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December 6, 2007 – **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

Dear Ms. Cole:

Enclosed for filing in the above-referenced matter is Verizon Florida LLC's Motion to Dismiss Complaint or, in the Alternative, Stay Proceedings. 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 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 Filed: December 6, 2007

VERIZON FLORIDA LLC'S MOTION TO DISMISS COMPLAINT OR, IN THE ALTERNATIVE, STAY PROCEEDINGS

Verizon Florida LLC ("Verizon") moves that the Complaint and Request for Emergency Relief ("Complaint") filed by Bright House Networks Information Services (Florida), LLC and Bright House Networks, LLC (collectively, "Bright House") be dismissed because it fails to state a claim for which relief can be granted. Verizon also seeks dismissal, or in the alternative a stay, on the independent ground that Bright House has already put the same issues before the FCC,[1] thus giving rise to the potential for conflicting decisions and wasteful and duplicative proceedings.[2]

The Complaint concerns Verizon's efforts to persuade customers who have decided to switch to other providers to change their minds and remain with Verizon. Not only are Verizon's customer retention practices lawful under state and federal law, they also are pro-competitive. Contrary to Bright House's allegation that Verizon is misusing information received by its wholesale operations,[3] Verizon in fact depends solely on information that it possesses by virtue of its role as a provider of retail services, not by

[1] Bright House acknowledges that it is pursuing a parallel challenge at the FCC. Complaint ¶ 3. The FCC proceedings are confidential at this stage.

[2] Although the Complaint should be dismissed for these reasons, or in the alternative stayed, if the Commission were to conclude that further consideration of the Complaint is required at this stage, it would be necessary for Verizon to file an answer and for the parties to develop an evidentiary record for hearing.

[3] Complaint ¶ 2.

virtue of its provision of wholesale services or network facilities to another carrier. Verizon thus does not misuse any carrier proprietary information protected under section 222(b) of the Telecommunications Act and does not violate Florida law. Indeed, the FCC has expressly approved the use for retention marketing purposes of information that a carrier obtains in connection with its retail operations.

Verizon's marketing efforts intensify competition and are a boon to consumers. As the FCC has recognized, communications markets have been transformed by the advent of vigorous facilities-based competition, particularly between incumbent cable companies, which have achieved great success in winning customers for their VoIP-based telephone services, and telephone companies like Verizon, that are investing billions of dollars to offer customers a meaningful video service alternative.[4] Cable companies are undertaking aggressive efforts to retain their customers in the face of Verizon's deployment of state-of-the-art fiber optic facilities. Verizon, too, has introduced programs designed to retain its customers by providing superior service packages and pricing incentives. Those programs provide consumers with timely, accurate information about competitive offers of which they might otherwise be unaware, so that customers are able to make the best choice based on complete information. Of course, nothing prevents Bright House and other competitors — who have symmetrical access to the type of information at issue in the Complaint — from attempting to retain their own disconnecting voice customers or from countering

[4] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5103 (2007), ¶ 2.

Verizon's retention efforts by seeking to persuade customers to switch after all, perhaps by sweetening their offer to the consumer.[5]

This intense competition for subscribers embodies the ideal of facilities-based competition that the Commission and the FCC have been seeking to encourage for more than a decade. This Commission's rules and orders, and federal and state law, protect *competition*; they do not countenance Bright House's efforts to use the Commission's complaint process to protect themselves *from* competition. The Commission should dismiss the Complaint.

I. BACKGROUND

A. BRIGHT HOUSE'S ALLEGATIONS

For purposes of this motion, Verizon takes Bright House's factual allegations at face value. Bright House alleges that it provides local voice service known as "Digital Voice" to thousands of Florida residents, using its own facilities to compete with Verizon.[6] Bright House is not a Verizon wholesale customer; it acknowledges that it does not use Verizon unbundled network elements or resold services and collocates with Verizon only for purposes of exchanging traffic.[7] Bright House states that when it wins a customer from Verizon, Bright House sends what it calls "disconnect and number portability notices," which direct Verizon to port the customer's number to Bright House and disconnect the customer's retail service in a coordinated fashion so the customer's service is not disrupted and he or she is not double billed.[8] Bright House alleges that

[5] Indeed, because they are not subject to state economic regulation, competitors providing VoIP services can offer rates and other terms without regard to state limitations on promotions, rates, or customer notice.
[6] Complaint ¶ 1.
[7] Id. ¶¶ 1, 10.
[8] Id. ¶¶ 11, 12, 14.

after it sends the "disconnect and number portability notices," Verizon notifies its retail operations of the disconnection, something Bright House admits is necessary so that customer billing can be stopped.[9] Bright House asks the Commission to order Verizon not to market to customers based on its knowledge that the customer has asked to disconnect his or her Verizon service.[10]

Bright House claims that Verizon's retention program violates four Florida statutes, a Commission rule and two Commission orders. The statutes cited by Bright House address anticompetitive conduct generally,[11] the regulation of monopoly services provided by incumbent local exchange carriers ("ILECs"),[12] and a prohibition against giving a person or locality an undue preference.[13] The Commission rule upon which Bright House relies simply requires local carriers to facilitate number porting.[14] The two Commission orders Bright House cites approved certain BellSouth marketing practices. In the *BellSouth Key Customer Tariffs Order*,[15] the Commission "acknowledged" BellSouth's voluntary 10-day waiting period before commencing winback activity.[16] The Commission also addressed the sharing of CPNI and wholesale information between BellSouth's retail and wholesale divisions, finding that BellSouth's policies, which the

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[9] *Id.* ¶ 15.
[10] *Id.*
[11] *Id.* ¶ 20 (citing Fl. Stat. §§ 364.01(4)(g); 364.3881(3)).
[12] *Id.* ¶ 21 (citing Fl. Stat. § 364.01(4)(i)). Bright House asserts that because it must coordinate disconnection and number porting with Verizon, Verizon is the monopoly provider of service to that customer. Complaint ¶ 20. This absurd theory would make every facilities-based carrier a monopoly provider for each of its customers.
[13] *Id.* ¶ 22 (citing Fl. Stat. § 364.10(1)).
[14] *Id.* ¶ 21 (citing Commission Rule 25-4.082).
[15] *In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional tariffs and for investigation of BellSouth's promotion price and marketing practices by Florida Digital Network, Inc.*, Docket No. 020119-TP et al., Order No. PSC-03-0726-FOF-TP (June 19, 2003)("*BellSouth Key Customer Tariffs Order*").
[16] *Id.* at 44. The Commission did not, as Bright House suggests, state that a ten-day waiting period was required under Florida law.

Commission did not describe, were satisfactory.[17] In its *BellSouth Carrier-to-Carrier Information Order*,[18] the Commission upheld the challenged win-back program and, contrary to Bright House's characterization, made clear that no allegations concerning retention activities were at issue.[19] As discussed below, none of these authorities provides a legal basis for the Complaint.

B. THE RETENTION MARKETING PROGRAM AT ISSUE HERE IS BASED ON THE USE OF RETAIL INFORMATION OBTAINED FROM RETAIL DISCONNECT ORDERS

The Complaint focuses on one aspect of Verizon's marketing — its retention efforts following Bright House's requests sent on behalf of migrating customers to disconnect their Verizon retail service. As the Complaint recognizes, Verizon does not require a customer to inform it directly of a request to cancel service.[20] Rather, in accordance with industry standards, when Verizon receives a local service request ("LSR") for local number porting ("LNP") from Bright House, Verizon issues a retail disconnect order to ensure that the customer's retail service is discontinued at the appropriate time, that the customer experiences no loss of dial tone or missed calls, and that the billing by the old and new local service providers does not overlap.[21] It is solely in response to this *retail* loss notification and disconnect request that Verizon provides additional information to the customer so that the customer can choose whether to

[17] *BellSouth Key Customer Tariffs Order* at 47.
[18] *In re: Complaint by Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. regarding BellSouth's alleged use of carrier-to-carrier information*, Docket No.030349-TP, Order No. PSC-03-1392-FOF-TP ("*BellSouth Carrier-to-Carrier Information Order*").
[19] *Id.* at 7.
[20] See Complaint ¶ 15.
[21] See Complaint ¶¶ 11-15. Bright House states that it submits "disconnect and number portability notices," but in fact Bright House submits an LNP LSR to Verizon that triggers a single retail service order, which orders the disconnection of Verizon's existing retail line and the work required to prepare for number porting by the LNP database administrator. For purposes of Verizon's motion, this difference is not material, but for clarity's sake Verizon here uses the more precise terminology.

remain with Verizon. In cases where a customer chooses to stay with Verizon, Verizon may, acting as the customer's authorized agent, stop the disconnect and porting activity as requested.

It is convenient to the customer who is changing carriers that Verizon's systems are designed to generate a retail service disconnect request upon the company's receipt of an LNP request. This streamlined process assures that the porting-out of the customer's telephone number and the disconnection of the retail service are coordinated. Customers presumably prefer to avoid placing two orders — one to port out and another to disconnect. If the disconnect order were not smoothly integrated into a flow-through provisioning process, a customer would have to call its old local service provider to discontinue its service before establishing new service. In such a scenario there would be no doubt about Verizon's ability to engage in retention marketing when its retail representatives receive a call from a departing customer. It would be ironic indeed if Verizon's right to engage in retention marketing were diminished simply because it has — consistent with industry understanding — implemented a customer-friendly process flow that automatically generates a disconnect order and thus ensures a smooth, coordinated, and seamless shift from one facilities-based service provider to another.

When a new facilities-based provider submits an LNP request on a retail customer's behalf, it is necessarily acting as the authorized agent of the customer, both for purposes of submitting an instruction to disconnect the customer's retail service on a particular date and for purposes of initiating a number port. Absent such an agency

relationship, the new carrier would have no independent authority to ask Verizon to cancel service.[22]

C. VERIZON HAS NO UNIQUE OR EXCLUSIVE ACCESS TO – OR ABILITY TO USE – RETAIL CUSTOMER LOSS INFORMATION

The Complaint assumes that Verizon's ability to use information derived from retail disconnect orders in its retention marketing efforts unfairly tilts the playing field in Verizon's favor. That is not the case. When a customer chooses to switch his or her voice service from a cable company to Verizon, Verizon submits an LNP LSR to that company. The same line loss notification that is available to Verizon in the case of a customer shift from Verizon to Bright House (for example) is available to Bright House in the same time frames and through the same interfaces in the case of a customer shift from Bright House to Verizon. Thus, the rights and abilities of Bright House when one of its customers switches to Verizon are precisely symmetrical to those of Verizon when one of *its* customers switches to Bright House. Neither acts as a wholesale provider when it receives a loss notification and generates its own internal retail disconnect order.

Indeed, if anything, the current triple-play offering of voice, video and data services bundles that governs much of the recent competition between Verizon and cable companies gives the cable companies a decided edge, since they are *not* currently required to accept a disconnect order for *video* service that is submitted by Verizon. Thus, the customer is forced to make a separate call to the cable provider to disconnect his or her cable service, which in turn can trigger retention marketing with no

[22] See, e.g., Inter-Service Provider LNP Operations Flows at 2 (July 9, 2003), available at http://www.npac.com/cmas/co_docs/NANC_Ops_Flow_Narratives_v2.0a.doc (Flow Step 3: new service provider "obtains authority . . . from end-user to act as the official agent on behalf of the end-user").

need for Bright House to rely on the retail *telephone* disconnect order triggered by the LNP LSR.

II. THE COMPLAINT FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED

A. FLORIDA LAW SPECIFICALLY PERMITS VERIZON TO ENGAGE IN RETENTION MARKETING

The Commission is charged with encouraging "competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services."[23] Consistent with this approach, the Commission must allow an ILEC to respond to an offering that a competitive provider makes to one of its customers:

> *Nothing contained in this section [364.051] shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, nonbasic services* in a specific geographic market or *to a specific customer* by deaveraging the price of any nonbasic service, packaging nonbasic services together or with basic services, using volume discounts and term discounts, and offering individual contracts. However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.[24]

Verizon's retention marketing program enables it to meet the offerings of Bright House and other competitors who are not Verizon's wholesale customers. Verizon's retention marketing thus complies with Florida law and is consistent with the legislature's direction to the Commission to promote competition.

[23] Fl. Stat. § 364.01(4)(b).
[24] Fl. Stat. § 364.051(5)(a)2 (emphasis added).

Bright House claims that Verizon's retention marketing program does not comply with general prohibitions on anticompetitive conduct similar to the one stated in section 364.051(5)(a)2. The Commission evaluates such claims under state law, which in practice it has interpreted to conform to requirements established by the FCC.[25] Verizon's program meets those requirements and therefore complies with Florida law.

B. THE COMMISSION'S JURISDICTION HERE IS LIMITED TO THE APPLICATION OF STATE LAW

Bright House appears to recognize that the Commission does not have jurisdiction to enforce federal CPNI and slamming rules because it acknowledges that it is pursuing claims under federal law at the FCC. Indeed, absent express authorization by Congress, state administrative agencies lack authority to enforce federal statutes. The Communications Act expressly authorizes the FCC to enforce the federal Act — *see* 47 U.S.C. §§ 208, 403 — and grants private parties a right of action that may be brought exclusively in a federal forum, *see id.* § 207. There is no room for state commissions to claim enforcement authority under this statutory regime,[26] as the Commission itself has recognized.[27]

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[25] *See BellSouth Key Customer Tariffs Order* at 6, 40-47; *BellSouth Carrier-to-Carrier Information Order* at 3-5.

[26] Furthermore, § 207 — which governs private parties' right of action for violations of the Act — excludes private parties' resort to state commission remedies. Section 207 of the federal Act provides that "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this Act may either [1] make complaint to the [Federal Communications] Commission as hereinafter provided for, or [2] may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies." 47 U.S.C. § 207 (emphasis added). The meaning of this provision is unmistakable: a private party may pursue a claim under the federal Act either in a complaint proceeding before the FCC or in federal court, but such remedies are both mutually exclusive and exclusive of any other private remedy, including the filing of a complaint before a state commission.

That plain meaning is reinforced by cases that have strictly construed § 207's election-of-remedies provision to preclude federal court actions in any case where a plaintiff has previously invoked the FCC's complaint jurisdiction, even by the filing of an informal complaint. *See Digitel, Inc. v. MCI Worldcom, Inc.*, 239 F.3d 187, 190 (2d Cir. 2001) ("There can be no doubt that § 207 permits an injured party to seek relief either in federal court or before the FCC, but not in both."); *Premiere Network Servs., Inc. v. SBC*

In the *BellSouth Key Customer Tariffs Order* and the *BellSouth Carrier-to-Carrier Information Order* relied upon by Bright House, the Commission predicated jurisdiction on state law,[28] but looked to the FCC's *CPNI Reconsideration Order*[29] and *2003 Slamming Order*[30] to ascertain the rules for winback and retention marketing programs that it will apply under state law.[31] The Commission's approach makes two points clear. First, when the Commission reviews state law claims such as those asserted in the Complaint, it must ensure that its decisions do not conflict with applicable federal law.[32] Thus, if federal law permits the challenged conduct, the Commission must deny the claim. Second, because the Commission has not found that Florida law creates any requirements beyond those imposed by the FCC, if the Commission determines that Verizon's retention marketing program does not violate the FCC's requirements, Verizon's program also complies with Florida law.

As discussed below, Verizon's retention marketing program is permitted under FCC rulings because it uses CPNI lawfully and is triggered by information that Verizon obtains by virtue of its role as a retail service provider, not by virtue of its provision of

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Communications, Inc., 440 F.3d 683, 688 (5th Cir. 2006); Mexiport, Inc. v. Frontier Comm'ns Servs., Inc., 253 F.3d 573, 574 (11th Cir. 2001) (§ 207 "provides relief for persons damaged by carriers"); *Stiles v. GTE Southwest, Inc.*, 128 F.3d 904 (5th Cir. 1997). It would make no sense for Congress to require a person claiming injury to choose between filing a complaint at the FCC and filing a complaint in court if the party could simply file a complaint in a state forum instead (or in addition).

[27] *See BellSouth Carrier-to-Carrier Information Order* at 3.

[28] *Id.* at 5. Specifically, the Commission asserted jurisdiction based on Florida Statutes, section 364.01(4)(g), which provides that "[t]he commission shall exercise its exclusive jurisdiction in order to . . . [e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint."

[29] *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, 14445, ¶ 67 (1999) ("*CPNI Reconsideration Order*").

[30] *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 5099, 5110, ¶ 27 (2003) ("*2003 Slamming Order*").

[31] *See BellSouth Key Customer Tariffs Order* at 40-47; *BellSouth Carrier-to-Carrier Information Order* at 8-10.

[32] *Id.*

any wholesale service or network facility to another carrier. In both the FCC's CPNI and Slamming dockets, certain carriers asked the FCC to adopt a presumption of illegality with respect to, or a *per se* prohibition on, retention marketing — that is, marketing aimed at "'soon-to-be-former' customers who have chosen to switch carriers, but have not yet been switched over."[33] The FCC refused to do so. Instead, it made clear that retention marketing like Verizon's is lawful and pro-competitive. Those rulings foreclose any argument that retention marketing constitutes a prohibited use of CPNI. And, while the FCC has likewise made clear that retention (and winback) marketing may run afoul of section 222(b) in cases where a carrier relies on another carrier's proprietary information, that restriction is not implicated here.

C. FCC RULES SPECIFICALLY PERMIT THE USE OF CPNI IN THESE CIRCUMSTANCES

In the *CPNI Reconsideration Order*, the FCC squarely ruled that "all carriers should be able to use CPNI to engage in winback marketing campaigns to target valued former customers that have switched to other carriers."[34] The FCC has made clear that the same rule applies to retention marketing: such marketing is permitted when "a carrier's retail operations . . . legitimately obtain notice that a customer plans to switch to another carrier."[35] In rejecting arguments that such use of CPNI was prohibited under section 222, the FCC likewise rejected claims that such marketing is either

[33] Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, 14918, ¶ 132 n.305 (2002) ("2002 CPNI Order").
[34] *CPNI Reconsideration Order*, 14 FCC Rcd 14409, 14445, ¶ 67.
[35] *2002 CPNI Order*, 17 FCC Rcd at 14917, ¶ 131.

unreasonable or anticompetitive.[36] To the contrary, the FCC has recognized that such marketing "facilitates direct competition on price and other terms, for example, by encouraging carriers to 'out bid' each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs."[37] "[D]eeming any winback or retention effort[s], including those based on information learned through the carrier's retail operations, . . . presumptively unlawful would deprive customers of . . . pro-consumer, pro-competitive benefits."[38]

Verizon's retention marketing is permitted under the *CPNI Reconsideration Order*. The marketing efforts at issue here are triggered when Verizon's *retail* operations are alerted to a customer's cancellation of retail service. There can be no dispute that, when a retail customer calls Verizon to cancel service, Verizon is permitted to engage in marketing designed to persuade that customer to remain with Verizon. Regardless of whether the customer submits his or her request to disconnect retail service directly to Verizon or authorizes a carrier to submit the request on his or her behalf (as occurs during the LNP process, as explained above), the two situations are functionally and legally equivalent — in both situations, Verizon's retail operations "legitimately obtain notice that a customer plans to switch to another carrier,"[39] and thus may engage in retention marketing.

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[36] *See CPNI Reconsideration Order*, 14 FCC Rcd at 14447, ¶ 71 ("Contrary to the commenters' suggestions, we believe such use of CPNI is neither a per se violation of section 201 of the Communications Act . . . nor the antitrust laws.").
[37] *Id.* at 14446, ¶ 69.
[38] *2002 CPNI Order*, 17 FCC Rcd at 14918, ¶ 133 (second alteration and ellipses in original; internal quotation marks omitted).
[39] *2002 CPNI Order*, 17 FCC Rcd at 14917, ¶ 131.

D. VERIZON'S RETENTION MARKETING PROGRAM DOES NOT VIOLATE SECTION 222(b) OF THE TELECOMMUNICATIONS ACT

Bright House's assertion that Verizon's retention marketing efforts violate section222(b) of the Act, which governs carriers' use of "proprietary information from another carrier for purposes of providing any telecommunications service," is also incorrect. Because Verizon's retail operations properly obtain notice of a customer's decision to cancel retail service, the FCC's rules permit Verizon to undertake marketing efforts directed at dissuading those customers from canceling retail service. Verizon's marketing representatives do not make use of any other carrier's information in their marketing efforts**.** In particular, Bright House does not allege, nor could it truthfully, that Verizon retail representatives determine or make any reference to the identity of the customer's new service provider (unless the customer volunteers the information). The fact that a retail customer has canceled Verizon service is not *another carrier's* proprietary information; it is information that Verizon "has independently learned from its retail operations."[40]

Bright House's argument fails for the additional and independent reason that, as discussed above, Verizon is not providing any wholesale "telecommunications service," to Bright House, as would be required to trigger the application of section 222(b). The FCC has made clear that its concerns regarding potential violations of section 222(b) are limited to circumstances where "the carrier gained notice of a customer's imminent cancellation through the provision of carrier-to-carrier service" — that is, where the carrier relies on information that it possesses "by virtue of its status as the underlying

[40] *CPNI Reconsideration Order*, 14 FCC Rcd at 14447, ¶ 78.

network-facilities or service provider."[41] However, as discussed above, Verizon provides no wholesale services to Bright House in connection with the processing of an LNP request.

E. VERIZON'S RETENTION MARKETING PROGRAM DOES NOT VIOLATE THE FCC'S SLAMMING ORDERS

In the *BellSouth Key Customer Tariffs Order* and the *BellSouth Carrier-to-Carrier Information Order*, the Commission referred to restrictions placed by the FCC's *2003 Slamming Order* on the use by "executing carrier[s]," for marketing purposes, of "carrier change information."[42] However, any such restrictions are inapplicable here for two independent reasons. *First*, as noted above, the information that prompts Verizon's marketing efforts is the retail service disconnect order, which is information that Verizon's retail operations obtain for the purpose of carrying out retail service functions that are independent of Verizon's role in the LNP process. Use of that information is expressly protected under the FCC's orders. *Second*, in the circumstances at issue here, Verizon is not an executing carrier as defined under the FCC's rules because Verizon does not "effect[] a request that a subscriber's telecommunications carrier be changed."[43] Rather, Verizon disconnects the customer's service and takes the steps required to prepare for number porting, which is effected by the neutral LNP database administrator after being notified by the porting-in provider. The change in the customer's telecommunications carrier is actually effected by Bright House enabling its Digital Voice product at the customer's premises and the number porting administrator,

[41] *CPNI Reconsideration Order*, 14 FCC Rcd at 14449-50, ¶¶ 77, 78.
[42] *See BellSouth Key Customer Tariffs Order* at 46-47 and the *BellSouth Carrier-to-Carrier Information Order* at 9-10.
[43] 47 C.F.R. § 64.1100(b). Verizon could be treated as an executing carrier if it were "responsible for any unreasonable delays in the execution of carrier changes or for the execution of unauthorized carrier changes," 47 C.F.R. § 64.1100(b), but there is no such allegation here.

acting at Bright House's behest, instructing its computers to direct any carrier's calls to the customer's number to Bright House's switch.

These facts distinguish this situation from the circumstances the FCC contemplated in the *2003 Slamming Order* and the *CPNI Reconsideration Order*. In those orders, the FCC considered circumstances in which a local carrier gains knowledge of a pending carrier change either by virtue of its "position as a provider of switched access services"[44] or wholesale services — either network facilities or telecommunications services provided for resale.[45] In those circumstances, a carrier may obtain information "for purposes of providing . . . [wholesale] telecommunications service[s]" to the requesting carrier — typically, an IXC or a UNE-based CLEC or reseller — information that may not be "use[d] . . . for its own marketing efforts" under section222(b). Here, Bright House does not allege that Verizon provides any telecommunications service to it. Verizon does not sell telecommunications services to Bright House for it to resell and does not sell UNEs or access services to Bright House. The FCC has never extended its rules to prohibit retention marketing when the old carrier is providing no wholesale service to the new carrier.

Moreover, the policy underlying the FCC's restrictions on executing carriers does not apply here. In cases where Verizon acts as an access provider or wholesale facilities provider, the rival carrier is also a Verizon customer and must inform Verizon of a pending change to ensure that Verizon modify the services it provides *to the carrier*. By contrast, a number port-out request is done at the request of the *retail customer* and is made necessary by virtue of Verizon's service relationship with that retail customer,

[44] *See 1998 Slamming Order*, 14 FCC Rcd at 1572, ¶ 106.
[45] *See CPNI Reconsideration Order*, 14 FCC Rcd at 14450, ¶ 77.

not because of any service provided to Bright House. The Commission has made clear that what a carrier learns by virtue of its status as a retail service provider is appropriately used for marketing purposes — consumers expect and benefit from such efforts.

F. SOUND PUBLIC POLICY SUPPORTS RETENTION MARKETING PROGRAMS SUCH AS VERIZON'S

The policy considerations that led the FCC to reject both a prohibition on all customer-retention marketing and a presumption of illegality for such efforts argue strongly for dismissal of Bright House's claims. As the cable industry itself has recognized, cable competitors offer a robust, facilities-based alternative to ILECs' local service offerings, and they do so without relying on ILECs for the provision of last-mile local network facilities.[46] Furthermore, cable incumbents enter the market for provision of local exchange services from a position of strength: they have an established customer base, the ability to offer a competitive package of services, and a dominant position in the provision of wireline video services. The FCC's — and this Commission's — focus on facilities-based competition is based on the recognition that intense competition between independent rivals promises the greatest consumer benefit. And that is precisely what is happening: Verizon is fighting for its customers in the best possible way — by offering attractive service packages and pricing incentives, and accurate information about those packages and incentives. The more information

[46] *See, e.g., AT&T Inc. and BellSouth Corp., Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5712, ¶ 93 n.268 (2007) ("'[C]able is offering real, facilities-based competition to incumbent [LECs] across the country . . . . Consumers are reaping the benefit of this competition[.]'") (quoting comments of Advance/Newhouse Communications, et al.) (second alteration in original).

the customer has about the competing products, the better equipped he or she will be to make a decision.

If Verizon succeeds in retaining a customer, it does so knowing that its competitor has every incentive to try to meet and beat Verizon's best offer. There is (and can be) no serious argument that Verizon's retention marketing has any impact on its competitors' ability to compete fairly for, win, and retain customers. Bright House is not asking the Commission to protect the *competitive process*; rather, it is asking the Commission to impair that process in order to protect *Bright House* from an effective and consumer-benefiting form of competition. In setting and enforcing the ground rules for competition, the Commission should not lose sight — as Bright House has — of the primacy of the *consumer's* interests. The Commission should not allow its orders to be distorted to produce an anti-consumer and anticompetitive result.

III. THE COMPLAINT SHOULD BE DISMISSED OR THE PROCEEDINGS STAYED UNTIL THE FCC ADDRESSES BRIGHT HOUSE'S PARALLEL CLAIMS

The Complaint should be dismissed for the independent reason that Bright House is challenging Verizon's retention marketing program at the FCC and it should not be allowed to pursue its claims here and at the FCC simultaneously. Because the Commission has interpreted Florida law by looking to the FCC's federal retention marketing requirements, a decision by the FCC almost certainly would be dispositive of the issues Bright House seeks to raise here. If the FCC were to reach a decision before the Commission, therefore, the efforts and resources expended by the Commission, its staff and the parties would have been wasted. If the Commission rules before the FCC decides the issue, the Commission would run the risk that the FCC subsequently might

reach a different decision, creating a conflict between state and federal law that the Commission would then have to resolve.[47] These pitfalls should be avoided by dismissing the Complaint and awaiting resolution by the FCC. In the alternative, the Commission should stay these proceedings until the FCC has had an opportunity to clarify the application of federal law to the marketing practices at issue here.

IV. COMPLIANCE WITH RULE 28-106.204(3)

In accordance with Rule 28-106.204(3), counsel for Verizon has conferred with counsel for Bright House concerning the alternative request for a stay and has been informed that Bright House opposes that request.

V. CONCLUSION

For the foregoing reasons, Verizon respectfully requests that the Complaint be dismissed or in the alternative that the proceedings be stayed.

Respectfully submitted on December 6, 2007.

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[47] Moreover, if state-imposed requirements undermine the federal policies under which carriers are permitted to use legitimately obtained retail information for marketing purposes — the result that Bright House is trying to achieve here — such requirements may be subject to preemption. *See CPNI Reconsideration Order*, 14 FCC Rcd at 14465-67, ¶¶ 112-13.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail and U. S. mail on December 6, 2007 to:

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