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Subject: Docket No. 080159 & 080641 - Comments of the Florida Cable Telecommunications Association
Attachments: 080159-080641 FCTA Comments 2-13-09.pdf

A. The person responsible for this electronic filing is:

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B. The docket title is:

In Re: Docket No. 080641 – Initiation of Rulemaking to Amend and Repeal Rules in Chapters 35-4 and 25-9, F.A.C., Pertaining to Telecommunications

Docket No. 080159 - In re: Joint petition to initiate rulemaking to adopt new rule in Chapter 25- 24, F.A.C., amend and repeal rules in Chapter 25-4, F.A.C., and amend rules in Chapter 25-9, F.A.C., by Verizon Florida LLC, BellSouth Telecommunications, Inc. d/b/a AT&T Florida, Embarq Florida, Inc., Quincy Telephone Company d/b/a TDS Telecom, and Windstream Florida, Inc.

C. This document is filed on behalf of the Florida Cable Telecommunications Association, Inc.

D. There are 17 pages.

E. Attached are the Florida Cable Telecommunications Association's Comments in Response to January 23, 2009 Notice of Rulemaking.

Thank you,

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint petition to initiate rulemaking to adopt new rule in Chapter 25-24, F.A.C., amend and repeal rules in Chapter 25-4, F.A.C., and amend rules in Chapter 25-9, F.A.C., by Verizon Florida LLC, BellSouth Telecommunications, Inc. d/b/a AT&T Florida, Embarq Florida, Inc., Quincy Telephone Company d/b/a TDS Telecom, and Windstream Florida, Inc. | DOCKET NO. 080159-TP

In re: Initiation of rulemaking to amend and repeal rules in Chapters 25-4 and 25-9, F.A.C., pertaining to telecommunications. | DOCKET NO. 080641-TP
February 13, 2009

COMMENTS OF FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC. IN RESPONSE TO JANUARY 23, 2009 NOTICE OF RULEMAKING

Florida Cable Telecommunications Association, Inc. hereby submits its comments following the January 6, 2009 agenda conference, which adopted, with some modifications, a Staff Recommendation issued December 23, 2008 Docket Numbers 080159-TP and 080641-TP, in which various Florida Incumbent Local Exchange Carriers seek repeal and or modification of various Commission rules and to create a new rule in Chapter 25-24 to achieve de-regulation of the telecommunications industry in Florida.

FCTA represents cable telephony providers throughout the state of Florida who provide, by and large, the only facilities-based mass market telephony competition to Florida's ILECs. The current regulatory regime has enabled FCTA's members to gain an initial foothold in the consumer

market for voice telephony. Florida's ILECs sought massive changes to existing regulation, claiming competition makes the regulations obsolete or unnecessary.

Out of dozens of rules that ILECs proposed to modify or delete, FCTA challenged three as important to the continued effective functioning of the competitive market. These included two rules concerning incremental cost pricing for ILEC services and the Preferred Carrier (PC) freeze rule. Staff explained at length in an informal meeting why two rules concerning incremental cost were not needed and FCTA dropped its opposition to them in the months before the Staff Recommendation (SR) was issued. However, the Order adopts significant changes to the PC freeze rules and modifies them in ways no party advocated.

The Commission issued its Notice setting the rules out for comment on January 23, 2009, setting February 13, 2009 as the deadline for submitting comments. Accordingly, FCTA objects and comments as follows: the Commission should keep the current PC freeze rule as it is, as more fully explained below. Consistent with these comments, FCTA has submitted specific alternative language for rules 25-4.083 and related rule 25-4.110 as Exhibit A hereto.

Rule 25-4.083 imposes requirements upon local exchange providers concerning imposition and removal of a Preferred Carrier Freeze (PC-

Freeze)¹ on a subscriber's account, including information which must be contained on written authorizations to impose a PC-Freeze on a customer's choice of provider. Rule 25-4.083 implements Section 364.603, F.S., Methodology for Changing Telecommunications Provider, which requires the Commission to adopt rules to prevent the unauthorized change of a subscriber's telecommunications service, to provide for specific verification methodologies, to provide for the notification to subscribers of the ability to freeze the subscriber's choice of carriers at no charge, to allow for a subscriber's change to be considered valid if verification was performed consistent with the Commission's rules, to provide for remedies for violations of the rules, and to allow for the imposition of other penalties available in Chapter 364, F.S.

The PC freeze rules serve a dual purpose. They protect consumers by ensuring that no "slamming" of a customer, i.e., the unauthorized switch of a customer's carrier, can occur. The rule also safeguards competition and ensures a level playing field because the current rule prevents a carrier from imposing a PC freeze on a customer without that customer's consent. Were it otherwise, carriers could unilaterally prevent any customer from switching to a competitor by imposing a PC freeze without the subscriber's consent, thereby stopping competition in its tracks. The PC freeze and other

¹ A PC-Freeze is defined in Rule 25-4.003 as "A service offered that restricts the customer's carrier selection until further notice from the customer."

anti-slamming rules were the product of several complex rulemakings at the state and federal levels.

In its comments, FCTA consistently opposed any changes to the current rule. The Joint Petitioners initially sought complete repeal of Florida's rule. Later, the ILECs advocated for incorporation by reference of the federal PC freeze rules, with a clarification stating that carriers could not charge for imposing or removing a PC freeze. However, the ILECs refused to agree to keep a provision championed by FCTA that would prohibit the ILECs from *soliciting* PC freezes from customers. The SR, which the Commission then provisionally adopted, incorporates the federal rule, keeps some state provisions, and then adds still other provisions.

Florida's existing PC Freeze rule represents a thoughtful and measured effort to curb slamming, and has proven successful in reducing consumer complaints. Because the rule has been successful in protecting consumers while ensuring a level playing field for providers, it should be retained in its current form. In contrast, the changes contained in the December 23, 2008 Staff Recommendation and provisionally adopted on January 6, 2009 significantly change and undercut a process that has proven to be successful. The changes that FCTA opposes also lack evidentiary support in the record.

As FCTA explained throughout this proceeding, Rule 25-4.083 has no place in an ILEC de-regulation docket devoted to removing regulations that are unnecessary because of competition. If the PC freeze rules are incorrectly drafted, no amount of competition will fix them because the rules

themselves will inhibit competition and distort marketplace forces. FCTA addresses each revision in detail below.

Change 1: Addition of New Subsection 1 to Rule 25-4.083 to require LECs to notify customers that the PC freeze option exists.

The SR that Rule 25-4.083 be amended to add a new Subsection (1) to state that a local provider shall make available a PC-Freeze upon a subscriber's request. Section 64.1190 applies only to LECs who offer PC-Freezes,² but that not all LECs do. Staff reasoned that, if a LEC elects not to offer this service, its customers would not be able to obtain a PC-Freeze to protect them from an unauthorized carrier change. Staff then noted that, in contrast, Section 364.603, F.S., requires telecommunications companies to offer PC-Freezes, and Rule 25-4.083, F.A.C., applies to ILECs, CLECs, and IXC. SR at 34.

FCTA disagrees with Staff's view, and opposes adding a new subsection 1 to Rule 25-4.083, for several reasons. First, the status quo has shown to be effective. Section 364.603 requires the Commission to create rules concerning PC freezes, which the Commission did, several years ago. Customer complaints over slamming and cramming diminished, indicating that the rules have worked. There has been no showing in this docket that requiring additional notification would be beneficial to consumers. In contrast, introducing a new rule now to require LECs who have not already done so to notify customers of the PC freeze option could hamper competition.

² 47 C.F.R. 64.1190(a)

Second, FCTA disagrees with Staff's view that offering of a PC freeze is mandatory, rather than optional. Section 364.603, F.S., requires consistency with federal law and for the notification to subscribers of their ability to freeze the subscriber's choice in place at no charge.³ The underlying federal statute, 47 U.S.C. sec. 258,⁴ outlines a verification process for switching customers and penalties for unlawful changes, but does not specify a mandatory PC freeze. The federal regulations suggest that offering PC freezes is optional rather than mandatory. *See* 47 C.F.R. sec. 64.1190(a) ("All local exchange carriers *who offer* preferred carrier freezes must comply with the provisions of this section.") *See also* 64.1190(b) ("All local exchange carriers *who offer* preferred carrier freezes shall offer freezes on a nondiscriminatory basis . . .") emphasis supplied. Consistent with federal law, Chapter 364.603 therefore can be read to mean that carriers *who offer* PC freezes, shall notify all subscribers of their ability to freeze in place their choice of provider, and not that *all* carriers *shall* offer the ability to freeze a carrier choice in place.

FCTA's concern has always been that an ILEC could aggressively solicit existing customers to freeze their choice in place, thereby making it more difficult to transfer seamlessly a customer to a new network once a

³ Chapter 364.603, F.S., provides that the Commission "shall adopt rules to prevent the unauthorized changing of a subscriber's telecommunications service" and that "such rules shall be consistent with the Telecommunications Act of 1996, provide for specific verification methodologies, provide for the notification to subscribers of the ability to freeze the subscriber's choice of carriers at no charge . . ."

⁴ Section 258(a) provides "No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the [FCC] shall provide. Nothing shall preclude any State commission from enforcing such procedures with respect to intrastate services."

customer placed an order to switch providers. For instance, Windstream stated that it "strictly interpreted" PC freezes allegedly placed on its customer accounts. FCTA members found that this made it more difficult for competitors to win those customers, even after a customer had made a choice to switch. From the perspective of FCTA members, it appeared that Windstream had placed a PC freeze on every customer account, although Windstream disputes this. The existence of this dispute shows how the PC freeze rule could be used to protect a competitor's market share rather than its intended use – protecting customers from slamming. The rule that the SR and ILECs seek to change virtually eliminated slamming and cramming in Florida. No party submitted evidence in this docket that additional notification would result in any additional benefits for consumers.

In contrast, adopting this provision could create a pretext for the ILECs to notify every customer of the option of freezing the ILECs service in place. Some customers no doubt would agree to do so, even though slamming and cramming has not been a problem for years, due to the success of the current rules. Freezing the customers in place makes it harder for a competitor to win the customer as it creates numerous additional steps to "unfreeze" the choice before the customer can be switched to the competitor's network. If the option must be available, then allow it via tariff and not through a wave of new communications to customers, which would only confuse customers and create opportunities for anti-

competitive actions by ILECs. Thus, the Commission should reconsider its decision to adopt the SR and not adopt a new subsection (1), and should keep the PC freeze rules as they existed prior to the SR.⁵

Change 2: Staff proposes keeping the portion of subsection 1 of Rule 25-4.083, which prevents an ILEC from insisting that subscribers execute a PC freeze as a precondition to obtaining service. FCTA agrees with Staff that the provision prohibiting PC freezes as a precondition of service should be retained.

Change 3: Staff recommended keeping subsection 2 of Rule 25-4.083 – which requires that there be no charge for implementing or removing PC freeze. FCTA agrees with Staff as to this provision. The requirement that there be no charge for placing or removing a PC freeze is contained in the text of Chapter 364.603, F.S. itself.

Change 4: Staff recommended, and the Commission adopted, a proposal to delete subsection 5 of Rule 25-4.083, which prohibits ILECs from soliciting their subscribers to place PC freezes on their accounts. FCTA disagrees with Staff's view. Staff's rationale for deleting the "no solicitation" provision is that other customer protections exist elsewhere in the rule that would make subsection (5) unnecessary. However, that misses the point of the rule. Prohibiting solicitation of PC

⁵ Consistent with this approach, the Commission should modify related rule 25-4.110(13) to insert the words "and offer the ability to freeze a customer's carrier choice in place" after "Companies that bill for local service" to make clear that the notification obligation only applies to carriers that elect to offer PC freezes. FCTA has offered this alternative language in Exhibit A hereto.

freezes by the incumbent carrier is not a consumer protection. It is a provision designed to ensure a level playing field between incumbent and competitor. The presence of this rule to date has helped lead to the current competition that exists in Florida. Deleting it will harm competition while not increasing any benefits to consumers. Removing the “no solicitation” rule would enable ILECs to create a new hurdle for competitors to clear when seeking to win customers.

The “no solicitation of PC freezes” rule is a Florida-specific innovation that has enabled competition here to gain a foothold. The ILECs provided no evidence for its removal, only speculation. Deleting this rule would achieve nothing more than again opening a door to soliciting all of a providers’ customers about the virtues of freezing their choice of local in place, and creating an unnecessary hurdle for competitors to clear. No showing was made that removing the rule would protect customers, and FCTA argued that allowing solicitation of PC freezes would be anti-competitive.

Similarly, Staff further proposes to delete 25-4.083(3), (6) and (8) arguing those provisions are already covered by 64.1190(c)(d)(2) and (e) of the federal regulations. However, FCTA disagrees with this change because 1190(c), (d) and (e) envision solicitation of PC freezes, which FCTA opposes.

Staff also recommended deleting 4(a) and 4(b) on ground that those provisions already are covered by 64.1190(d)(1). FCTA disagrees with this

change also because these rules also specifically allow solicitation, which represents a downgrade from current Florida rule 25-4.083(5), which prohibits solicitation of PC freezes.⁶

Accordingly, the Commission should overturn its decision to permit solicitation of PC freezes and instead return to the status quo ante.

Change 5: The Staff recommended, and the Commission adopted a proposal to delete 25-4.083(9) as unnecessary. FCTA disagrees with Staff's view. Rule 25-4.083(9) requires a local provider to authorization documentation for one year to show a customer requested implementing or lifting a freeze.

As its basis for deleting this provision, Staff stated it has received few, if any, complaints about this. However, lack of complaints should not form a basis for deleting the rule. Rather, the lack of complaints show this rule is working. The third-party verification process is very detailed and already exists. The FCC's rules, 47 C.F.R. § 64.1190, require recorded consent for PC freezes. All providers have been complying with these rules for several years now. Consumers and providers have benefited from this certainty. The very existence of a documentation requirement acts as a deterrent to prevent wholesale freezing in place of customers, which is the anticompetitive evil FCTA seeks to combat here.

⁶ Should the Commission continue to disagree with FCTA and find that solicitation of PC freezes should be lawful, FCTA does agree with Staff's view that any communication concerning PC freezes should be made in clear and non-misleading language. *See* SR at 34.

Rule 25-4.083(9) is part of a regime that successfully addressed slamming and cramming, resulting in vastly fewer complaints. The rule's effectiveness should not be used as a rationale for deleting it. To do so would open the door to renewed slamming and cramming by unscrupulous providers – because there would be no way to determine whether a PC freeze had or had not been authorized. Thus, Rule 25-4.083(9) should be retained.

Change 6: Staff recommends (and the Commission adopted) deleting Subsections (10), (11) and (12) of 25-4.083, which contain operational provisions designed to ensure that back office procedures account for PC freezes when an underlying wholesale service provider changes.

Once again, FCTA disagrees with the SR's conclusion. Staff states that "the industry" requested elimination of Subsections (10), (11) and (12) of Rule 25-4.083. SR at 35. Based on the perceived lack of opposition to this rule, Staff surmised that "the industry has changed its operational practices such that the issues addressed by these rules no longer exist as impairments to the competitive market." SR at 35. However, FCTA has opposed any changes to 25-4.083 from the beginning of this proceeding and continued to do so throughout, and therefore, market participants were not uniform in their approach to this rule. In fact, the ILECs and CompSouth entered into a global compromise concerning all of the rules, including this one, but FCTA pointedly was not a party to that agreement. FCTA chose not to join

largely because the ILECs would not agree to keep Rule 25-4.083 in its current form.

FCTA is unaware of any provisioning changes in operations made since 2004 for transferring customers that would render subsections 10, 11, and 12 of Rule 25-4.083 unnecessary. No commenter specifically identified these three provisions in isolation as being unnecessary. Nor did the ILECs explain what effect removing subsections (10), (11) and (12) would have on provisioning.

Deleting rules 25-4.083(10) and (12) most likely would not have any effect on FCTA members, as those appear applicable to resellers,⁷ whereas FCTA members offer service using their own facilities. However, Rule 25-4.083(11)⁸ increases communication between providers, and deleting it would have an unknown and possibly harmful effect on interaction between companies. Therefore, Rule 25-4.083(11) should be retained.

CONCLUSION

As FCTA noted in its initial comments in this docket, the stakes here remain high. Before the recent successful competition by cable operators, many other competitive providers tried, but failed, to bring mass market telephony competition to Florida. Competition stalled for more than a decade after the 1996 federal Telecommunications Act. Consumer choice did

⁷ Current Rule 25-4.083(10) provides "A PC Freeze shall not prohibit a local provider from changing wholesale services when serving the same end user." Current Rule 25-4.083(12) states "Local providers shall make available the ability for the subscriber's new local provider to initiate a local PC Freeze using the local service request."

⁸ Current Rule 25-4.083(11) provides that "Local providers shall make available an indicator on the customer service record that identifies whether the subscriber currently has a PC Freeze in place."

not exist for mass market telephony until recently, after cable operators built networks and found technology solutions that enabled them to provide service with minimal reliance on the networks of incumbent telephony providers. The telephony competition that exists today resulted from efforts and investment by cable operators and careful oversight of ILECs by the Commission and should not be taken for granted.

Cable operators built their own facilities and networks to provide competitive VoIP service. Yet, even though cable operator and ILEC networks are separate, ILECs still possess the power unilaterally to delay or prevent customers from switching to competitors. A recent AT&T "software upgrade" needed for customers to switch to competitive telephony providers contained numerous bugs and resulted in thousands of lost orders. See Docket No. 000121A-TP, *Investigation into the establishment of operations support systems permanent incumbent local exchange telecommunications companies*, (investigating AT&T OSS interface problems that resulted in lost orders of competitive providers). The Commission levied a multimillion dollar fine against Verizon for violating service quality standards in Florida, and regulators have echoed those concerns in at least a half-dozen other states. See FCTA Initial Comments at 2. FCTA did not challenge the great majority of rule changes sought by the ILECs. Yet, undoubtedly, some rules will be needed to ensure fair competition and address level playing field issues that the competitive marketplace cannot remedy. Section 25-4.083

represents one such rule. Adopting the changes contained in the SR will have unintended consequences, and the Commission should act swiftly to repeal those revisions and return to the status quo ante.

RESPECTFULLY SUBMITTED this 13th day of February, 2009.

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I hereby certify that the foregoing comments of the Florida Cable Telecommunications Association were served by electronic mail delivery this 13th day of February, 2009 to the following:

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FCTA Exhibit A:

FCTA Proposal, Rule 25-4.083:

Maintain rule exactly as it existed prior to the December 23, 2008 Staff Recommendation.

FCTA Proposed language for 25-4.110(16):

Companies that bill for local service and offer the ability to freeze a customer's choice of provider in place must provide notification with the customer's first bill or via letter, and annually thereafter that a PC-Freeze is available at no charge. Existing customers must be notified annually that a PC-Freeze is available at no charge. Notification shall conform to the requirements of Rule 25-4.083.