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April 24, 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 Opposition to Verizon's Motion for Reconsideration.

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

please do not hesitate to contact me.

Sincerely,

Beth Keating

Beth Keating
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Enclosures

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: April 24, 2008

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BRIGHT HOUSE'S OPPOSITION TO THE MOTION OF VERIZON FLORIDA, LLC FOR RECONSIDERATION

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 Reconsideration ("Verizon Motion") filed on April 17, 2008. Verizon's Motion should be denied on several grounds: First, the Motion is untimely under Rule 25-22.0376, F.A.C. Second, the Motion does not meet the standard for granting reconsideration, in that it does not identify a mistake of fact or law in either Commission Order referenced. Third, the Motion reargues matters previously considered and rejected by the Commission.

BACKGROUND

Verizon filed its motion to dismiss this case 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. According to Verizon, this Commission supposedly 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 federal vassals limited to enforcing whatever dictates might emanate from Washington, D.C., while permitting anything the federal masters had not expressly outlawed. 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.

By the time of oral argument on Verizon's motion – March 4, 2008 – the FCC proceedings against Verizon were well underway. Understandably, therefore, Verizon renewed its claim that this Commission should stay or dismiss Bright House's complaint on the basis of that federal case.

ARGUMENT

Verizon's Motion for Reconsideration should be rejected because there has been no mistake of fact or law in either of the Commission's decisions at issue, and simply relies on matters previously considered by the Commission. Much to the contrary, the situation that now exists – an FCC staff recommendation regarding the federal law complaints against Verizon – was thoroughly and completely discussed at oral argument. Verizon is simply attempting to use predicted – and discussed – issuance of the FCC staff's recommended decision as to take another bite at the apple. This is inappropriate in the context of a motion for reconsideration.

For example, at the Commission's March 4 Agenda Conference, Bright House fully acknowledged that action by the FCC staff on the FCC complaint was likely in mid-April.[1] And

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[1] Transcript of Proceedings, Agenda Conference, Docket No. 070691-TP (March 4, 2008) ("Transcript") at page 8, lines 9-15 (statement of Mr. Savage):

> "I bet the [FCC] staff will get their recommendation, their decision out in the middle of April, more or less when they say they should. The problem is that

(note continued)...

Bright House outlined the possible outcomes at the FCC, in order to show that – no matter what happened in that forum – there was no reason to stay or dismiss its complaint here. Moreover, Bright House specifically addressed the fact that the main statutes at issue in the FCC case – Sections 222(a) and 222(b) of the federal Communications Act – contained some specific, "technical" requirements that did not exist in Florida law. And we specifically noted that it was possible that Bright House might lose at the FCC on the grounds that we had not fulfilled those technical requirements. We pointed out that given the breadth of the Florida statutes on which our case here is based, Verizon's conduct would still violate Florida law, even if the FCC concluded that Sections 222(a) and/or (b) had not been violated,. As a result, we argued, this case could, and should, proceed, notwithstanding the pending FCC matter.[2]

...(note continued)

doesn't end the case. If the staff issues a recommended decision, that just moves things on until time in June if the FCC decides to stick with its schedule."

[2] This point was made at least twice at oral argument. For example, *see* Transcript at page 9, line 5, through page 10, line 8 (statement of Mr. Savage):

"With respect to the issue of the law, I would just submit that the legal grounds for our complaint in Florida are vastly different than the legal grounds for our complaint at the FCC. You know, you've got all the papers in front of you, but fundamentally Verizon's defenses at the FCC are largely very technical. Oh, yes, okay, we are doing this. But, you know, Section 222(b) says it has to be this kind of a service that we might be providing you on a wholesale basis. And so we are not technically doing that kind of a service, so don't hold us liable.

"Now, I don't think those are good arguments, but suppose they are. Suppose the FCC says, yes, well, it doesn't technically violate Section 222(b), so we are not going to hold you liable. What does that have to do with Florida Statute 364.01, which says they can't act in an anticompetitive manner, period? What does that have to do with your general regulatory authority over the way these intrastate services are handled when a customer is moving from one to another? Nothing. And so, it is certainly true that if eventually the FCC gets around to telling them you can't do this because it violates federal law, we presume they will stop in Florida and everywhere else. But if the FCC decides that it doesn't actually violate the technicalities of federal law because of the way that law is written, that says nothing about the effect on Florida consumers under Florida law. So I just don't see any reason to stay this

(note continued)...

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, as predicated at the March 4 oral argument (Transcript at 8), the FCC staff issued its recommended decision. And, as Bright House had expressly 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). Specifically, the FCC staff recommended that the federal complaint be dismissed because (1) when Bright House and others ask Verizon to implement local number portability and terminate a customer's service with Verizon, that does not constitute buying a "telecommunications service" (under the specific definition of that term in federal law); (2) Bright House and Comcast had not presented sufficient evidence to show that their certificated CLEC affiliates were acting as "telecommunications carriers" (under the specific definition of that term in federal law) when they provide wholesale network connectivity; and (3) the restrictions on use of another carrier's proprietary information, in Section 222(a) of the federal act, only forbids public disclosure of that information, but does not forbid misappropriating that information for the recipient's own competitive advantage.

Verizon's motion for reconsideration is based on nothing more than the issuance of this FCC staff recommendation.

...(note continued)

> case on the hope that maybe the FCC will meet its schedule this time and maybe resolve it."

See also Transcript at pages 20-21 (quoted *infra* note 3).

As a matter of federal law, Bright House disagrees with the recommendations of the FCC staff, and we will be pursuing that debate at the FCC. But, as we explained at oral argument before this Commission, the technicalities of federal law simply have no bearing on the questions of ***Florida*** law that govern this case, at this Commission.[3]

We have repeated these points for the simple purpose of pointing out that ***all of these issues were fully and completely aired at the March 4 oral argument before this Commission.*** This destroys any Verizon claim for reconsideration based on what the FCC does or does not do, because it is well-established that reconsideration is appropriate only where there is some factual or legal issue that the Commission's initial decision failed to consider.[4] The Commission was fully

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3 *See* note 2, *supra. See also* Transcript at page 20, line 19, through page 21, line 22:

"The inconsistency that, I guess, people are worried about is the FCC saying, you know, this doesn't violate federal law, but you folks saying, you know, it does violate Florida law. There's nothing inconsistent about that. There is all kinds of things that are okay as far as the federal law is concerned, but not okay as far as the state is concerned. Those are, I think, the only possibility. I mean, the other would be, gee, you think it is okay under Florida law and they say it violates federal law. But, again, there is no inconsistency there. They are just different bodies of law that address different things."

"Now, let me get into that in a little bit more detail. You can cut me off if you don't want the detail, but to be real specific, the federal law complaint is being brought under Section 222(b) and (a) principally of the Federal Communications Act. Section 222(b) is addressed to a very specific situation where one carrier goes to another carrier and says I've got to give you information in connection with providing a telecommunications service. And, if the carrier does that, then the carrier who's, you know, getting the data isn't allowed to use it in connection with marketing and so on. 222(a) says if one carrier gets another carrier's information, they have to protect its confidentiality. And we, the complainants at the FCC, contend that protecting confidentiality of information includes not misusing it for your own competitive purposes. Verizon is saying, no, no, that just means don't give it to the paper so they can publish it."

"Those are interesting questions of federal law. I spend a lot of time on federal law. But neither of those questions raises the fundamental question that is implicated here, which frankly is properly before this Commission, is what they are doing fair competition?"

4 The standard of review for a motion for reconsideration is whether the motion identifies a (note continued)...

and completely aware of the fact that the FCC staff (and, indeed, eventually, the FCC itself) might dismiss the complaint at the FCC based on the specific, "technical" requirements of federal law; was fully and completely aware of Verizon's argument that federal law, even with all its technicalities, should control what this Commission decides about what is anticompetitive or discriminatory in Florida; and was fully and completely aware of Bright House's counter-argument that Florida law was broader than federal law, so that the latter simply did not control this Commission's actions. Without ruling that Verizon's conduct ***in fact*** violates Florida law, the Commission recognized that – the federal case notwithstanding – Verizon's conduct ***could be found*** to violate Florida law.

In these circumstances, the April 11 recommended decision from the FCC staff is simply a non-event in the context of ***this*** case before ***this*** Commission. Put aside the fact that all we have at this point is a recommendation from the FCC staff.[5] The prospect that the FCC might dismiss the federal law complaint based on the specific, technical requirements of federal law was fully considered by the Commission ***before it decided to reject Verizon's motion to dismiss and/or stay the case.*** It follows that this FCC action (again, putting aside the fact that all we have is an FCC staff recommendation) cannot form a basis for reconsideration of the Commission's ruling against

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...(note continued)
point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. *See Stewart Bonded Warehouse, Inc. v. Bevis,* 294 So.2d 315 (Fla. 1974); *Diamond Cab Co. v. King,* 146 So.2d 889 (Fla. 1962); and *Pingree v. Quaintance,* 394 So.2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. *Sherwood v. State,* 111 So.2d 96 (Fla. 3rd DCA 1959), *citing State ex. rel. Jaytex Realty Co. v. Green,* 105 So.2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." *Stewart Bonded Warehouse, Inc. v. Bevis,* 294 So.2d 315, 317 (Fla. 1974).

[5] Even Verizon cannot seriously argue that the authority of the Florida Public Service Commission to take action under Florida law is, or should be, in any way constrained by the ***recommendations*** of the ***staff*** of the FCC.

Verizon's motion to dismiss and/or stay. The possibility of this type of FCC action was not overlooked by the Commission, and does not in any sense constitute a new or unanticipated development that would warrant reconsideration. As a result, Verizon's motion for reconsideration must be rejected, because it is totally and obviously based on matters the Commission has already considered, and therefore, because Verizon has failed to meet the standard for reconsideration.

In addition, Verizon's Motion for Reconsideration – at least as it pertains to Order No. PSC-08-0180-FOF-TP, issued March 24, 2008 – is untimely. Verizon's Motion for Reconsideration was filed on April 17, 2008, a full 24 days after the issuance of that Order. Rule 25-22.0376, however, states clearly that all motions for reconsideration must be filed within 10 days after the issuance of the order in question, and that "failure to timely file a motion for reconsideration … shall constitute a waiver of the right to do so." Even if Order No. PSC-08-0180-FOF-TP were deemed a final order, which it is not, Rule 25-22.060 mandates that a motion for reconsideration must be filed within 15 days of the issuance of the Order. Thus, as it pertains to Order No. PSC-08-0180-FOF-TP, the Motion for Reconsideration should be rejected outright. *See City of Hollywood v. Public Employee Relations Commission,* 432 So.2d 79 (Fla. 4th DCA 1983) and *Citizens of the State of Florida v. North Fort Meyers Utility, Inc. and Florida Public Service Commission,* Case No. 95-1439 (Fla. 1st DCA, November 16, 1995). It is clear from the discussion above that all Verizon is trying to do here is re-argue the significance of the ongoing FCC proceeding, a matter that was fully aired at oral argument, and that the Commission has already taken into account in deciding to move forward with this case. It is clear from Rule 25-22.0376, as well as Rule 25-22.060, that –

whatever Verizon might be trying to do – a "Motion for Reconsideration" is not the way to do it.

Respectfully submitted,

/s/ Christopher W. Savage

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April 24, 2008

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 24th day of April, 2008, to the persons listed below:

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