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October 27, 2003

Ms. Blanca S. Bayo, Director  
Division of the Commission Clerk  
and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: Docket No. 030867-TL  
Petition of Verizon Florida Inc. to Reform Its Intrastate Network Access and Basic  
Local Telecommunications Rates in Accordance with Florida Statutes, Section  
364.164

Dear Ms. Bayo:

Please find enclosed for filing an original and 15 copies of Verizon Florida Inc.'s  
Response to AARP's Motion to Dismiss in the above matter. Service has been made as  
indicated on the Certificate of Service. If there are any questions regarding this filing,  
please contact me at 813-483-1256.

Sincerely,

A handwritten signature in cursive script that reads "Richard Chapkis".

Richard Chapkis

RC:tas  
Enclosures

DOCUMENT NUMBER: 030867-TL

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FPSC-COMMISSION CLERK

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Response to AARP's Motion to Dismiss in Docket No. 030867-TL were sent via electronic mail and overnight delivery on October 27, 2003 to:

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Richard Chapkis

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition of Verizon Florida Inc. to Reform )  
Its Intrastate Network Access and Basic Local )  
Telecommunications Rates in Accordance with )  
Florida Statutes, Section 364.164 )  
\_\_\_\_\_ )

Docket No. 030867-TL  
Filed: October 27, 2003

**VERIZON FLORIDA INC.'S RESPONSE TO  
AARP'S MOTION TO DISMISS**

Pursuant to Rule 28-106.204 of the Florida Administrative Code, Verizon Florida Inc. (Verizon) submits this Response to the Motion to Dismiss filed by the American Association of Retired Persons AARP of Florida (AARP).

**I. INTRODUCTION**

1. The Florida Public Service Commission (Commission) should deny AARP's Motion to Dismiss for several important reasons. First, it is based on a rule that does not apply to administrative proceedings. Second, it is not necessary to join the interexchange telecommunications companies (IXCs) as "indispensable parties" to obtain discovery from them. Third, the Commission has jurisdiction over the IXCs and thus has the ability to ensure that they will comply with their statutory obligations. Fourth, the "flow through" issue is not an issue in this proceeding; a separate docket has already been opened to consider IXC flow-through compliance. Fifth, it would be impractical in the context of this expedited 90-day proceeding to join all of the carriers that provide intrastate access services and attempt to determine how they intend to flow through the access reductions.

## II. DISCUSSION

### A. Legal Standard For A Motion To Dismiss

2. A motion to dismiss raises as a question of law whether the petition alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1<sup>st</sup> DCA 1993). In disposing of a motion to dismiss, the Commission must: (1) assume all of the allegations of the petition to be true; (2) draw all reasonable inferences from the petition in favor of the petitioner; and (3) determine whether the petition alleges the required elements under the substantive law on the matter. Heekin v. Florida Power & Light Co., Order No. PSC-99-1054-FOF-EI, 1999 WL 521480 \*2 (citing Varnes, 624 So. 2d at 350).

3. As discussed below, applying this standard to the instant case demonstrates that AARP's Motion to Dismiss must be denied.

### B. AARP Relies On A Florida Rule Of Civil Procedure That Does Not Apply Here.

4. AARP contends Verizon's Rate Rebalancing Petition should be dismissed because Verizon did not join the IXCs as "indispensable parties" in accordance with Rule 1.140(b), Florida Rules of Civil Procedure.<sup>1</sup> AARP's reliance on this rule is misplaced because it is not a discovery rule and does not apply here. The Legislature has only authorized the application of civil procedure discovery rules to administrative proceedings.

5. The Legislature has mandated that the discovery rules from the Rules of Civil Procedure apply to administrative proceedings. Section 120.569(2)(f), Florida Statutes, provides that:

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<sup>1</sup> Rule 1.140(b), Florida Rules of Civil Procedure, provides that "[e]very defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader: . . . (7) failure to join indispensable parties."

The presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, and to effect discovery on the written request of any party by any means available to the courts and ***in the manner provided in the Florida Rules of Civil Procedure***, including the imposition of sanctions, except contempt. (Emphasis added.)

Similarly, Rule 28-106.206, Florida Administrative Code, provides that:

After commencement of a proceeding, parties may obtain discovery ***through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure***. The presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanctions ***in accordance with the Florida Rules of Civil Procedure***, except contempt. (Emphasis added.)

6. However, the Legislature has not authorized the application of the other (non-discovery) rules to administrative proceedings. Rule 1.140(b), which forms the foundation of AARP's Motion to Dismiss, is not a discovery rule and there is no authority permitting its application to administrative proceedings. AARP does not cite to any such authority, nor does any such authority exist. Accordingly, the rule upon which AARP relies does not apply here, and the Commission should deny AARP's motion to dismiss.

**C. It Is Not Necessary To Join The IXCs To Seek Discovery From Them.**

7. AARP contends that unless the IXCs are joined it will be impossible to understand whether and how the IXCs will flow through the access reductions. AARP's contention is flatly wrong.

8. The Commission has jurisdiction to ensure that the IXCs properly flow through the access reductions. Section 364.163(3), Florida Statutes provides that:

The Commission shall have continuing regulatory oversight of intrastate switched network access and customer long distance rates for purposes of determining the correctness of any rate decrease by a telecommunications company resulting from the

application of Section 364.164, Florida Statutes, and making any necessary adjustments to those rates.

9. Moreover, the Commission and the parties have the power to seek discovery from the IXCs regardless of whether they are joined as parties. As set forth above, the presiding officer has the power to issue subpoenas to obtain discovery from third parties (see Section 120.569(2)(f), Florida Statutes), and the parties may obtain third-party discovery in the manner provided in Rules 1.280 through 1.400 Florida Rules of Civil Procedure (see Rule 28-106.206, Florida Administrative Code).

10. Furthermore, the Commission has authority to obtain information from telecommunications companies. Section 364.183(1), Florida Statutes, provides that:

The commission shall have access to all records of a telecommunications company that are reasonably necessary for the disposition of matters within the commission's jurisdiction.<sup>2</sup>

In addition, Section 364.17, Florida Statutes, provides that:

The commission may, in its discretion, prescribe the forms of any and all reports, accounts, records, and memoranda to be furnished and kept by any telecommunications company whose facilities extend beyond the limits of this state, which are operated partly within and partly without the state, so that the reports, accounts, records, and memoranda show any information required by the commission concerning the business done, receipts, and expenditures appertaining to those parts of the facility within the state.

And, Section 350.117(1), Florida Statutes, provides that:

(1) The commission may require such regular or emergency reports, including, but not limited to, financial reports, as the

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<sup>2</sup> Although an "intrastate interexchange telecommunications company" is not a "telecommunications company" within the meaning of Section 364.02(13), Florida Statutes, many of the companies that provide intrastate interexchange telecommunications services also provide other services and thus are "telecommunications companies" within the meaning of that section.

commission deems necessary to fulfill its obligations under the law.

(2) The commission may perform management and operation audits of any regulated company except railroads. The commission may consider the results of such audits in establishing rates; however, the company shall not be denied due process as a result of the use of any such management or operation audit.

Reading these sections together, it is clear that the Legislature has given the Commission authority to obtain information from telecommunications companies and their affiliates to ensure that their rates are appropriate. Because the Commission and the parties are able to seek discovery from the IXCs, it is not necessary to join them as “indispensable parties.”

11. Moreover, there is no need to join the IXCs as “indispensable parties” because there is no reason to doubt that the IXCs will flow through the access reductions in accordance with the law. First, the IXCs are expressly required to flow through the access reductions by Section 364.163(2), Florida Statutes. Second, the Commission has continuing regulatory oversight over the flow through of access reductions pursuant to Section 364.163(3), Florida Statutes. Third, the Commission has opened a docket to ensure that the IXCs comply with their statutory obligations (Docket No. 030961-TI), and Staff has issued a recommendation requiring that the IXCs file tariffs that will become effective concurrently with Verizon’s rate rebalancing tariffs.

12. In sum, it is not necessary to join the IXCs as parties, as AARP urges. The Commission and the parties have the means at their disposal to seek discovery from the IXCs, and the Commission has jurisdiction to ensure that the IXCs will comply with their statutory “flow through” obligations.

**D. The “Flow Through” Issue Is Not Properly Decided In This Proceeding**



13. AARP argues that the IXCs must be joined as “indispensable parties” so that the “flow through” issue may be resolved in this proceeding. Contrary to AARP’s contentions, that issue is properly decided in the separate docket (Docket No. 030961-TI) that was opened expressly to ensure that the IXCs correctly flow through the access reductions.

14. The Commission should not consider the “flow through” issue here because AARP has failed to demonstrate that it is an issue in this proceeding. In its Motion to Dismiss, AARP argues that it is necessary to consider the “flow through” issue in this proceeding because the Commission must consider whether granting the petition “will benefit residential customers.” That argument is erroneous. The Commission must consider whether granting Verizon’s petition “will remove current support for basic local telecommunications services that prevents the creation of a more attractive competitive local exchange market for the benefit of residential customers.” See Section 364.164(1)(i), Florida Statutes. Thus, the issue is whether granting the petition will remove current support for residential customers and thereby create a more competitive local exchange market for their benefit – not net overall benefits. Indeed, that is precisely what the Prehearing Officer ruled in Order No. PSC-03-1061-PCO-TL when he refused to enlarge the scope of the Commission’s consideration beyond that contemplated by the Legislature and rejected AARP’s (and Public Counsel’s) attempt to frame the issue as whether the ILECs’ rebalancing proposals will result in net overall benefits to residential ratepayers. Accordingly, the Commission should not consider the “flow through” issue in this proceeding because AARP has not demonstrated that it is an issue here.


15. In addition, the Commission should not consider the "flow through" issue in this proceeding because it would be impractical to do so. In short, it would be an arduous, if not impossible, chore to join the multitude of carriers that provide intrastate access services and determine how they intend to flow through the access reductions in the context of a 90-day proceeding. Contrary to AARP's contentions, it would be much more practical to consider this issue in the separate docket that has already been opened for that express purpose.

16. Finally, the Commission should not consider the "flow through" issue in this proceeding because the IXCs plans are necessarily speculative until after the ILECs' rate rebalancing plans are approved.

### III. CONCLUSION

17. For the foregoing reasons, the Commission should dismiss AARP's motion to dismiss.

Respectfully submitted on October 27, 2003.

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