time they are asking the Commission to direct Verizon to stop its less aggressive retention marketing program. Presumably the Bright House and Comcast cable companies would not engage in conduct they believe to be "anticompetitive" and they certainly have given no indication that they have any intention of stopping their own practices. The cable companies' own conduct thus belies the validity of the claims here that Verizon has somehow engaged in "anticompetitive" conduct. Even in the unlikely event that Bright House and Comcast were to criticize their cable companies' own marketing practices, they would be admitting that they come



before the Commission with unclean hands, and accordingly that they are not entitled to relief. Therefore, whatever position Bright House or Comcast take concerning their cable companies' retention marketing practices, those practices bear directly on their claims that Verizon's less aggressive practices are "anticompetitive," and indeed compel the conclusion that their claims have no merit.

B. Verizon's Retention Marketing Program Must Be Viewed in Light of the Competition it Faces

Bright House and Comcast ask the Commission to stop Verizon's retention marketing program without considering the relevant marketplace context, which includes their own retention marketing. For the Commission to assess whether Verizon's program is anticompetitive, it must take into account the robust competition that is taking place in the Tampa Bay area between Verizon and its cable competitors. In this intermodal competition, Verizon is entering the cable business, the cable companies are entering the voice business and both Verizon and the cable companies are continuing to compete for broadband customers. Both Verizon and the cable companies 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. The Commission should not accept Bright House's and Comcast's invitation to turn a blind eye to their cable companies' retention marketing practices because doing so would leave the Commission with an inaccurate picture of Tampa Bay's competitive landscape and prevent it from fairly judging Verizon's program in the context from which it arises.

Obtaining and reviewing information about unregulated services when relevant to the task at hand is nothing new for the Commission. The Commission's annual reports to the legislature have included data on unregulated services such as Voice over Internet Protocol ("VoIP"), broadband and wireless services, which has enabled the Commission to provide a more complete picture of the Florida telecommunications industry.<sup>10</sup> Likewise, when determining whether good cause has been shown to relieve a local exchange telecommunications company of its carrier-of-last-resort obligation, the Commission has considered evidence that VoIP service was available at the property from other providers, including the cable company.<sup>11</sup> As it has done in these other contexts, the Commission should take into account information about the cable companies' services, even though they are unregulated.

Consideration of the cable companies' retention marketing for unregulated services is particularly appropriate here because of its effect on voice service. In a market like the Tampa Bay area where both traditional telephone and traditional cable providers offer similar service bundles including voice, broadband and video services, retention marketing for any of these services affects all of them. As the FCC Enforcement Bureau recently stated:

A cable operator has [an] opportunity to retain its customer if it requires the customer to call personally to cancel service, to stay home to wait for a technician to arrive to disconnect service, or if it requires that the customer personally return equipment to the cable provider's offices. Yet these practices affect not just the customer's choice of provider for

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<sup>10</sup> See Commission's Report on the Status of Competition in the Telecommunications Industry as of May 31, 2006 and Report on the Status of Competition in the Telecommunications Industry as of May 31, 2005.

<sup>11</sup> See *In re: Petition for relief from carrier-of-last-resort (COLR) obligations pursuant to Florida Statutes 364.025(6)(d) for two private subdivisions in Nocatee development, by BellSouth Telecommunications, Inc.*, Order Granting Petition for Relief From Carrier-of-Last-Resort Obligation, Docket No. 060822-TL, Order No. PSC-07-0862-FOF-TL, p. 4 (Oct. 26, 2007).

a single service. In a market of bundles they affect the customer's choice of provider for *all* services.<sup>12</sup>

Thus, the cable companies' retention marketing for broadband and cable customers also targets voice customers for reacquisition. For example, when Verizon wins a triple play (voice, broadband and cable) customer, and Bright House then persuades the customer not to switch after the customer calls to cancel his or her cable service, Bright House keeps all the services in the bundle, including the voice service. The direct effect of the cable companies' retention marketing practices on voice customers leaves no doubt as to their relevance here.

C. The Commission Should Not Grant Requested Relief that Would Lock in an Unfair Advantage for Cable Competitors

Bright House and Comcast seek an unfair advantage in the marketplace by getting this Commission to prohibit Verizon's retention marketing while the cable companies engage in more aggressive retention marketing with no restrictions. The FCC Enforcement Bureau emphasized the need to avoid such asymmetric regulation in the Recommended Decision when it stated that "[r]egulatory parity, whether by increased regulation or deregulation, is important to ensure a level playing field, despite possible historic differences in regulation of the various services in the bundle."<sup>13</sup> The Bureau further stated that it is "very clear" that retention marketing, "whether engaged in by the incumbent telephony provider or by the cable provider, should be treated consistently."<sup>14</sup> Although this Commission cannot level the playing field between cable

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<sup>12</sup> *In re: Bright House Networks, LLC v. Verizon California, Inc.*, Recommended Decision, File No. EB-08-MD-002 ¶ 30 (April 11, 2008) ("Recommended Decision") (emphasis in original).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* ¶ 31.

companies and Verizon through regulation that applies to both, it can and should consider that effects of its actions in the broader marketplace when it regulates Verizon. The Commission therefore should review the retention marketing programs of the Bright House and Comcast cable companies so it can assess the impact of the requested relief on Verizon's ability to compete on a level playing field with the cable companies.

For the foregoing reasons, Verizon respectfully requests that its motion be granted and that its proposed issues be added to the issues list in this case.

Respectfully submitted on April 25, 2008.

By: s/ Dulaney L. O'Roark III  
Dulaney L. O'Roark III  
5055 North Point Parkway  
Alpharetta, Georgia 30022  
Phone: (678) 259-1449  
Fax: (678) 259-1589  
Email: [de.oroark@verizon.com](mailto:de.oroark@verizon.com)

Attorney for Verizon Florida LLC

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail and U. S. mail on April 25, 2008 to:

Beth Salak  
Rick Mann  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850  
[bsalak@psc.state.fl.us](mailto:bsalak@psc.state.fl.us)  
[rmann@psc.state.fl.us](mailto:rmann@psc.state.fl.us)

Samuel F. Cullari, Counsel  
Comcast Cable  
1500 Market Street  
Philadelphia, PA 19102  
[samuel\\_cullari@comcast.com](mailto:samuel_cullari@comcast.com)

Christopher McDonald  
Comcast Digital Phone  
Director of State Government Affairs  
300 West Pensacola Street  
Tallahassee, FL 32301  
[christopher\\_mcdonald@cable.comcast.com](mailto:christopher_mcdonald@cable.comcast.com)

Charlene Poblete, Staff Counsel  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850  
[cpoblete@psc.state.fl.us](mailto:cpoblete@psc.state.fl.us)

Christopher W. Savage  
Davis Wright Tremaine, LLP  
1919 Pennsylvania Avenue, NW, Suite 200  
Washington, DC 20006  
[chrissavage@dwt.com](mailto:chrissavage@dwt.com)

Beth Keating  
Akerman Senterfitt  
106 East College Avenue, Suite 1200  
Tallahassee, FL 32301  
[beth.keating@akerman.com](mailto:beth.keating@akerman.com)

Floyd R. Self  
Messer Law Firm  
2618 Centennial Place  
Tallahassee, FL 32308  
[fself@lawfla.com](mailto:fself@lawfla.com)

Marva Brown Johnson  
Bright House Networks Information Services (Florida), LLC  
12985 North Telecom Parkway  
Temple Terrace, FL 33637-0907  
[Marva.johnson@bhnis.com](mailto:Marva.johnson@bhnis.com)

David A. Konuch  
Florida Cable Telecommunications Association  
246 E. 6<sup>th</sup> Avenue, Suite 100  
Tallahassee, FL 32303  
[dkonuch@fcta.com](mailto:dkonuch@fcta.com)

Howard E. Adams  
Pennington Law Firm  
P. O. Box 10095  
Tallahassee, FL 32302-2095  
[gene@penningtonlaw.com](mailto:gene@penningtonlaw.com)

Carolyn Ridley  
Time Warner Telecom  
555 Church Street, Suite 2300  
Nashville, TN 37219  
[carolyn.ridley@twtelecom.com](mailto:carolyn.ridley@twtelecom.com)

s/ Dulaney L. O'Roark III