

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint petition for show cause proceedings against Verizon Florida LLC for apparent violation of Rule 25-4.070, F.A.C., Customer Trouble Reports, and impose fines, by the Office of the Attorney General, Citizens of the State of Florida, and AARP.

DOCKET NO. 080278-TL

DATED: MARCH 11, 2009

COMMISSION  
CLERK

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**PROSECUTORIAL STAFF'S RESPONSE IN OPPOSITION TO VERIZON'S MOTION TO MODIFY ORDER ESTABLISHING PROCEDURE, BIFURCATE PROCEEDING AND SUSPEND DISCOVERY NOT RELATED TO JURISDICTIONAL ISSUES**

Pursuant to Rule 28-106.204, Florida Administrative Code (F.A.C.), prosecutorial staff files this response to the Motion to Modify Order Establishing Procedure, Bifurcate Proceeding, and Suspend Discovery Not Related to Jurisdictional Issues (Motion) filed by Verizon Florida LLC (Verizon) on March 4, 2009. The Commission should deny Verizon's motion in its entirety. In support thereof, prosecutorial staff states as follows:

**Background**

On May 15, 2008, Attorney General Bill McCollum, the Citizens for the State of Florida, and the American Association of Retired Persons, (collectively, the Petitioners) filed a joint petition requesting that the Florida Public Service Commission (Commission) issue a Show Cause Order. The Petitioners requested that the Order require Verizon to show cause why the company should not be penalized approximately \$6.5 million for the company's apparent violation of Rule 25-4.070, F.A.C., Customer Trouble Reports. On January 5, 2009, the Commission issued Order No. PSC-09-0015-SC-TL ordering Verizon to show cause, in writing, within 21 days of the order, why it should not be penalized in the amount of \$10,000 per violation, for a total of \$2.62 million, for 262 apparent violations of Rule 25-4.070, F.A.C., during 2007; and \$10,000 per violation, for a total of \$1.94 million, for 194 apparent violations of Rule 25-4.070, F.A.C., during 2008. Verizon responded on January 26, 2009, requesting an administrative hearing.

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**The Commission should deny Verizon's Motion to Bifurcate Proceeding.**

On March 4, 2009, Verizon requested the Commission bifurcate proceedings in this docket. Verizon argues that there is a threshold jurisdictional issue as to whether the Commission has been granted rulemaking authority to promulgate and apply rules concerning service quality regulation of customer telephone service. Specifically, Verizon asserts that the threshold issue is whether the Commission has jurisdiction to apply Rule 25-4.070, F.A.C. Verizon requests bifurcation to deal with its rule challenge and that in addition, the Commission suspend discovery on non-jurisdictional issues. As set forth below, prosecutorial staff believes that Verizon's Motion is based on an inappropriate application of Florida law and, if granted, will cause unnecessary delay by postponing the Commission's resolution of this matter.

Verizon argues that this proceeding should be bifurcated because the Commission is faced with both legal and factual issues. This argument offers no applicable basis for altering the established procedure. Many cases handled by this Commission raise both legal and factual issues. While prosecutorial staff is comfortable addressing the issue of jurisdiction in the normal course of the scheduled hearing, Verizon's proposed bifurcation will delay consideration of its failure to comply with the service standards in Rule 25-4.070, F.A.C., by adding significant delay to the final resolution of this proceeding.

Verizon had ample opportunity to challenge the Commission's rulemaking authority in the recent rulemaking docket (Docket No. 080641-TP), which reviewed Rule 25-4.070, F.A.C., in its entirety, but chose not to do so. Rather, Verizon chose to raise this issue only after the Commission issued an Order requiring Verizon to show cause why it should not be penalized for violation of Rule 25-4.070, F.A.C. Verizon has at all times since promulgation of the rule known that the Commission considered Verizon subject to Rule 25-4.070, F.A.C. In fact, this is not the first instance where Verizon has had to address allegations it violated Rule 25-4.070, F.A.C. In Docket No. 991376-TL, In Re: Initiation of Show Cause Proceedings Against GTE Florida Incorporated for Apparent Violation of Service Standards<sup>1</sup>, the Commission investigated whether Verizon had violated Rule 25-4.070, F.A.C. During the proceeding Verizon did not challenge the validity of the rule, nor the Commission's jurisdiction. In 2001, Verizon agreed to make a

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<sup>1</sup> Verizon Florida Inc., f/k/a GTE Florida Incorporated.

voluntary contribution to the General Revenue Fund in the amount of \$2 million to settle the company's apparent violation of Rule 25-4.070(3)(a), F.A.C., for the years 1996 through 1999. By Order No. PSC-02-0146-AS-TL, issued February 1, 2002, the Commission approved the company's settlement offer.

Verizon has employed this legal strategy only after the Commission issued a Show Cause Order in the instant proceeding. Verizon has had knowledge of the rule and the Commission's application of the rule since it was promulgated. Furthermore, Verizon's Motion misapplies Florida law by failing to consider the established procedure for challenging an agency rule.

Verizon has set forth two legal issues the Commission should address. First, Verizon challenges whether the Commission was granted rulemaking authority to apply rules concerning service quality regulation. Second, Verizon challenges whether the service quality rules are applicable to Verizon. Verizon's challenge of the Commission's authority as an "invalid exercise of delegated legislative authority" should be brought before the Division of Administrative Hearings (DOAH) as a rule challenge in a proceeding pursuant to Section 120.56, F.S.<sup>2</sup> Section 120.56(1)(c), F.S. states that:

- (c) The petition shall be filed with the division<sup>3</sup> which shall, immediately upon filing, forward copies to the agency whose rule is challenged, the Department of State, and the committee. Within 10 days after receiving the petition, the division director shall, if the petition complies with the requirements of paragraph (b), assign an administrative law judge who shall conduct a hearing within 30 days thereafter, unless the petition is withdrawn or a continuance is granted by agreement of the parties or for good cause shown. Evidence of good cause includes, but is not limited to, written notice of an agency's decision to modify or withdraw the proposed rule or a written notice from the chair of the committee stating that the committee will consider an objection to the rule at its next scheduled meeting. The failure of an agency to follow the applicable rulemaking procedures or requirements set forth in this chapter shall be presumed to be material; however, the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired.

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<sup>2</sup> Such as in *Ocean Properties, LTD vs. Public Service Commission*, 2005 Fla. PUC LEXIS 496, Case No. 04-2250RX, issued May 20, 2005.

<sup>3</sup> Section 120.52(5), F.S. defines "Division" to mean the Division of Administrative Hearings.

Consequently, a show cause proceeding before the Commission is not an appropriate forum to raise a challenge to an agency rule.

Although prosecutorial staff believes Verizon's request that the Commission address the validity of the rule is improper, prosecutorial staff does acknowledge that the Commission may consider the applicability of Rule 25-4.070, F.A.C. Courts have ruled that while a challenge concerning the validity of a rule must be heard by DOAH, a challenge to the application of the rule is not a proper rule challenge<sup>4</sup> pursuant to Section 120.56, F.S. Consequently, the Commission is the appropriate venue to decide whether Rule 25-4.070, F.A.C., applies to Verizon.

The Commission should treat this docket no different than other cases that contain mixed questions of fact and law. After an administrative hearing on the merits to consider the facts at issue, the parties will have the opportunity to submit post hearing briefs addressing the application of legal principles to the facts proven at the administrative hearing. Verizon's request to bifurcate this proceeding does not promote administrative economy, is a misapplication of applicable rule challenge procedures, and therefore, Verizon's request to bifurcate should be denied.

**The Commission should deny Verizon's Motion for a Protective Order.**

As Verizon has conceded in its Motion, the application of Rule 25-4.070, F.A.C., raises a mixed question of fact and law. Consequently, parties should be allowed to conduct discovery on this issue. Even if the Commission were to consider bifurcation, discovery should not be suspended. Suspension of discovery would serve to further delay resolution of this matter if and when the Commission determined Verizon to be subject to Rule 25-4.070, F.A.C. Therefore, Verizon's request to suspend discovery<sup>5</sup> and Motion for Protective Order should not be granted.

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<sup>4</sup> Section 120.56(1), F.S. states that a rule challenge petition "must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it."

<sup>5</sup> Discovery requests include Office of Public Counsel's First Set of Requests for Production of Documents, served on January 28, 2009 and prosecutorial staff's First Request for Admissions, First Set of Interrogatories and First Set of Production of Documents, served on March 3, 2009.

**Prosecutorial staff offers proposed Issues for Commission consideration.**

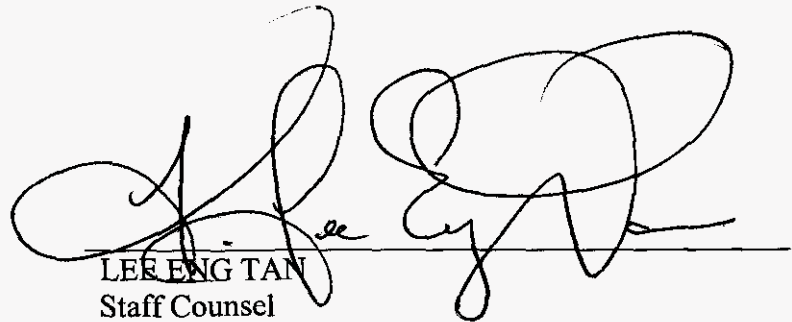
In an effort to assist the Commission's consideration of this matter, prosecutorial staff is submitting the following proposed issues.

1. How many times over the period January 2007 through September 2008 did Verizon Florida LLC fail to meet the Service Objectives stated in:
  - a. Rule 25-4.070(3)(a), Florida Administrative Code?
  - b. Rule 25-4.070(3)(b), Florida Administrative Code?
2. Does each instance in which Verizon Florida LLC failed to meet the Service Objectives stated in Rules 25-4.070(3)(a) and 25-4.070(3)(b), Florida Administrative Code, constitute a rule violation?
3. Do the rule violations, if any, identified in Issue 2 constitute willful violations of Rule 25-4.070(3), Florida Administrative Code? If so, does the Commission have authority to impose penalties pursuant to Section 364.285, Florida Statutes?
4. What action, penalty, or fine, if any, should be imposed by the Commission?

**Conclusion**

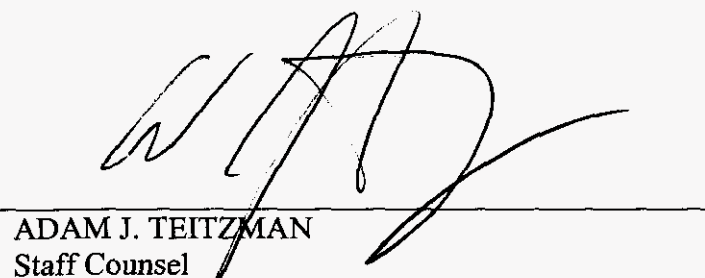
For the reasons set forth above, prosecutorial staff respectfully requests that the Commission summarily deny Verizon's Motion to Modify Order Establishing Procedure, Bifurcate Proceeding, and Suspend Discovery Not Related to Jurisdictional Issues. Furthermore, prosecutorial staff requests the Commission issue an order adopting the proposed issues set forth above.

Respectfully submitted on March 11, 2009.



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Trouble Reports, and impose fines, by the  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five correct copies of PROSECUTORIAL  
STAFF'S RESPONSE IN OPPOSITION have been filed with Office of Commission Clerk and  
one copy has been furnished to the following by U. S. mail or by (\*) hand delivery, this 11<sup>th</sup> day  
of March, 2009:

AARP  
c/o Michael B. Twomey  
Post Office Box 5256  
Tallahassee, FL 32314-5256

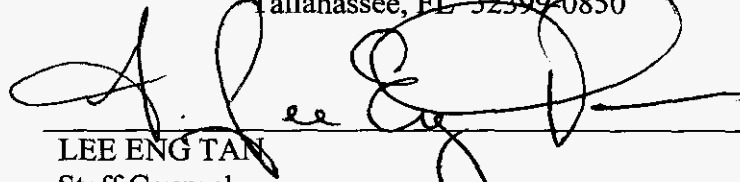
Office of Attorney General  
Bill McCollum/Cecilia Bradley  
The Capitol – PL01  
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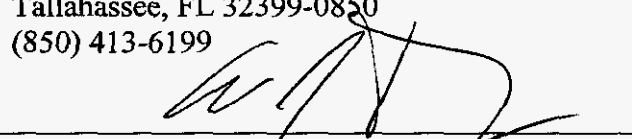
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