

**Ruth Nettles**

**From:** Keating, Beth [beth.keating@akerman.com]  
**Sent:** Tuesday, August 12, 2008 10:08 AM  
**To:** Filings@psc.state.fl.us  
**Subject:** Dockets Nos. 070691 and 080036  
**Attachments:** 20080812100433407.pdf

Attached for electronic filing in the referenced consolidated Dockets, please find Bright House Network's Response in Opposition to Verizon's Motion for Continuance. Thank you for your assistance with this filing.

Sincerely,  
Beth Keating

A.  
Beth Keating  
Akerman Senterfitt  
106 East College Ave., Suite 1200  
Tallahassee, FL 32301  
(850) 224-9634  
(850) 521-8002 (direct)  
(850) 222-0103 (fax)  
beth.keating@akerman.com

Christopher W. Savage  
Davis Wright Tremaine, LLP  
1919 Pennsylvania Avenue, NW, Suite 200  
Washington, D.C. 20006  
Tel: 202-973-4200  
Fax: 202-973-4499  
chrissavage@dwt.com

B. Docket No. 070691-TP - Complaint and Request for Emergency Relief Against Verizon Florida, LLC for Anticompetitive Behavior in violation of Sections 364.10(4), 364.3381, and 364.10, F.S. and for failure to facilitate transfer of customers' numbers to Bright House Networks Information Services, 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 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.

C. On behalf of Bright House Networks Information Services, LLC and Bright House Networks, LLC

D. Number of Pages: 10

E: BHN's Response in Opposition to Motion for Continuance



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Suite 1200  
106 East College Avenue  
Tallahassee, FL 32301  
www.akerman.com  
850.224.9634 tel 850.222.0103 fax

August 12, 2008

**Electronic filing**

Ms. 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, 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.**

Dear Ms. Cole:

Attached for electronic filing in the above-referenced consolidated Dockets, please find Bright House Networks, LLC's Response in Opposition to Verizon's Motion for Continuance filed in these dockets.

Thank you for your assistance with this filing. If you have any questions whatsoever,

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DOCUMENT NUMBER-DATE

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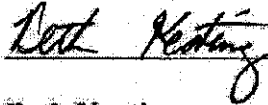
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Ms. Ann Cole  
August 12, 2008  
Page 2

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please do not hesitate to contact me.

Sincerely,



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**Beth Keating**  
**AKERMAN SENTERFITT**  
106 East College Avenue, Suite 1200  
Tallahassee, FL 32302-1877  
Phone: (850) 224-9634  
Fax: (850) 222-0103

Enclosures  
cc: Parties of Record

**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  
Filed: August 12, 2008

**BRIGHT HOUSE NETWORKS' RESPONSE IN OPPOSITION  
TO VERIZON'S MOTION FOR CONTINUANCE**

Bright House Networks Information Services (Florida), LLC, and its affiliate, Bright House Networks, LLC (together, "Bright House"), through their attorneys, respectfully file this response to Verizon Florida LLC's Motion for Continuance ("Verizon Motion") filed on August 7, 2008. Verizon's Motion should be denied, because the Motion reargues matters that have been considered, and rejected, by the Commission on two separate occasions. As such, the Motion should be construed as seeking reconsideration of a decision on a Motion for Reconsideration, Order No. PSC-08-0450-POF-TP, which is clearly prohibited by Rules 25-22.0376 and 25-22.060, F.A.C. This third bite at the apple by Verizon provides absolutely no new basis upon which a continuance should be granted, and should, therefore, be denied.

**BACKGROUND**

Verizon first requested that this proceeding be stayed (as an alternative remedy to its motion to dismiss) in December 2007. Its main claim was that Bright House was challenging,

under Florida law, the same Verizon conduct that it was challenging at the Federal Communications Commission ("FCC"), under federal law. Verizon mistakenly asserts that this Commission has no power to regulate Verizon outside of what the FCC might do, and so may not apply Florida law to forbid anticompetitive or discriminatory Verizon marketing activity that is not already forbidden at the federal level. In response, Bright House pointed out that there is no legal support for Verizon's view – which would reduce this Commission (and the Florida legislature) to an FCC field office limited to enforcing whatever dictates might emanate from Washington, D.C. In fact, as Bright House noted, it is common for states to declare certain conduct to be illegal that the federal government may not have banned, and vice versa.

At the March 4, 2008 oral argument on the Motion to Dismiss, Bright House pointed out that, given the different legal standard found in and the breadth of the Florida statutes governing this proceeding, Verizon's conduct would still violate Florida law, even if the FCC concluded that Sections 222(a) and/or (b) of the federal Communications Act had not been violated. 47 C.F.R. § 222(a), (b). As a result, we argued, this case could, and should, proceed, notwithstanding the pending FCC matter.

After considering these arguments – and Verizon's arguments suggesting that the FCC's rulings *do* somehow control how this Commission exercises its powers under Florida law – the Commission rejected Verizon's motion to stay and/or dismiss Bright House's complaint.

On April 11, 2008, the FCC staff issued its recommended decision. And, as Bright House had advised this Commission might occur (Transcript at 9-10, 20-21), the FCC staff recommended that the full FCC reject the FCC complaint on the grounds that – in the view of the FCC staff – complainants there had not fulfilled the technical requirements of Sections 222(a) and (b).

Based on the FCC staff recommendation, Verizon filed with this Commission a Motion for Reconsideration of the Order Denying its Motion to Dismiss (Order No. PSC-08-0180-FOF-TP), asking for reconsideration of the denial as well as the subsequent orders establishing the procedural requirements for the hearing in this case. In that motion, Verizon *again* asked that the Commission stay these proceedings and consider whether dismissal was also appropriate in view of the FCC staff's findings.

Again, Bright House argued that this Commission has independent, state statutory authority to address Verizon's actions at issue in this case, and must, in fact, act to address anticompetitive conduct. Counsel for Comcast further elucidated at oral argument, and we agreed, that the FCC's decision is but one piece of the puzzle on this issue, and that appeals of the FCC's decision, regardless of the conclusions, were likely. (TR at 27). Thus, we argued that it was important to proceed with this matter under state law in order to obtain clarity regarding the legality of Verizon's actions under both state and federal law. The Commission considered these arguments on June 17, and agreed with Bright House and Comcast.<sup>1</sup>

Shortly thereafter, by order released June 23, 2008, the FCC rejected its staff's recommendation and ordered Verizon to cease its retention marketing program.<sup>2</sup> Verizon filed an appeal of that decision with the U.S. Court of Appeals for the District of Columbia Circuit on June 27, 2008.

#### ARGUMENT

Now, with the prehearing and hearing just days away, Verizon comes to the Commission asking, once again, that the Commission continue these proceedings pending the outcome of

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<sup>1</sup> Order No. PSC-08-0450-FOF-TP, memorializing the Commission's decision to deny Verizon's Motion for Reconsideration, was issued July 16, 2008.

<sup>2</sup> 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) (FCC Order).

separate proceedings addressing Verizon's conduct under federal law with different and more narrow legal standards. Verizon makes this superfluous request nearly six weeks after it filed its appeal of the FCC's Order in the U.S. Court of Appeals. In that same time frame, the case in Florida has proceeded according to schedule. Rebuttal testimony has been filed by the parties, as well as prehearing statements. Discovery requests have been issued, responses have been provided, and depositions have been scheduled. Much work has been done by the parties and Commission staff to ensure that the Commission will have all the information necessary for it to render a decision regarding Verizon's conduct under Florida law. Yet, Verizon asks that the Commission bring these proceedings to a screeching halt.

Verizon's only "new" arguments as to why a continuance is appropriate are: (1) Verizon is currently complying with the FCC's Order to cease its retention marketing program; and (2) the Court of Appeals for the D.C. Circuit has ordered expedited briefing and thus, it is "reasonable to expect that the court will issues its ruling on an expedited basis." (Motion at 4). The Court of Appeals has not, however, set a specific date by which it intends to render its decision. Moreover, there remains the possibility that further FCC proceedings will arise from the Court's decision, which could result in significant delay. As such, it remains unclear, at best, when and how questions regarding Verizon's retention marketing program under federal law will be resolved. In the meantime, the legality of Verizon's retention marketing program under Florida law has not yet been determined, leading to uncertainty in the Florida market.<sup>3</sup> The Commission should, therefore, proceed to hearing in order to complete the record of this case and based thereon, resolve this matter in accordance with Florida statutes.

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<sup>3</sup> Only the issuance of a final, non-appealable ruling permanently terminating Verizon's retention marketing program under federal law would render Bright House's state law claims moot, and thus obviate the need to proceed further with the state law claims. Under any other scenario, the state law claims require a decision.

Verizon further argues that all the various bases relied upon by the Commission in denying Verizon's prior requests for stay have been resolved. Verizon contends that there is no longer a question regarding the timing of an FCC decision, and no concern that the complainants will be prejudiced by Verizon's conduct, because Verizon is complying with the FCC's Order. Thus, Verizon contends that a continuance better serves the interests of administrative economy and will conserve resources. (Motion at 4). To the contrary, Verizon's repackaged arguments run directly counter to the notion of judicial economy and certainly do not promote the efficient use of the resources of the parties and the Commission. Verizon once again asks the Commission to speculate as to what another decision-maker might decide, when that decision might be made, and what impact it might have on the state proceeding.<sup>4</sup> Such speculation does not lend itself to efficient resolution of a matter properly before the Commission and already well advanced in the hearing process. Specifically, if the Commission were to delay this matter until November, as Verizon has requested, there is no guarantee that a decision will have been issued by the Court of Appeals by then, nor is there any guarantee that the Court will finally resolve the matter under federal law as it could remand the case to the FCC for additional proceedings. Thus, in November, this Commission would likely have to schedule a new date for the hearing and endure a round of supplemental filings in order to "refresh" the record. Moreover, given the history of this and the federal proceedings, Verizon would surely seek to interject additional delay in the proceedings at that point as well. None of those procedural gyrations will be necessary if the Commission simply proceeds to hearing as scheduled.

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<sup>4</sup> See Order No. PSC-08-0450-FOF-TP at 9 (rejecting Verizon's arguments on reconsideration because they called for speculation as to what the FCC might do, and whether an FCC decision would bear on the state proceedings.)



Verizon also contends that neither complainant would be prejudiced by the delay because Verizon has suspended its retention marketing program based on the FCC's Order. Bright House will be prejudiced, however, by the additional delay in the resolution of a Petition it filed in November 2007, and the continuing uncertainty regarding the legality of the Verizon's conduct. Furthermore, Bright House would certainly incur additional costs and administrative burdens associated with rescheduling the availability of witnesses (assuming that they will still be available at all), and perhaps refreshing the record, if the hearing must be rescheduled. A live issue exists in Florida as to whether Verizon's marketing program violates Florida law. The Commission, therefore, should take the most prudent, efficient, and fair path, which is to proceed according to the current schedule, and thereby fulfill its obligations to enforce Chapter 364, Florida Statutes.

Verizon notes that similar proceedings in New York and Pennsylvania have been stayed, and that Florida is the only state moving forward to address Verizon's retention marketing program. (Motion at 4).<sup>5</sup> The Commission should not be moved by this statement. With regard to the Cablevision complaint in New York, Bright House is not a party to that Complaint, and consequently, is unfamiliar with the circumstances associated with the delay of that case.<sup>6</sup> Likewise, Bright House is not a party to the Comcast complaint in Pennsylvania. It is apparent, however, from the publicly available documents that neither case is as procedurally advanced as

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<sup>5</sup> See CASE 07-C-1288 - Complaint of the Cable Telecommunications Association of New York and Cablevision Lightpath, Inc. against Verizon for the Unlawful Use of Competitor Proprietary Information to Retain Customers and for an Order Directing Verizon to Comply with Applicable Laws, and Imposing Safeguards on Verizon to Prevent Future Misconduct; and CASE No. C-2008-2023687 - Complaint of Comcast Phone of Pennsylvania, LLC d/b/a Comcast Digital Phone and Comcast Business Communications against Verizon Pennsylvania Inc. and Verizon North Inc.

<sup>6</sup> Furthermore, the Cablevision complaint is based, at least in part, on federal law; therefore, the interpretations of the FCC and the Court of Appeals, may have a direct impact on the New York case. Such is not the case with Bright House's Complaint in Florida, which relies entirely upon Florida Statutes.

the Florida Commission's proceeding, and neither of the referenced cases has been set for hearing. Certainly, the status of proceedings in other states should not serve as the basis for this Commission to derail this proceeding when the hearing is so close at hand and significant resources have already been expended in preparation for hearing.

For all the foregoing reasons, Bright House respectfully requests that the Commission reject Verizon's third attempt to delay this proceeding and deny Verizon's Motion for Continuance.

Respectfully submitted this 12<sup>th</sup> day of August, 2008.

By: *Beth Keating*  
Beth Keating

Florida Bar No. 0022756  
AKERMAN SENTERFITT  
106 East College Avenue,  
Suite 1200  
P.O. Box 1877 (32302)  
Tallahassee, FL 32301  
(850) 224-9634

and

Christopher W. Savage  
Davis Wright Tremaine, LLP  
1919 Pennsylvania Avenue, NW,  
Suite 200  
Washington, D.C. 20006  
Tel: 202-973-4200  
Fax: 202-973-4499  
chrissavage@dwt.com

*Attorneys for Bright House Networks  
Information Services, LLC  
Bright House Networks, LLC*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail, U.S. Mail First Class, or Hand Delivery this 12th day of August, 2008, to the persons listed below:

Dulaney L. O'Roark, III, VP/General Counsel Verizon Florida, LLC P.O. Box 110, MC FLTC 0007 Tampa, FL 33601 de.oroark@verizon.com	David Christian Verizon Florida, Inc. 106 East College Ave., Ste. 710 Tallahassee, FL 32301-7748 David.christian@verizon.com
Rick Mann, Staff Counsel Florida Public Service Commission, Office of the General Counsel 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 rmann@psc.state.fl.us	Beth Salak, Director/Competitive Markets and Enforcement 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 bsalak@psc.state.fl.us  Floyd R. Self, Esquire Messer, Caparello & Self, P.A. 2618 Centennial Place Tallahassee, FL 32308

  
Beth Keating  
Akerman Senterfitt  
106 East College Ave., Suite 1200  
Tallahassee, FL 32301  
Tel: 850-521-8002  
Fax: 850-222-0103  
beth.keating@akerman.com