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1200 Peachtree St., N.E.
Atlanta, GA 30309

August 18, 2003

BY HAND DELIVERY

Ms. Blanca Bayó, Director
The Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

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Re: **Docket Nos. 030677-TP**

Dear Ms. Bayó:

Enclosed for filing is an original and fifteen copies of TCG's Motion to Dismiss Verizon's Petition and Complaint.

Please acknowledge receipt of this letter by stamping the extra copy of this letter "filed," and return to me at the time of filing. Thank you for your assistance.

Sincerely yours,

Tracy Hatch/Res

Tracy W. Hatch

TWH/las
Enclosure

cc: Richard Chapkis

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition and complaint by Verizon Florida Inc. regarding customer transfer charges imposed by TCG South Florida.

DOCKET NO. 030677-TP

FILED: August 18, 2003

TCG'S MOTION TO DISMISS VERIZON'S PETITION AND COMPLAINT

Pursuant to Rule 28-106.204, Florida Administrative Code, TCG South Florida ("TCG") respectfully submits its Motion to Dismiss Verizon Florida Inc.'s ("Verizon") Petition and Complaint Regarding Customer Transfer Charges Imposed by TCG South Florida filed on July 24, 2003. The Florida legislature specifically provides, in Section 364.337(2), Florida Statutes, that the specific provisions upon which Verizon relies in its Petition and Complaint shall not apply to alternative local exchange providers. Accordingly, Verizon fails to state a claim upon which the Florida Public Service Commission may grant relief. Accordingly, Verizon's Petition and Complaint (hereinafter collectively the "Petition") should be dismissed.

STANDARD OF REVIEW

1. The purpose of a motion to dismiss is to test the legal sufficiency of a complaint or petition which purports to invoke the Commission's jurisdiction. If the petition fails to state a cause of action for which relief can be granted, it must be dismissed. *Varnes v. Dawkins*, 624 So.2d 349 (Fla. 1st DCA 1993). When reviewing the sufficiency of Verizon's Petition, the Commission "may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." *Id.* at 350. Verizon's Petition must be

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07612 AUG 18 03

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dismissed for failure to state a claim upon which relief can be granted because the statutory provisions relied on are not applicable to CLECs including TCG.

THE COMMISSION LACKS SUBJECT MATTER JURISDICTION

2. Subject matter jurisdiction is conferred by statutory or constitutional law and cannot be conferred by acquiescence. *Jesse v. State*, 711 So. 2d 1179, 1180 (Fla. 2nd Dist. Ct. App. 1998). An agency must be vested with subject matter jurisdiction in order to grant the relief sought by the parties. *See Keena v. Keena*, 245 So. 2d 665, 666 (Fla. Dist. Ct. App. 1971). "The Commission has only those powers granted by statute expressly or by necessary implication." *See Deltona Corp. v. Mayo*, 342 So.2d 510, 512, n. 4 (Fla. 1977). Further, "any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it." *State v. Mayo*, 354 So.2d 359, 361 (Fla. 1977). Florida statutory law expressly prohibits the Commission from applying sections 364.03 and 364.14 to CLECs such as TCG.

3. The statutory provisions upon which Verizon relies in its arguments regarding the TCG tariff in question are not applicable to CLECs including TCG. Section 364.337(2) Florida Statutes expressly provides, *inter alia*, "In no event shall alternative local exchange telecommunications companies be subject to the requirements of ss. 364.03, . . . 364.14 . . ." (emphasis added). These sections, as well as the other sections listed in that list of statutory exemptions for CLECs were enacted in 1995 as part of the Florida legislatures amendments to Chapter 364, Florida Statutes, to allow local exchange competition and to eliminate the Commission's authority to engage in rate-of-return/rate-based regulation. Both Sections 364.14 and 364.03 have been absent from the regulatory

lexicon for CLECs since 1995. Simply put, TCG is not subject to the statutes upon which Verizon relies for its Petition.

4. Other than the sections cited above, Verizon does not reference any other Florida statutes except for a footnote referencing section 364.01 and 364.337(5) regarding the Commission's general jurisdiction.¹ Verizon provides no legal support for how these general jurisdictional statutes apply in light of the specific prohibitions of Section 364.337(2). In fact, Verizon provides no discussion at all of those general statutes.

5. Indeed the Supreme Court has already ruled that where there is a specific exemption, the Commission cannot rely upon its general authority to impose requirements on the exempted party². In *State v. Mayo*, the Commission established some minimum rates for carriers of road building aggregates. The Commission relied upon a statute that conferred upon the Commission broad powers regarding public interest in safety. The Department of Transportation challenged the ruling because of a statute that exempted such carriers from the Commission's authority to set rates. The Florida Supreme Court found that in light of the specific exemption, the Commission could not use its broad power over safety regulation to set such rates. Similarly, Verizon

¹ Verizon in a footnote references the following provisions:
Section 364.01(3) provides that "the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure."

Section 364.01(4)(g) provides that "the Commission shall exercise its exclusive jurisdiction in order to: ... (g) ensure that all providers of telecommunications services are treated fairly, by preventing anti-competitive behavior and eliminating unnecessary regulatory restraint."

Section 364.337(5) provides that "[t]he commission shall have continuing regulatory oversight over the provision of basic local exchange telecommunications service provided by a certificated competitive local exchange telecommunications company or a certificated alternative access vendor for purposes of establishing reasonable service quality criteria, assuring resolution of service complaints, and ensuring the fair treatment of all telecommunications providers in the telecommunications marketplace."

² *State v. Mayo*, 354 So.2d 359, 361 (Fla. 1977).

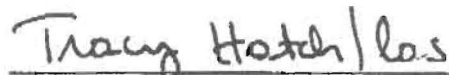
cannot rely upon any broad regulatory powers of the Commission to establish authority over TCG's rates in this instance in light of Section 364.337(2), which specifically exempts CLECs from such oversight. Accordingly, Verizon's Petition must be dismissed because it sets forth a claim that the Commission has no authority to entertain and seeks a remedy that is not within its power to grant.

CONCLUSION

6. Verizon asks the Commission to exercise jurisdiction it does not possess, and demands a remedy that the Commission may not grant. Verizon's petition wholly fails to state a cause of action upon which relief may be granted by the Commission, and must be dismissed.

7. WHEREFORE, TCG respectfully requests that the Commission dismiss Verizon's Petition and Complaint Regarding Customer Transfer Charges Imposed by TCG South Florida.

Respectfully Submitted,



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