

Ruth Nettles

From: Scobie, Teresa A (TERRY) [terry.scobie@verizon.com]
Sent: Monday, January 26, 2009 4:06 PM
To: Filings@psc.state.fl.us
Cc: Adam Teitzman; Cecilia Bradley; David Christian; De O'Roark; Demetria Clark; J. R. Kelly; Michael Twomey; Shaffer, Sharon B
Subject: Docket No. 080278-TL - Verizon Florida LLC's Request for Administrative Hearing
Attachments: 080278 VZ FL Req for Adm Hearing 1-26-09.pdf



The attached filing is submitted in Docket No. 080278-TL on behalf of Verizon Florida LLC by

Dulaney L. O'Roark III
P. O. Box 110, MC FLTC0007
Tampa, Florida 33601
(678) 259-1449
de.oroark@verizon.com

The attached .pdf document consists of a total of 25 pages - cover letter (1 page), Request with Exhibits (23 pages), and Certificate of Service (1 page).

Terry Scobie
Legal Secretary II
Verizon Legal Department
P. O. Box 110 - MC FLTC0007
Tampa, Florida 33601-0110
813-483-2610 (tel)
813-204-8870 (fax)
terry.scobie@verizon.com

COM _____
ECR _____
GCL _____
OPC _____
RCP _____
SSC _____
SGA _____
ADM _____
CLK *Maguerita*

DOCUMENT NUMBER-DATE
00637 JAN 26 08
FPSC-COMMISSION CLERK

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



5055 North Point Parkway
Alpharetta, Georgia 30022

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

January 26, 2009 – VIA ELECTRONIC MAIL

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 080278-TL
Joint Petition for show cause proceedings against Verizon Florida LLC for
apparent violation of Rule 24-4.070, F.A.C., service availability, and impose fines,
by the Office of the Attorney General, Citizens of the State of Florida, and AARP

Dear Ms. Cole:

Enclosed for filing in the above-referenced matter is Verizon Florida LLC's Request for
Administrative Hearing. 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

tas

Enclosures

DOCUMENT NUMBER-DATE
00637 JAN 26 08
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition for show cause proceedings) Docket No. 080278-TL
against Verizon Florida LLC for apparent violation of) Filed: January 26, 2009
Rule 24-4.070, F.A.C., service availability, and)
impose fines, by the Office of the Attorney General,)
Citizens of the State of Florida, and AARP)
_____)

VERIZON FLORIDA LLC'S REQUEST FOR ADMINISTRATIVE HEARING

Verizon strives to deliver excellent service to its customers month in and month out while it also continues to invest heavily in its network and the state's economy, including through a massive investment in its fiber-to-the-premises ("FTTP") network. This ongoing investment not only provides consumers with innovative and competitive new service offerings, but it also contributes to providing excellent quality service. The overall level of service that Verizon delivers reflects these efforts. For example, Verizon has continued to focus intently on keeping customers in service, delivering 98% network reliability month after month and cutting trouble reports in half over the last three years. In the rare circumstances when a customer is out of service or has a service-affecting trouble, Verizon restores service quickly, usually within 24 hours for an out-of-service ("OOS") condition and within 72 hours for a not-out-of-service ("NOOS") condition. Customers seldom complain about Verizon's repair service and give Verizon high marks for customer satisfaction. Verizon provides this superior service despite intense competitive pressures and significant operational challenges, including a lengthy rainy season and frequently severe weather. For these reasons, the record in this proceeding will show that, under the totality of the circumstances present here, Verizon has undertaken reasonable efforts to satisfy the service objectives in the Commission's

DOCUMENT NUMBER-DATE

00637 JAN 26 09

FPSC-COMMISSION CLERK

rules. Accordingly, Verizon has not violated Rule 25-4.070, Florida Administrative Code, willfully or otherwise, and it may not and should not be penalized for its good performance.

Moreover, even aside from these facts, Verizon may not be penalized here for its alleged failure to reach the OOS and NOOS service objectives because those objectives are targets, not absolute standards. Finally, as a matter of Florida law, the Commission may not penalize Verizon for the alleged violation of OOS and NOOS service objectives because Verizon is a price-regulated company whose services are subject to effective competition from cable providers, wireless carriers and others who are not subject to the Commission's service quality rules.

I. INTRODUCTION¹

1. The respondent is Verizon Florida LLC ("Verizon") and its counsel is Dulaney L. O'Roark III. Their address, telephone number and facsimile number are as follows:

Verizon Florida LLC
P. O. Box 110, 37th Floor
MC FLTC0007
Tampa, Florida 33601-0110
678-259-1449 (telephone)
813-204-8870 (facsimile)

2. Verizon received an electronic copy of the Order on January 5, 2009.

3. Based on raw data in Verizon's quarterly service quality reports, Commission Order No. PSC-09-0015-SC-TL (the "Order") concludes that Verizon violated Rule 25-4.070 262 times in 2007 and 194 times during the first three quarters of

¹ Verizon files its request in compliance with Rule 28-106.2015, Florida Administrative Code.

2008. The Order interprets the rule to impose absolute standards that may be relaxed only “due to extreme weather conditions, such as a hurricane”² or when the Commission considers mitigating factors.³ The Order does not state what the mitigating factors might be and does not explain the legal basis for this aspect of its decision. The Order concludes that Verizon refused to comply with or willfully violated Rule 25-4.070 because “Verizon has knowledge of both the service quality objectives and its continued failure to meet these objectives.”⁴ Based on these conclusions, the Order requires Verizon to show cause why it should not be penalized \$10,000 for each alleged violation for a total of \$4.56 million.

4. Verizon requests an administrative hearing in this docket to address the material facts in dispute. Disputed issues of material fact, described in more detail below, include (a) whether Verizon willfully violated Rule 25-4.070; (b) whether Verizon has invested heavily in its FTTP network, which, among other things, facilitates providing high quality service to its customers; (c) whether Verizon provides excellent repair service to its customers; (d) whether Verizon’s customer complaint levels are low; (e) whether Verizon’s customer satisfaction is consistently high; (f) whether Verizon continues to provide superior service despite competitive and operational challenges; and (g) whether the services in question are monopoly services.

5. Verizon disputes the Order’s interpretation of Rule 25-4.070 for the reasons explained in this paragraph and in more detail below. First, the rule does not impose absolute standards, but rather describes desirable and aspirational levels of service. Second, the service objectives only apply when incumbent local exchange

² Order, p. 10.

³ *Id.* at 15.

⁴ *Id.* at 17.

carriers (“ILECs”) are operating under “normal conditions,” which means that for purposes of rule enforcement, repairs made under abnormal conditions must be excluded from the raw data in ILECs’ quarterly reports. Third, even when an alleged rule violation occurs, penalties may not be assessed unless the ILEC “is found to have refused to comply with or to have willfully violated” the rule.⁵ Such a finding must be based on competent evidence that an alleged violation was committed with the specific intention to violate the law and may not be inferred from the alleged violation itself or the actor’s knowledge of the underlying circumstances.⁶ Resolution of this dispute concerning the interpretation of Rule 25-4.070 involves issues of law.

6. Verizon disputes the Commission’s authority to take the action proposed in the Order because application of the service objectives in Rule 25-4.070 to a price-regulated company such as Verizon whose services are subject to effective competition would exceed the Commission’s grant of rulemaking authority in violation of Section 120.52(8)(b) and would enlarge or contravene the specific provisions of the law implemented in violation of Section 120.58(8)(c). On this issue, Verizon intends to submit evidence that the services in question are not monopoly services. If there are no disputed issues of material fact on this point, the Commission may resolve the issue based on a motion for summary final order and briefing by the parties. Verizon requests an administrative hearing in the event the Commission determines that disputed issues of material fact exist. Because the issue involves a threshold jurisdictional question, Verizon requests that such a hearing precede any hearing on the merits.

⁵ Fl. Stat. § 364.285.

⁶ *Smit v. Geyer Detective Agency, Inc.*, 130 So. 2d 882, 884 (Fla. 1961); *Metropolitan Dade County v. State Department of Environmental Protection*, 714 So.2d 512, 516-17 (Fla. 3rd DCA 1998), *rev. denied* (Fla. 1998).

II. VERIZON HAS NOT, WILLFULLY OR OTHERWISE, VIOLATED COMMISSION RULE 25-4.070

7. The Commission may not find that Verizon willfully violated Rule 25-4.070 under all the circumstances of this case because it has used reasonable (and indeed extraordinary) efforts to meet the Commission's service objectives, as described below.

8. The Commission may not penalize Verizon for any alleged violation of Rule 25-4.070 unless it finds that Verizon has refused to comply with or has willfully violated the rule.⁷ Such a finding must be based on competent evidence that a violation was committed with "the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done" or in other words "with bad purpose either to disobey or to disregard the law."⁸ The mere violation of a rule does not constitute willful conduct,⁹ nor does knowledge or awareness of the underlying circumstances.¹⁰ The Order's finding of willfulness based on its conclusion that "Verizon has knowledge of both the service quality objectives and its continued failure to meet these objectives"¹¹ thus fails to apply the correct legal standard.

9. The Order does not point to any evidence that Verizon specifically intended to violate Rule 25-4.070 and the Commission cannot make such a finding, for several reasons. First, Verizon has made a huge investment in its FTTP network, which provides superior service and reliability and has helped to cut OOS and NOOS trouble reports by more than half in three years. Second, because of the reliability of Verizon's network and its intense focus on keeping customers in service, only a tiny fraction of its

⁷ Fl. Stat. § 364.285.

⁸ *Metropolitan*, 714 So.2d at 517 (quoting Black's Law Dictionary).

⁹ *Smit*, 130 So. 2d at 884.

¹⁰ See *Thunderbird Drive-In Theater, Inc. v. Reed*, 571 So.2d 1341, 1344 (Fla. 4th DCA 1990), *rev. denied* (Fla. 1991); *Metropolitan*, 714 So.2d at 516-17.

¹¹ Order at 17.

customers experience an outage or service-affecting trouble each month; in the rare instances when they do, Verizon provides excellent and timely repair service. Third, Verizon strives to reach the Commission's service objectives – the most aggressive targets in Verizon's national footprint – and normally repairs OOS conditions within 24 hours and NOOS conditions within 72 hours. Meeting the Florida service objectives has always been challenging, in part because of the severe weather conditions that often prevail in the Tampa area, and has become increasingly difficult in recent years because competition has intensified. Verizon has used extraordinary efforts to meet that challenge, by among other things investing more than \$1 billion in its FTTP network in this state.

A. Verizon is investing heavily in its FTTP network

10. Verizon's investment in its state-of-the-art FTTP network demonstrates not only its commitment to the state and to Florida consumers but also to providing excellent network service quality. Verizon has invested heavily in its service territory, bringing the FTTP network past more than 1 million households. Since 2004, Verizon has invested substantially more than \$1 billion in its Florida FTTP network – including several hundred million in 2006, 2007 and 2008. This investment benefits consumers by providing them with exceptionally high quality voice, data and video FiOS services that have been rated the best in the country by Consumer Reports. The FTTP network also enables Verizon to improve overall service quality, as more and more customers choose services that require a move from the existing network to the fiber network.

11. FTTP has important technical advantages over copper that reduce the frequency and duration of service quality problems arising in the loop distribution plant, as well as the time required to detect and remedy those problems. Because fiber technology is based on optical transmission over a dielectric medium (glass), rather than electrical transmission over a conducting medium (copper), it is not susceptible to electromagnetic interference, is immune to corrosion due to moisture, and has a higher tensile strength than copper cable — all factors that can considerably reduce the contribution of weather conditions to service troubles. Verizon’s experience has been that the rate of service line troubles drops substantially — by about 94% — when FTTP replaces copper distribution.¹² Moreover, from the fourth quarter of 2005 to the fourth quarter of 2008, OOS and NOOS reports dropped 52%, in significant part because of the FTTP network.

12. Not only does the FTTP network experience fewer service quality problems, but those problems that do occur are easier to diagnose, localize, and repair than on the traditional network. Verizon can use a device to send a light signal across the fiber and “ping” the Optical Network Terminal (“ONT”) at the home (*i.e.*, the network interface device for FTTP) to troubleshoot the network and identify the precise location of the problem, allowing the technician to fix it much faster than on the traditional network, where the technician may have to hunt for the problem, sometimes requiring multiple dispatches to repair a single problem. Thus, a comparatively faster repair interval for voice service on the FTTP network is both expected and desired – the whole

¹² This calculation is based on a comparison of total outside plant troubles for copper and fiber plant versus troubles arising from problems with the service line from the central office to the customer’s property (excluding the drop).

point of building the new network is to provide a more advanced and reliable network for Florida consumers.

13. Verizon expects important service quality improvements as it continues to deploy fiber and as more customers, attracted by FiOS service offerings and pricing, are connected to the fiber network. And Florida customers have shown an extraordinary demand for these services – a demand that Verizon is working hard to keep up with every day. In short, Verizon’s deployment of FTTP – and the sales of FiOS services that depend on such deployment – promote the reliability and quality of Verizon’s network overall. As Verizon serves increasing numbers of customers on the all-fiber network, Verizon’s already solid service quality performance will improve still further, and Florida consumers will have numerous additional benefits, in the form of advanced competitive video and data services, available to them. Therefore, FTTP deployment and FiOS penetration are key components of Verizon’s long-term service quality strategy – and demonstrate its extraordinary efforts to provide high quality service.

B. Verizon Provides Excellent Service Quality to its Customers

14. Verizon strives to provide its customers with excellent service, and its results reflect these efforts. This is demonstrated, among other things, by its intent focus on keeping customers in service, delivering 98% network reliability month after month. As shown in Exhibits A and B, the average number of monthly OOS and NOOS trouble reports Verizon received in 2007 and the first three quarters of 2008 was a small fraction of Verizon’s average number of residential access lines. During 2007, only 2% of Verizon’s customers experienced a service outage – or more to the point, 98% did

not – and less than 1% had a service-affecting trouble in an average month. Similarly, in 2008, less than 2% of Verizon's customers experienced a service outage – again, meaning that 98% did not – and less than 1% had a service-affecting trouble in an average month. Because of Verizon's network reliability, therefore, the vast majority of Verizon's customers remain in service each month and do not require service restoration or service-affecting trouble clearance.

15. In the rare instances when a customer does experience an outage or service-affecting trouble, Verizon normally meets the 24 hour or 72 hour objective. In 2007, Verizon on average restored service within 24 hours 88% of the time. During the first nine months of 2008, the percentage dipped to 84%, but this decline was due to performance levels in March and April that were not in keeping with the high level of service that Verizon seeks to provide. Verizon quickly remedied the situation, as evidenced by the 90% OOS service level it achieved for the other seven months of that period. For NOOS, Verizon cleared service-affecting troubles 84% of the time on average in 2007, and then improved that performance to 88% for the first three quarters of 2008. When March and April 2008 data are excluded, the 2008 NOOS figure increases to 92%.

16. In most months, Verizon meets the OOS and NOOS objectives 85% of the time or more. For OOS restoration, Verizon achieved a statewide result in the 95-100% range 63 times, in the 90-94.9% range 85 times, in the 85-89.9% range 49 times and in the 80-84.9% range 42 times. In only 43 instances (out of 282 opportunities)¹³ did

¹³ Results for exchanges with at least 50,000 lines are calculated on a monthly basis (thus creating one OOS and one NOOS opportunity per exchange per month), while results for exchanges with fewer than 50,000 lines are calculated on a quarterly basis (thus creating one OOS and one NOOS opportunity per exchange per quarter).

Verizon report raw data reflecting an OOS service level below 80%. For NOOS trouble clearance, Verizon reported statewide service levels in the 95-100% range 45 times, in the 90-94.9% range 59 times, in the 85-89.9% range 56 times and in the 80-84.9% range 49 times. In only 73 instances (out of 282 opportunities) did Verizon report raw data reflecting an OOS service level below 80%.

17. Because Verizon's customers seldom have an outage or service-affecting trouble in the first place, the percentage of Verizon customers who experience an OOS or NOOS "miss" per month is extremely low. As shown in Exhibit A, the percentage of Verizon's customers experiencing a "miss" per month in 2007 was .24% for OOS and .13% for NOOS. As shown in Exhibit B, in 2008 only .30% of Verizon's customers per month experienced an OOS "miss" and less than .1% experienced an NOOS "miss."

18. Verizon's average response times also reflect that it strives to provide its customers with excellent service. For both 2007 and the first three quarters of 2008, Verizon's average OOS response time was less than 24 hours and its average NOOS response time was less than 48 hours.

C. Verizon's complaint levels remain low

19. Based on service complaint levels, Verizon's customers considered Verizon's service quality in 2007 and 2008 to be good. The Commission logged 354 customer complaints concerning Verizon during 2007, which at the end of 2007 had 1,543,608 access lines in its Florida service territory. Verizon's complaint rate per thousand lines was .2293, the lowest rate of the state's largest ILECs, and indeed of any ILEC for which complaints were logged. Of the 354 complaints, only about 165 concerned network performance (the others concerned billing), which means that during

2007 the Commission logged about one customer complaint concerning Verizon's network performance for every 10,000 Verizon access lines.

20. Verizon's complaint rate continued to be low in 2008. During the year, the Commission logged 425 complaints relating to Verizon, 196 of which concerned network performance. Verizon's complaint rate remained below .3 complaints per thousand lines. The number of complaints concerning network performance continued to be approximately 1 in 10,000.

21. Verizon receives few complaints about OOS and NOOS misses in particular. During 2007, Verizon received just 66 complaints from customers who experienced an OOS miss and 26 complaints from customers who experienced an NOOS miss. These figures represent complaints from all sources, not just complaints logged by the Commission.¹⁴ The relationship between Verizon's average monthly customer base, trouble reports, "misses" and OOS and NOOS complaints is shown in Exhibit A.¹⁵

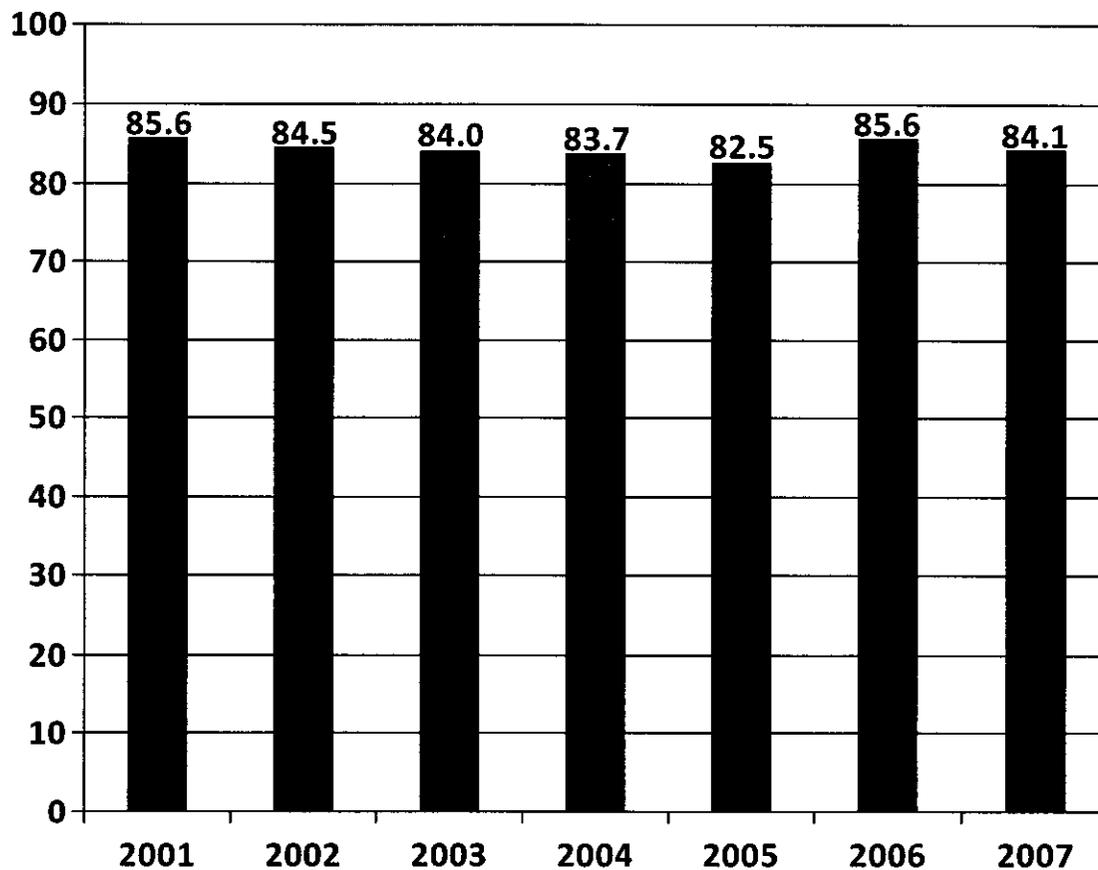
D. Verizon's customer satisfaction for repair service remains high

22. Verizon annually files ARMIS reports with the FCC that include objective data gathered by an independent third party concerning Verizon's customer satisfaction. The third party surveys a number of Florida customers each month who have received Verizon repair service, asks the customers to evaluate Verizon's performance, and then submits survey data annually to the FCC. The following chart shows the percentage of

¹⁴ These figures represent complaints were from all sources, including the Attorney General's Office, the Better Business Bureau, the FCC, other government agencies and the Commission (whether logged or transfer connected), as well as complaints received by Verizon's Customer Advocacy Office and Verizon executives.

¹⁵ Verizon has not yet done this complaint analysis for its 2008 data.

customers each year from 2001 to 2007¹⁶ stating that they were satisfied or more than satisfied with Verizon's performance:



This data demonstrates that customers rated Verizon's performance as highly in 2007 as in the previous years when the Commission raised no issue concerning Verizon's service quality. Indeed, Verizon's customer satisfaction has remained remarkably consistent over time and shows that Verizon's customers believe they are receiving good repair service from Verizon.

¹⁶ Verizon has not yet submitted its customer satisfaction data to the FCC for 2008.

E. Verizon continues to provide superior service despite competitive and operational challenges

23. Verizon's Tampa Bay service territory is among the most (if not the most) competitive consumer markets in Florida, as the Commission has recognized.¹⁷ Cable companies, VoIP providers and wireless carriers have all engaged in aggressive marketing campaigns in the Tampa Bay region, giving customers many competitive alternatives. Three cable companies offer voice service in the Tampa Bay area, with cable telephony available to 93 percent of homes passed¹⁸ and cable modem service available to all homes passed, which means that customers may obtain access to VoIP service from a cable broadband connection. Moreover, 99.9% of households in the area have access to three or more wireless carriers,¹⁹ so that customers who wish to "cut the cord" are free to do so.

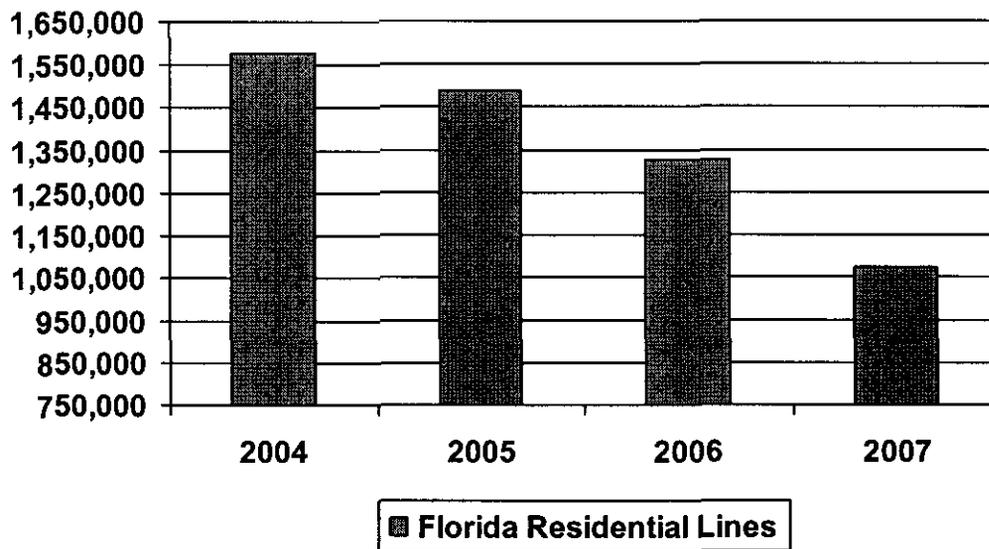
24. Verizon's year-over-year line losses evidence the head-to-head competition that is taking place in neighborhoods throughout the region. As noted in the Commission's 2008 Local Competition Report, from 2004 to 2007 Verizon's residential switched access lines decreased from 1.58 million to 1.07 million, a decline of about 32%,²⁰ as shown in the chart below:

¹⁷ See Commission's Division of Competitive Markets and Enforcement's *Report on the Status of Competition in the Telecommunications Industry as of December 31, 2007*, p. 34 ("2008 Local Competition Report").

¹⁸ Cable companies pass most homes in Verizon's service territory.

¹⁹ NERA, *Intermodal Competition in Florida Telecommunications*, pp. 12-14 (March 2008), filed in Docket No. 080159.

²⁰ Local Competition Report, p. 34.



This trend has continued in 2008, so that Verizon’s residential access line loss since 2004 now exceeds 40%. Over the three-year period ending July 2007 (the most recent period for which census data is available), the number of households in the Tampa Bay area increased by 7%, which means these line-loss figures understate the impact of competition in the region.

25. As Verizon continues to lose customers and revenue, it faces the challenge of maintaining a network with many fixed costs that are not reduced when customers leave. Verizon is stepping up to this challenge by investing massively in its FTTP network while continuing to invest in and maintain its copper network. These circumstances, however, make it all the more difficult to achieve OOS and NOOS service objectives in Florida that are higher than almost all other states in Verizon's national footprint.

26. Because Verizon faces competition that was not contemplated when Rule 25-4.070 was adopted, it no longer operates under “normal” conditions.²¹ In 1968,²² Verizon’s predecessor operated as a state-sanctioned monopoly under rate-of-return regulation. Today, Verizon does business as a price-regulated company in a highly competitive environment against unregulated providers that are not required to comply with the Commission’s service quality rules. These competitive challenges Verizon faces today far outstrip anything that could have been imagined in 1968, when many consumers still had rotary dial telephones and none had cell phones. Because “normal” conditions no longer exist as originally contemplated by the rule, it should not be used to penalize ILECs such as Verizon.

27. Verizon also faces significant operational challenges. Because Verizon’s service territory on the central west coast of Florida is subject to severe weather, Verizon frequently operates under conditions that are anything but normal. For example, in July 2007 there were more than 200,000 lightning strikes in Verizon’s service territory, which created an unusually high number of service outages and delayed restoration because Verizon does not dispatch its employees during dangerous conditions. In addition to operational issues posed by severe weather, Verizon must address other problems in the field like major outages and cable cuts by other utilities, which can lead to service levels below 95% through no fault of Verizon. OOS and NOOS “misses” that occur under such circumstances must be excluded from the raw data Verizon reports for purposes of this proceeding and Verizon should not be

²¹ See Rule 25-4.003(45) (defining “service objective” as “[a] quality of service which is desirable to be achieved under normal conditions”).

²² The notes to Rule 25-24.070 state that it was “revised” in 1968, so the original version may date to an even earlier time.

penalized when “misses” under those conditions cause its service level to fall below 95%.

III. THE SERVICE OBJECTIVES ARE TARGETS, NOT ABSOLUTE STANDARDS

28. The Commission must find in Verizon’s favor for the independent reason that the rule does not impose absolute standards but instead at most provides targets that require reasonable efforts. The facts here show that Verizon is undertaking reasonable (indeed, extraordinary) efforts to meet the OOS and NOOS service objectives. Verizon therefore may not be penalized for its 2007 and 2008 OOS and NOOS performance because its performance complied with the rule. Further, the Commission should reject the Order’s interpretation of Rule 25-4.070 because that reading would render the rule unconstitutionally vague.

29. Rule 25-4.070 requires telecommunications companies to use reasonable efforts to minimize the extent and duration OOS and NOOS conditions. The rule includes service objectives of 95% within 24 hours for OOS restoration and 95% within 72 hours for NOOS trouble clearance. These objectives do not impose absolute standards. The Commission’s rules define “service objective” as “[a] quality of service which is desirable to be achieved under normal conditions.”²³ In contrast, a “service standard” is defined as “[a] level of service that a telecommunications company, under normal conditions, is expected to meet in its certificated territory as representative of adequate services.”²⁴ Because the service objectives only state a “desirable” quality of service, they are aspirational in nature and do not impose hard-and-fast requirements.

²³ Rule 25-4.003(45).

²⁴ Rule 25-4.003(46).

At most, they require ILECs to use reasonable efforts to achieve the stated service levels. Therefore, failure to reach the targeted levels by itself does not constitute a rule violation and cannot be penalized.

30. ILECs submit quarterly reports on the number of reported outages and service-affecting troubles they receive and the number of times they fixed the problem within 24 or 72 hours, respectively. For reporting purposes, ILECs are not permitted to exclude “misses” that arise under abnormal conditions, but rather must explain the circumstances when a 95% level for OOS restoration is not achieved. The reported number of raw troubles and “misses” therefore cannot establish that a 95% service level has not been met, much less that the ILEC failed to attempt to reach it. For enforcement purposes, a more detailed assessment of the achieved service level must be undertaken so that all “misses” are excluded that involved repair work performed under abnormal conditions.

31. Based on the facts described above, Verizon has used more than reasonable efforts to meet the OOS and NOOS service objectives and therefore has not violated Rule 25-4.070. The Order reaches a different conclusion only because it misinterprets the rule. Under the Order’s interpretation, the rule would be unconstitutionally vague in violation of the Due Process Clause because it would purport to define a violation and fix a penalty using criteria and standards that are not stated in the rule.

IV. AS A MATTER OF LAW, THE COMMISSION MAY NOT PENALIZE VERIZON FOR VIOLATION OF THE SERVICE OBJECTIVES

32. Even setting aside the facts demonstrating that Verizon did not willfully violate Rule 25-4.070, and made (at the least) reasonable efforts to meet the service objectives, as a purely legal matter the Commission may not penalize Verizon for allegedly failing to meet the rule's service objectives. Because Verizon is a price-regulated company whose services are subject to effective competition, the Commission lacks the rulemaking authority to apply the OOS and NOOS objectives. This conclusion puts Verizon in the same position as its competitors who also are not subject to these objectives.

33. The service objectives in Rule 25-4.070 cannot be applied to a price-regulated company such as Verizon because doing so would exceed the Commission's grant of rulemaking authority in violation of Section 120.52(8)(b) and enlarge or contravene the specific provisions of the law implemented in violation of Section 120.58(8)(c). Such an application of the rule therefore would be an invalid exercise of delegated legislative authority.

34. The Commission's general grant of rulemaking authority is Section 350.127(2), which provides:

The commission is authorized to adopt, by affirmative vote of a majority of the commission, rules pursuant to s. 120.536(1) and 120.54 to implement provisions of laws conferring duties on it.

Under the standards of Section 120.52(8), this general grant of rulemaking authority extends only to rules that interpret or implement specific powers and duties.

35. Of the seven statutes cited as authority for the rule, only three relate in any way to quality of service objectives: Section 364.01(4), Section 364.03, and Section 364.15. It is clear that neither of the latter two sections provides any authority to apply Rule 25-4.070 to Verizon.

(a) Section 364.03 does not apply to price-regulated companies and therefore cannot support applying Rule 25-4.070 to Verizon.

(b) Section 364.15 dealing with the adequacy of certain telecommunications facilities requires a Commission order directing specific improvements. It therefore does not give the Commission an explicit power or duty that can be implemented through rulemaking.

36. The only two paragraphs of Section 364.01(4) that arguably could give the Commission authority to apply the service objectives to Verizon are as follows:

(4) The commission shall exercise its exclusive jurisdiction in order to:

* * *

(c) Protect the public health, safety, and welfare by ensuring that *monopoly services* provided by telecommunications companies continue to be subject to effective price, rate, and *service regulation*.

* * *

(i) Continue its historical role as a *surrogate for competition* for *monopoly services* provided by local exchange telecommunications companies.
(Emphasis added.)

Assuming for the sake of argument that subsections (4)(c) and (4)(i) could be deemed to establish specific powers and duties that could be implemented through rulemaking, those provisions would grant authority only as to monopoly services. A monopoly service is defined in Section 364.02(9) as “a telecommunications service for which there is no effective competition, either in fact or by operation of law.” The local services

covered by Rule 25-4.070 are, in fact, subject to effective competition in Verizon's service territory, as Verizon will prove in this proceeding. Because these local services are no longer monopoly services as defined by Chapter 364, the Commission cannot properly subject them to service regulation under subsection (4)(c) or impose rules designed to serve as a surrogate for competition under subsection (4)(i). To do so would impermissibly enlarge the provisions of the law implemented, in violation of Section 120.52(8)(c).

37. Subsections (4)(c) and (4)(i) cannot be used to subject Verizon to the Rule 25-4.070 service objectives for the additional reason that those subsections are trumped by the more specific provisions of Sections 364.051(1)(c) and Section 364.03. The decisions in *Day Cruise*²⁵ and *Ortiz*²⁶ establish the principle that any specific limitation on the Commission's rulemaking authority must take precedence over any broader grant of general rulemaking authority. Outside of the general provisions in Section 364.01(4) (again assuming they could be deemed to establish specific powers and duties that could be implemented through rulemaking), the only statute cited in Rule 25-4.070 that could provide specific authority for rules relating to quality of service is Section 364.03. Yet by virtue of Section 364.051(1)(c), the Legislature has removed price-regulated companies from the purview of that section. Relying on the broad language in Section 364.01(4) to extend service quality regulation to price-regulated companies would be an attempt to do indirectly that which cannot be done directly. That would exceed the Commission's grant of rulemaking authority and improperly enlarge or contravene the provisions of the more specific statute.

²⁵ *State, Board of Trustees v. Day Cruise Ass'n, Inc.*, 794 So. 2d 696 (Fla. 1st DCA 2001).

²⁶ *Ortiz v. Dept. of Health*, 882 So. 2d 402, 405 (Fla. 4th DCA 2004) *rev. denied* (Fla. 2004).

WHEREFORE, Verizon respectfully requests that the Commission determine that Verizon has demonstrated that it should not be penalized and that this proceeding should be terminated.

Respectfully submitted on January 26, 2009.

By: s/ Dulaney L. O'Roark III
Dulaney L. O'Roark III
P. O. Box 110, 37th Floor
MC FLTC0007
Tampa, Florida 33601-0110
678-259-1449 (telephone)
813-204-8870 (facsimile)

Attorney for Verizon Florida LLC

Exhibit A



Verizon's 2007 Average Monthly Network Performance (January – December)

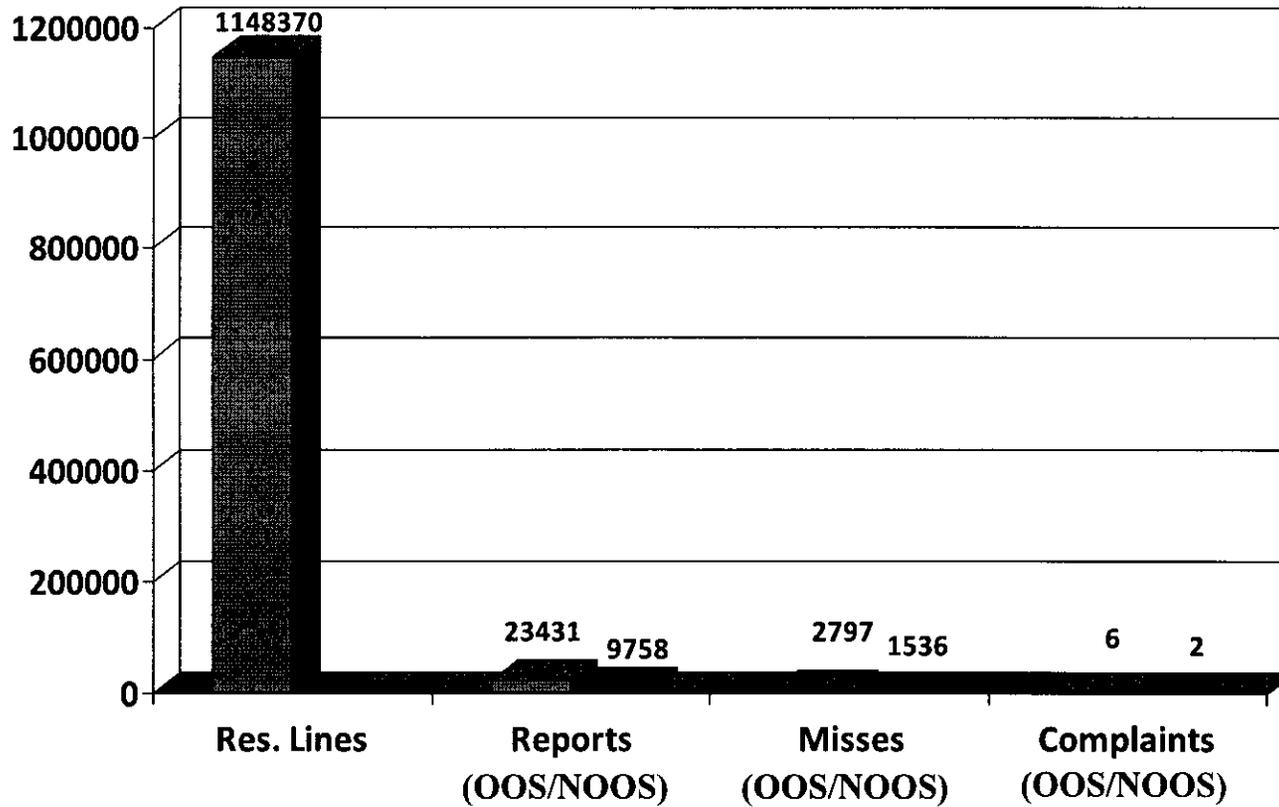
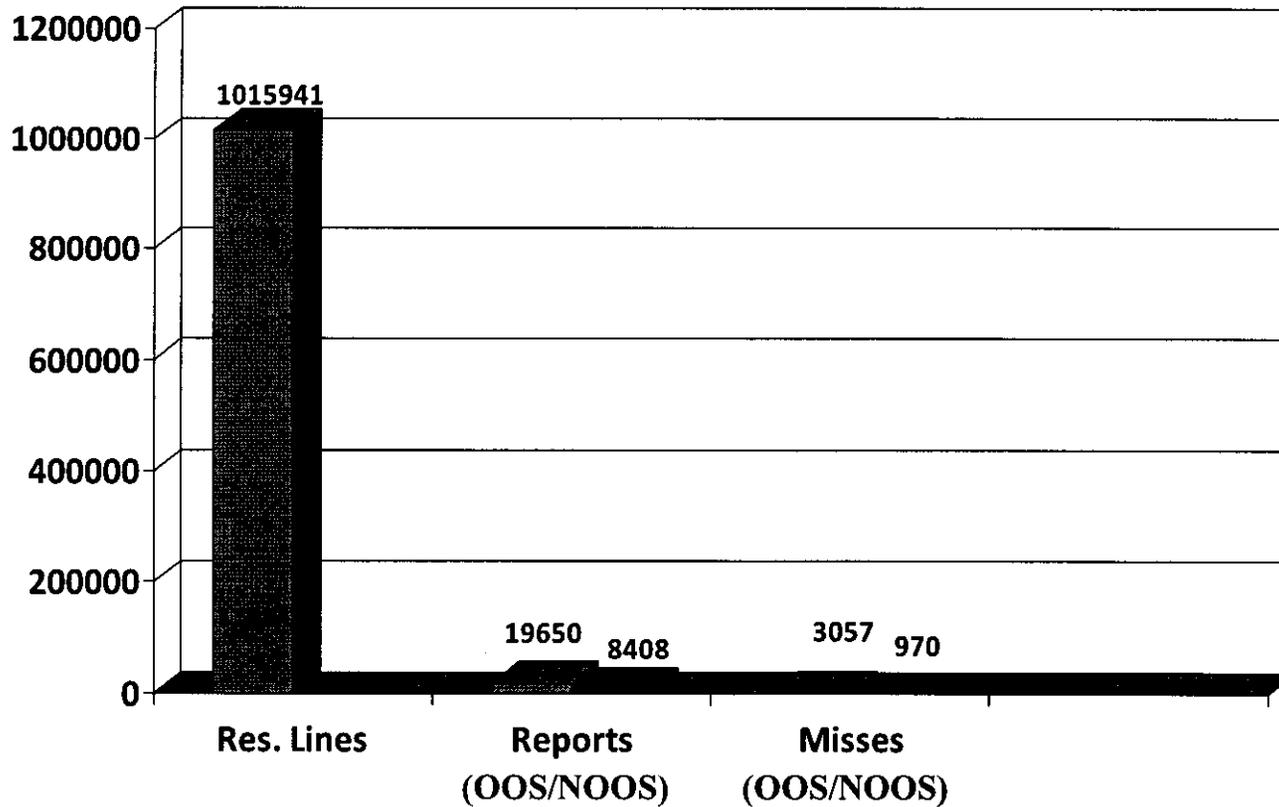


Exhibit B



Verizon's 2008 Average Monthly Network Performance (January – September)*



*Verizon has not yet calculated the number of complaints by customers in 2008 who experienced an OOS or NOOS "miss."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail on
January 26, 2009 to:

Adam Teitzman, Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
ateitzma@psc.state.fl.us

Bill McCollum
Office of Attorney General
The Capitol – PL01
Tallahassee, FL 32399-1050
cecilia_bradley@oag.state.fl.us

J. R. Kelly
Patricia Christensen
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
kelly.jr@leg.state.fl.us

Michael B. Twomey
AARP
P. O. Box 5256
Tallahassee, FL 32314-5256
miketwomey@talstar.com

s/ Dulaney L. O’Roark III