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March 4, 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 Motion to Modify Order Establishing Procedure, Bifurcate Proceeding and Suspend Discovery Not Related to Jurisdictional Issues. 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: Joint Petition for show cause proceedings) Docket No. 080278-TL
against Verizon Florida LLC for apparent violation of) Filed: March 4, 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 MOTION TO MODIFY ORDER ESTABLISHING
PROCEDURE, BIFURCATE PROCEEDING AND SUSPEND DISCOVERY
NOT RELATED TO JURISDICTIONAL ISSUES**

In this case the Commission has ordered Verizon to show cause why it should not be penalized for the alleged violation of service objectives in Rule 25-4.070 during 2007 and the first nine months of 2008. Verizon moves that this proceeding be bifurcated so the Commission can address as a threshold matter whether it has statutory authority to apply the service objectives to a price-regulated company like Verizon. This motion should be granted because Verizon has raised substantial jurisdictional issues, summarized below, that the Commission should resolve so it may determine whether it has the power to decide the underlying claims. Further, bifurcation would promote administrative economy because if resolution of the jurisdictional issues wholly or partially disposes of this case, the Commission and parties will save the time and expense of creating and addressing a detailed factual record concerning Verizon's repair performance during the nearly two years in question.

Verizon further requests that the Commission suspend discovery on nonjurisdictional issues during the first phase of the proceeding because the Commission should not subject Verizon to extensive discovery on the merits while serious jurisdictional issues are pending. Consistent with this request, Verizon asks the

Commission to issue a protective order providing that Verizon not be required to respond to the First Set of Requests for Production of Documents served by the Office of Public Counsel on January 28, 2009 or to Staff's First Request for Admissions, First Set of Interrogatories and First Set of Production of Documents served on March 3. Those discovery requests do not concern the jurisdictional issues Verizon has raised and, if the Commission orders bifurcation, Verizon should not be required to respond to them during the first, jurisdictional phase of the case.

I. BACKGROUND

The Commission issued Order No. PSC-09-0015-SC-TL (the "Order") on January 5, 2009. The Order alleges that Verizon in 2007 and the first nine months of 2008 failed to comply with Rule 25-4.070, which describes service objectives for out-of-service ("OOS") and not-out-of-service ("NOOS") conditions and requires incumbent local exchange carriers ("ILECs") to file quarterly reports that describe their performance against these objectives for each exchange in their service territory. The Order requires Verizon to show cause why Verizon should not be penalized \$10,000 for each alleged violation for a total of \$4.56 million.

Verizon responded to the Order on January 26 and requested an administrative hearing. Among other things,¹ Verizon disputed the Commission's authority to take the

¹ Verizon also requested an administrative hearing to address the merits of the Commission's claims. Verizon identified the following disputed issues of material fact: (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. Moreover, Verizon disputed the Commission's interpretation of Rule 25-4.070 because the rule does not impose absolute standards, but rather describes desirable and aspirational levels of service; 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 would exceed the Commission's grant of rulemaking authority in violation of Section 120.52(8), Florida Statutes.² Verizon noted that this issue involves a threshold jurisdictional question and therefore should be resolved before the underlying claims are addressed.

After the Office of Public Counsel served its document requests on Verizon on January 28, counsel for Verizon requested a conference call with counsel for the opposing parties to discuss whether they would agree to bifurcated proceedings and, if not, how this procedural issue should be raised with the Commission. During the call, which took place on February 12, opposing counsel stated they were opposed to bifurcation, and Verizon stated in response that it would file a motion requesting bifurcation and a protective order concerning the outstanding discovery requests.

On February 23, the Commission issued its Order Establishing Procedure, which among other things calls for pre-filed testimony beginning in April and sets the hearing for July 6 and 7, 2009. An issue identification conference has not yet been held. Verizon understands that the Office of Public Counsel intends to file a motion to convene a scheduling conference and to request that the docket schedule be revised to allow more time to prepare the case for hearing. Verizon agrees that more time should be allowed, and specifically requests that Order Establishing Procedure be modified to bifurcate this proceeding, address the jurisdictional issues outlined below in the first

service objectives only apply when ILECs are operating under "normal conditions"; and 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.

² Verizon has not alleged that the service objectives were invalid in their entirety during 2007 and the first nine months of 2008 because during that time there was one rate-of-return regulated carrier, Frontier Communications of the South, LLC, to which the service objectives could be lawfully applied.

phase of the case, and suspend discovery on the merits until the first phase of the case has been completed.

II. BIFURCATION SHOULD BE ORDERED

The Prehearing Officer “may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case, including bifurcating the proceeding.”³ Bifurcation has proven to be a useful and flexible procedural tool that the Commission has applied in many different circumstances.⁴ In this case, bifurcation would be the most legally sound and fair approach, would be the most cost-effective way to proceed and would provide an effective means of dealing with discovery.

When as here a substantial issue of jurisdiction is presented, the Commission should deal with that issue before addressing other issues in the case. If the Commission lacks jurisdiction, it lacks the power to prosecute the case and address the merits of the underlying claims, and pressing ahead despite a serious jurisdictional question means the Commission would expend its own resources and those of the

³ Rule 28-106.211, Florida Administrative Code.

⁴ See, e.g., *In re: Proposed rules governing placement of new electric distribution facilities underground, and conversion of existing overhead distribution facilities to underground facilities, to address effects of extreme weather events*; *In re: Proposed amendments to rules regarding overhead electric facilities to allow more stringent construction standards than required by National Electric Safety Code*, Docket Nos. 060172-EU and 060173-EU, Order No. PSC-06-0632-PCO-EU (July 27, 2006)(ordering bifurcation of issues involving municipalities and cooperative associations, in part to allow time for negotiations); *In re: Investigation into pricing of unbundled network elements*, Docket No. 990649-TP, Order No. PSC-00-1486-PCO-TP (August 18, 2000)(bifurcating issues relating to BellSouth from issues relating to Verizon and Sprint); *In re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP, Order No. PSC-00-2452-PCO-TP (December 20, 2000)(allowing bifurcation to allow additional prehearing preparation for some issues while proceeding to a hearing with remaining issues).

parties only to later conclude it cannot act. Accordingly, bifurcation would serve administrative economy by first providing the parties and the Commission an opportunity to address potentially dispositive threshold issues that may save the Commission and parties the considerable time and expense of litigating the underlying claims.

In a nutshell, the threshold dispositive jurisdictional issue here is whether the Commission has been granted rulemaking authority to apply rules concerning service quality regulation during the period in question. The general rulemaking authority⁵ granted to the Commission by the legislature in Section 350.127(2), Florida Statutes, provides:

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

This grant of rulemaking authority is necessary but not sufficient for the Commission to adopt a rule.⁶ Before the Commission may adopt a rule under its general rulemaking authority, it must satisfy two conditions under the Administrative Procedure Act (“APA”). First, the proposed rule must implement or interpret specific statutory powers and duties,⁷ which means those powers and duties must be stated explicitly in the statute.⁸ Statutory language generally describing the Commission’s powers and functions, or

⁵ Under the APA, “Rulemaking authority’ means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term “rule.” Section 120.52(17), Florida Statutes.

⁶ Section 120.58(8), Florida Statutes.

⁷ Under the APA, “Rulemaking authority’ means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term “rule.” Section 120.52(17), Florida Statutes. “Law implemented’ means the language of the enabling statute being carried out or interpreted by an agency through rulemaking.” Section 120.52(9), Florida Statutes.

⁸ *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

setting forth general legislative intent or policy, does not suffice to create authority for rulemaking purposes.⁹ Second, the rule must not enlarge, modify or contravene the statute being implemented, which requires the Commission to consider more specific statutes that limit the scope of the statute being implemented.¹⁰

Rule 25-4.070 purports to implement service objectives based on seven statutory provisions, but none of them authorize service quality regulation of any sort for price-regulated companies. Three of the provisions do not apply to price-regulated companies at all;¹¹ two only require companies to provide access to or report data;¹² one expressly limits the Commission's power to issuing orders in particular cases;¹³ and one (Section 364.01(4), Florida Statutes) does not describe specific powers and duties that are sufficient to create rulemaking authority under the APA, as the Department of Administrative Hearings ("DOAH") has expressly held.¹⁴ The Commission thus plainly lacks authority to apply the service quality rules to Verizon as a matter of law. This purely legal issue does not involve disputed issues of material fact and may be resolved after full briefing by the parties.

Even if Section 364.01(4) were interpreted to create specific powers that could be implemented through rulemaking (which it cannot), those powers only would concern "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." Even under an erroneously broad interpretation of Section

⁹ See Section 120.52(8), Florida Statutes.

¹⁰ See Section 120.52(8), Florida Statutes; *State Board of Trustees v. Day Cruise Ass'n, Inc.*, 794 So. 2d 696, 701-02 (Fla. 1st DCA 2001); *Ortiz v. Dept. of Health*, 882 So. 2d 402, 405 (Fla. 4th DCA 2004) *rev. denied* (Fla. 2004).

¹¹ See Sections 364.03, 364.17 and 364.18, Florida Statutes.

¹² See Sections 364.183 and 364.386, Florida Statutes.

¹³ See Section 364.15, Florida Statutes.

¹⁴ See *GTE Florida, Inc. v. Florida Pub. Serv. Comm'n*, 2000 Fla. Div. Adm. Hear. LEXIS 5215 (2000).

364.01(4), therefore, application of the service objectives to Verizon in this case only would be authorized if it were determined that the local Verizon retail services that the Commission seeks to regulate through Rule 25-4.070 were “monopoly” services not subject to competition in 2007 and 2008. As the Commission is well aware, Verizon’s service territory was extremely competitive during that time (and continues to be), so this factual question also raises a serious jurisdictional issue. Opposing parties can be expected to argue that resolution of that issue would involve disputed issues of material fact, so resolution of this issue may require a hearing.

III. RELIEF REQUESTED

Verizon respectfully requests that the Order Establishing Procedure be modified to bifurcate jurisdictional issues in the case from other issues and to establish a procedural schedule with two phases. During Phase 1, the parties would identify the jurisdictional issues to be resolved and then proceed on an expedited basis to complete discovery, submit pre-filed testimony and present factual evidence relating to jurisdictional issues at the Phase 1 hearing. Purely legal issues could be addressed in post-hearing briefs or by motion beforehand, as appropriate. If Phase 2 is necessary after the jurisdictional issues have been addressed, then other issues could be identified and addressed at the Phase 2 hearing. Consistent with this approach, a protective order should be granted that postpones responses to the discovery served by the Office of Public Counsel on January 28 and by Staff on March 3 until Phase 2 of the case.

WHEREFORE, Verizon respectfully requests that the Commission grant its motion to modify the Order Establishing Procedure, bifurcate this proceeding and suspend discovery concerning issues not related to the Commission's jurisdiction.

Respectfully submitted on March 4, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail on March 4, 2009 to:

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