

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Investigation of Vilaire Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange company certificate status in the State of Florida.

DOCKET NO. 080065-TX
DATED: MAY 5, 2008

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COMMISSION CLERK

STAFF'S RESPONSE TO VILAIRE COMMUNICATIONS, INC.'S

MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO COMPEL

AND REQUEST FOR ORAL ARGUMENT

Pursuant to Rules 25-22.060 and 28-106.204, Florida Administrative Code (F.A.C.), Staff files this response in opposition to the Motion for Reconsideration of Order Granting Motion to Compel ("Motion") filed by Vilaire Communications, Inc. (VCI) on May 2, 2008. As explained below, VCI fails to meet its burden to demonstrate a material and relevant fact or law that the Public Service Commission ("Commission") overlooked or failed to consider upon issuance of Order No. PSC-08-0258-PCO-TX ("Order"), on April 25, 2008. In support thereof, Prosecutorial staff states as follows:

Background

On February 13, 2008, the Commission issued Order No. PSC-08-0090-PAA-TX ("PAA Order"), which proposed the Commission rescind VCI's Eligible Telecommunications Carrier ("ETC") status and cancel VCI's CLEC Certificate. In response, VCI filed a Protest of PAA Order PSC-08-0090-PAA-TX, issued 2/13/08, and Petition for Formal Hearing ("Protest"). An issue identification ("Issue ID") was held between Prosecutorial staff and VCI, on March 13, 2008, where 11 tentative issues were identified and agreed to. An Order Establishing Procedure ("OEP") was issued on March 26, 2008, setting out the procedure for the Section 120.57, Florida Statutes (F.S.), hearing requested by VCI.

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Prosecutorial staff served discovery to VCI on March 31, 2008. On April 7, 2008, VCI filed its Objections to Prosecutorial staff's 1st set of Interrogatories (Nos. 1-38) and Production of Document Requests (Nos. 1-10) ("Discovery Objections"). VCI filed its Response to Prosecutorial staff's discovery requests on April 15, 2008, serving responses to only four of Prosecutorial staff's discovery requests. Prosecutorial staff filed its Motion to Compel VCI to respond to Prosecutorial staff's requests on April 22, 2008. As stated above, the Prehearing Officer issued an Order Granting the Motion to Compel on April 25, 2008.

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VCI's Request for Oral Argument

VCI's Motion for Reconsideration was accompanied by a Request for Oral Argument. Given that VCI's Motion for Reconsideration is insufficient on its face as a matter of law, Prosecutorial staff does not believe oral argument is appropriate. In addition, oral argument would not assist the Commission in rendering a decision. Based on the arguments set forth in VCI's Motion, Prosecutorial staff believes VCI's Request for Oral Argument is an attempt to argue the merits of its case. Consequently, Prosecutorial staff does not believe Oral Argument will aid the Commission in rendering its decision. Therefore, VCI's Request for Oral Argument should be denied.

VCI's Motion for Reconsideration

VCI's Motion for Reconsideration is nothing more than a shameless attempt to delay the ultimate resolution of this proceeding. VCI erroneously asserts that the Prehearing Officer based his Order on mistakes of fact and a misapplication of applicable law. In fact, in its Motion VCI simply re-argues its Discovery Objections, and ultimately exposes its true intention to needlessly delay resolution in this matter. For this reason alone, VCI's Motion should be summarily denied.

From the inception of the Commission's investigation into VCI's operation as an ETC and CLEC in the state of Florida, VCI has utilized delay tactics on several fronts, ranging from its reluctance to meet with Prosecutorial staff to its frivolous objections to Prosecutorial staff's discovery requests. In its March 5, 2008, protest letter of the PAA Order, VCI requested that this docket be set for a "Section 120.57(1), F.S. hearing to resolve the disputed issues of fact and law identified herein, and to allow VCI a full opportunity to present evidence and arguments as to why Order No. PSC-08-0090-PAA-TX should be rescinded." However, in its Motion, VCI now states that "VCI hereby provides notice to the Commission of its intent to file a motion, in due course, seeking dismissal of this proceeding on that ground, or in the alternative, abeyance pending resolution of the jurisdiction questions in Federal District Court under the concept that a motion to dismiss for lack of subject matter jurisdiction may be brought at any time."¹

First, as set forth in Prosecutorial staff's Motion to Compel, VCI should have requested that the Commission address jurisdiction as a threshold issue. Consequently, VCI incorrectly relies on this argument to support its objections to Prosecutorial staff's discovery requests. Furthermore, VCI's notice of its intention to file a Motion to Dismiss or Request Abeyance, while it seeks an appeal in Federal District Court is nothing more than that, a Notice of Intent. More importantly, an appeal to Federal District Court would surely fail because there has yet be a final agency action upon which to appeal.

Rather than allow the Commission's PAA order to become final, VCI chose to protest the Order and request a hearing. Thus, because the PAA Order did not become a Final Order, as a

¹ VCI Motion at 3.

matter of law there have been no legal or factual findings by the Commission regarding VCI's operations as an ETC or CLEC in the state of Florida. This was clearly a calculated decision by VCI. Since the issuance of the PAA Order, VCI has received \$51,966.00 and \$53,461.00 in universal service funds from USAC for March and April for Florida. Now, after failing to respond to Prosecutorial staff's discovery requests, VCI has stated its intention to file a Motion to Dismiss or a Request for Abeyance pending a future appeal to Federal District Court. At best, VCI's Notice of Intent is a misunderstanding of applicable law and the status of this proceeding. At worst, it is a calculated attempt to delay resolution of this matter while it continues to receive funding from USAC for its operations as an ETC in the state of Florida. Until the Commission issues a Final Order setting forth its factual and legal findings, an appeal to Federal District Court would surely fail due to a lack of ripeness. Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967); accord, Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732-733, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998). In fact, Diamond Cab Co. et al., v. Wilbur C. King et al., 146 So. 2d 889 (Fla. 1962), a case cited by VCI in its Motion, sets forth that "[f]or the purpose of judicial review the administrative process is completed upon the rendition of the final order. . ."²

Prosecutorial staff does note that if VCI would like this matter addressed in Federal District Court, Prosecutorial staff would certainly not oppose VCI's withdrawal of its Protest and Request for Hearing. Thus allowing the Commission to issue an Order consummating its PAA Order as a Final Order, which would then be ripe for review by a court of competent jurisdiction.

Standard of Review

A motion for reconsideration must identify a point of fact or law that the Commission overlooked or failed to consider in rendering the order. In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers \$143 million, Order No. PSC-08-0136-FOF-EI, issued March 3, 2008. In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee, Order No. PSC-06-1028-FOF-EU, issued Dec. 11, 2006, citing Stewart Bonded Warehouse, Inc. v Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981); and State ex. Rel Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). This is the "sole and only purpose" of a motion for reconsideration, Green, 105 So. 2d at 818.

² Prosecutorial Staff notes that if the Commission were to entertain a Motion to Dismiss and appropriately find that the Commission does not lack subject matter jurisdiction, Prosecutorial staff would strongly oppose a stay of this proceeding pending the outcome of an appeal in recognition of the potential harm to Florida rate payers if VCI continued to receive universal service funds and the alleged misapplication of late payment fees.

In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Reconsiderations granted based on re-arguing facts and evidence available to the Commission at the time the Motion to Compel was granted is a reversible error on appeal. Stewart Bonded Warehouse, Inc. 294 So. 2d at 317-318.

Staff does not believe that VCI has identified a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Order Granting Staff's Motion to Compel. Although VCI refers the Commission to the proper standard for granting reconsideration, VCI's Motion fails to meet that standard. Rather, VCI simply re-argues its general and specific objections to Prosecutorial staff's discovery requests.

In fact, VCI's Motion reads more like a Response to Staff's Motion to Compel. A Response that VCI chose not to file after Advisory staff apparently notified VCI that it would need to file an expedited Response.³ As a result, VCI's Motion is nothing more than a re-hashing of VCI's objections to Prosecutorial staff's discovery and fails to identify any accurate information not already at the disposal for the Prehearing Officer to consider and reject. Accordingly, staff respectfully requests that VCI's Motion for Reconsideration be summarily denied.

Irrelevant or discovery outside the scope of this proceeding

Although staff believes that VCI's Motion fails to meet the standard for reconsideration, staff feels compelled to respond to certain inaccuracies and allegations leveled against Prosecutorial staff.

Prosecutorial staff takes great issue with VCI's erroneous allegation that staff's discovery is an attempt at fishing. VCI's assertion in its Motion that Prosecutorial staff appears to be "fishing" as the "most likely basis for these requests" is an inaccurate and gross mischaracterization of Prosecutorial staff's discovery requests. As discussed below, every discovery request served by Prosecutorial staff is relevant to the issues agreed upon by the parties and is reasonably calculated to lead to the discovery of admissible evidence.

Prosecutorial staff notes that parties have agreed to the following factual issues:

2. Did VCI provide Lifeline service to its Florida customers using a combination of its own facilities and resale of another carrier's services between June 2006 and November 2006?

³ VCI Motion at 4.

3. Did VCI correctly report Link-Up and Lifeline lines on USAC's Form 497 for reimbursement while operating as an ETC in Florida in accordance with applicable requirements?
4. (a) Does VCI provide toll limitation service to Lifeline customers using its own facilities?
 - (b) If so, is VCI entitled to obtain reimbursement for incremental costs of TLS?
 - (c) If yes, what is the appropriate amount of reimbursement?
5. Were late payment charges correctly applied to VCI Florida customer bills?
6. What is the appropriate refund amount for E-911 customer overbilling?
8. (a) Has VCI violated any FCC statute, rule or order pertaining to ETC status, or Lifeline and Link-Up service?
 - (b) If so, what is the appropriate remedy or enforcement measure, if any?
9. (a) Has VCI violated any PSC rule or order applicable to VCI pertaining to ETC status or Lifeline and Link-Up service?
 - (b) If so, what is the appropriate remedy, if any?
10. (b) If so, is it in the public interest, convenience, and necessity for VCI to maintain ETC status in the state of Florida?
11. (a) Has VCI willfully violated any lawful rule or order of the Commission, or provision of Chapter 364?
 - (b) If so, should VCI's competitive local exchange company certificate be revoked?

VCI alleges in its Motion that Prosecutorial staff seeks expansive discovery for purposes beyond this proceeding and cites to the Direct Testimony of Robert Casey. VCI is referring to Prosecutorial staff's assertion that VCI may also have violated Section 364.336, F.S. by not paying a correct regulatory assessment fee (RAF) because of VCI's incomplete information provided for the calculation of RAF fees. VCI also references where Prosecutorial staff witness Robert Casey states that:

"Based on my investigation which discovered double compensation being received for Lifeline and Link-Up, improper filings for TLS support, overbilling of E-911 fees, possible improper billing of late payment charges, erroneous

information contained on monthly customer billing, business telephone numbers receiving Lifeline credits, lack of support to reconcile revenues to Form 497 and the PSC's regulatory assessment fee return, and **possible other improprieties** which may be uncovered by staff's interrogatories and PODs, I believe that Vilaire no longer has the technical, financial, and managerial capability to provide CLEC service in the state of Florida. It [VCI] has violated the terms and conditions upon which its CLEC certificate was granted, and has violated Commission rules and orders." (emphasis added)

Issue No. 11 specifically requires the Commission to make a finding whether VCI has "willfully violated any lawful rule or order of the Commission, or provision of Chapter 364, F.S." Therefore, requesting information that will allow the Commission to consider whether VCI has accurately reported its annual revenue on the Commission's Regulatory Assessment Form is clearly within the scope of this proceeding. This is just one example of VCI's misleading arguments in opposition to Prosecutorial staff's discovery.

VCI argues that Prosecutorial staff has not properly informed VCI of "additional charges" and cites that "[a]n agency cannot find a defendant in violation on an issue not charged in the original complaint against the defendant".⁴ Prosecutorial staff notes that once protested, the PAA Order is no longer in effect. Consequently, staff signals its intent through the agreed-upon issues identified at the Issue I.D. Furthermore, the OEP specifically stated that "[t]he scope of this proceeding will be based upon these issues as well as other issues raised by the parties up to and during the Prehearing Conference, unless modified by the Commission."⁵

VCI's Billing

In its Motion, VCI's asserts that Prosecutorial staff did not notify VCI that it would be requesting all monthly bills since VCI was granted ETC status by the Commission. VCI's assertion is a blatant falsehood. Staff Witness Robert Casey is prepared to testify under oath or file an affidavit if the Commission so requires, that Prosecutorial staff's intentions to request all monthly bills was clearly expressed to counsel for VCI at the Issue ID and that there was never an indication that the request would be limited to VCI's billing of the 911 surcharge. Prosecutorial staff was not required to provide such notice, but chose to do so in order to provide as much advance notice as possible.

VCI further argues that Prosecutorial staff's request is not appropriately limited in scope. Prosecutorial staff is not aware of a better method to confirm the appropriateness of VCI's billing as an ETC than by reviewing all bills issued by VCI since its designation as an ETC. The monthly bills will provide a comprehensive understanding of VCI's operation as an ETC.

⁴ Motion at 15, citing to Willner v. Dept. of Prof. Reg., 563 So. 2d 805 (Fla. 1st DCA 1990).

⁵ OEP at 1.

Prosecutorial staff finds it ironic that in the same Motion where VCI complains that the Prehearing Officer should have waited for it to file its Response to Prosecutorial staff's Motion to Compel, it also asserts that "it seems unlikely that Prosecutorial staff could effectively review and synthesize in time for the June 6⁶ hearing the information from each and every one of VCI's thousands of bills issued over the 2-year period since VCI received ETC designation."⁷ The Commission is fully aware that in the regular course of business, members of Prosecutorial staff review a significant number of documents and bills related to the provisioning of telecommunications services in the state of Florida. In fact, Prosecutorial staff was fully aware that its request would yield thousands of bills and has already made preliminary plans to review VCI's bills in preparation for the June 4th hearing. Consequently, VCI's assertion should be given no weight.

Finally, with regard to the discussions that occurred between the parties prior to the filing of Prosecutorial staff's Motion to Compel, Prosecutorial staff disputes assertions made by Stanley Johnson in his Affidavit in Support of VCI's Motion. Mr. Johnson, states that the electronic billing was requested by Prosecutorial staff in a "downloadable" format. In fact, Prosecutorial staff simply offered to accept the bills in electronic format if available and easier for VCI. In addition, Mr. Johnson asserts that he hoped that "staff would agree to the production of a random sampling of bills" and that Prosecutorial staff did not "disclose the possibility of reducing the scope" of discovery. In fact, VCI informed Prosecutorial staff that it would not consider any electronic billing in lieu of paper records and did not inform Prosecutorial staff of any technical difficulty in providing the bills in electronic format. VCI also notified Prosecutorial staff that it would consider the possibility of a sampling of bills only if VCI could choose the bills to be provided. As discussed in the Commission's PAA Order, the Commission has previously noted suspicious similarities in the sampling of 130 bills previously provided to Commission staff by VCI. Therefore, in good conscience, staff could not agree to allow VCI to determine the billing sample to be provided.

Furthermore, Prosecutorial staff found that in dealing with local counsel, Prosecutorial staff incurred delays in receiving information in working toward resolution, especially important given the hearing time frame set forth in the OEP. Prosecutorial staff specifically requested local counsel to set up a teleconference with its client so that the parties could fully discuss VCI's objections. Prosecutorial staff was fully prepared to work towards an equitable resolution regarding the remaining data in dispute. However, Prosecutorial staff was informed by local counsel that VCI's corporate counsel did not feel that there was any reason to work with Prosecutorial staff directly and that working with local counsel should be sufficient. Prosecutorial staff determined that VCI had no intention to work out a compromise in good faith regarding Prosecutorial staff's discovery requests. Subsequently, in recognition of the need to receive VCI's bills and responses to additional discovery requests in a timely manner and VCI's

⁶ Prosecutorial staff notes that the hearing is actually scheduled for June 4, 2008.

⁷ Motion at 10.

apparent reluctance to work with Prosecutorial staff in good faith, Prosecutorial staff filed its Motion to Compel to prevent further unreasonable delay.

Privileged Information

In its Motion, VCI erroneously asserts that the Commission cannot inquire into the mechanics of VCI's business relationships with its underlying carrier or other third parties. VCI's assertion is a gross misunderstanding of applicable Florida law. Pursuant to Section 364.183, F.S.,

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. The commission shall also have access to those records of a local exchange telecommunications company's affiliated companies, including its parent company, that are reasonably necessary for the disposition of any matter concerning an affiliated transaction or a claim of anticompetitive behavior including claims of cross-subsidization and predatory pricing. The commission may require a telecommunications company to file records, reports or other data directly related to matters within the commission's jurisdiction in the form specified by the commission and may require such company to retain such information for a designated period of time.

Clearly, the Commission has authority pursuant to Section 364.183, F.S. to require VCI to provide any documents within the Commission's jurisdiction. As discussed above and in Prosecutorial Staff's Motion to Compel, it is not appropriate for VCI to allege the Commission lacks jurisdiction in order to avoid responding to Prosecutorial staff's discovery requests. VCI has failed to request that the Commission address the jurisdictional issues as threshold issues, and therefore, its assertion is nothing more than a transparent attempt to unreasonably delay this proceeding.

Additionally, VCI alleges in its Motion that Staff Interrogatory Nos. 11, 12, 13, and 33 and Production of Documents Request No. 9 are protected by the attorney work-product doctrine/attorney-client privilege. Rule 90.502(1)(c), Florida Rule of Evidence, defines the lawyer-client privilege as a confidential communication between lawyer and client that is not intended to be disclosed to third parties other than (1) those to whom disclosure is in furtherance of the rendition of legal services to the client and (2) those reasonably necessary for the transmission of the communication. VCI asserts that Prosecutorial staff requests information that contains attorney-client information, or "confidential communications made by an attorney in rendering legal services to a client." VCI further asserts that the information Prosecutorial staff requests includes fact work product, which is "information relating to a case and gathered in

anticipation of litigation”, and opinion work product, or “the attorney’s mental impressions, conclusions, opinions and theories.”⁸ Prosecutorial staff has made the following requests:

Interrogatories No.

11) Order FCC 07-148, released August 15, 2007, addressed duplicate USF reimbursements received by VCI and inaccurate Form 497 forms filed with USAC by VCI for the states of Oregon, Washington, and Minnesota. Has VCI returned excess reimbursements to USAC or filed revised Form 497 forms for any of these states?

12) Has VCI refiled any Florida Form 497 forms with USAC, or reimbursed USAC for any disbursements for Florida to date? If so, were the duplicate number of Link-Up lines claimed by VCI and discovered in staff’s audit corrected?

13) Were any Florida Form 497s revised on June 15, 2007? If so, please describe what necessitated the revisions and what were they?

33) Has VCI requested copies of VCI information which was provided to the PSC under subpoena from AT&T? If so, please describe when? If it was requested from AT&T, when did VCI receive the information?

Production of Documents No.

9) Provide copies of VCI’s June 13, 2007, June 21, 2007, and July 12, 2007 responses furnished to the FCC in response to the FCC Letters of Inquiry referenced in Order No. FCC 07-148 (¶ 10), released August 15, 2007, along with any other correspondence with the FCC regarding the allegations against VCI included in FCC 07-148.

Clearly, none of Prosecutorial staff’s requests would violate the attorney-client privilege or the attorney work product doctrine. Rather, Prosecutorial staff requests information provided to “third parties”, specifically, USAC in the course of VCI’s business as an eligible telecommunications carrier and information provided to the FCC. Prosecutorial staff further points out that VCI has failed to provide Prosecutorial staff or the Commission with any description of the nature of the documents, communications or things not produced or disclosed, as required by Rule 1.280(b)(5) of the Florida Rules of Civil Procedure.⁹ In fact, in its

⁸ Motion at 23.

⁹ Rule 1.280(b)(5), Florida Rules of Civil Procedure, sets forth that: When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things

Discovery Objections, VCI does not even raise the attorney-client and/or attorney work-product privilege for Interrogatory Nos. 12, 13, or 33,¹⁰ that it now adds as privileged in its Motion for Reconsideration.

List of Customer Names

In its Motion, VCI accuses Prosecutorial staff of “refusing” to provide it with the identifying information for those customers not correctly billed and that such information should have been produced pursuant to VCI’s public records request. VCI further asserts that as a result “it is unable to investigate Staff’s allegations, clean the company’s name or alternatively substantiate the allegations.” Prosecutorial staff vigorously disputes VCI’s claim that Prosecutorial staff “refused” to provide information regarding the VCI customers contacted by Commission staff. Prosecutorial staff did, in fact, provide the list of customers contacted by Commission staff to VCI in a red confidential folder accompanying VCI’s Public Records Request. Additionally, Prosecutorial staff’s concerns regarding VCI’s assessment of late payment fees was not solely based on the customers contacted, rather Prosecutorial staff’s concerns were triggered based on the observation that of the 130 sample bills provided by VCI, every bill included a late payment fee. VCI is very well aware of this fact.¹¹

Finally, Prosecutorial Staff, in the interest of full cooperation and disclosure, faxed an “additional copy” of the list of customers contacted from VCI’s 130 sample bills to local counsel around noon on May 2, 2008.

Duplicative Requests

In Response to VCI’s claims that Prosecutorial staff is in possession of certain material it has requested in Production of Document Requests Nos. 4, 5, and 7 and Interrogatory Nos. 1 and 12. VCI has made it abundantly clear in this proceeding that it intends to utilize any procedural or evidentiary tool at its disposal in order to frustrate the Commission’s consideration of this matter. Furthermore, as has been discussed in detail above, many of VCI’s claims are erroneous or misleading. Consequently, staff felt it necessary to request these materials and responses from VCI in anticipation of objections based on lack of proper authentication and/or hearsay. More importantly, Prosecutorial staff wanted to ensure that the materials it intends to offer into evidence were comprehensive and accurate. Such matters may have been resolved if VCI would have consented to a conference call with Prosecutorial staff to further discuss VCI’s objections.

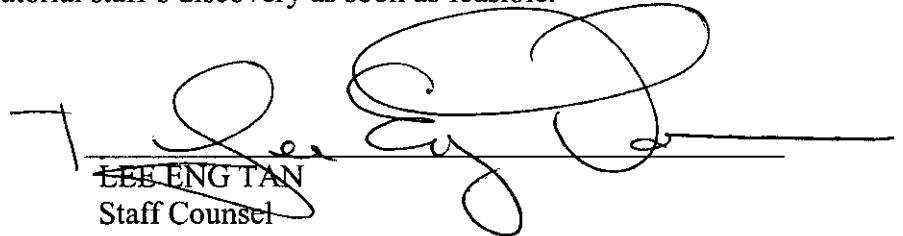
not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

¹⁰ Discovery Objections at pgs. 7 and 13.

¹¹ See Tuesday, February 14, 2008, Agenda Conference, Item 4 Transcript at 44.

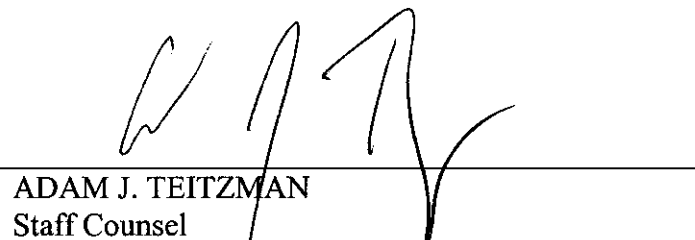
Conclusion

For the reasons set forth above, Prosecutorial staff respectfully requests that the Commission summarily deny VCI's Motion for Reconsideration and Request for Oral Argument and require VCI to respond to Prosecutorial staff's discovery as soon as feasible.



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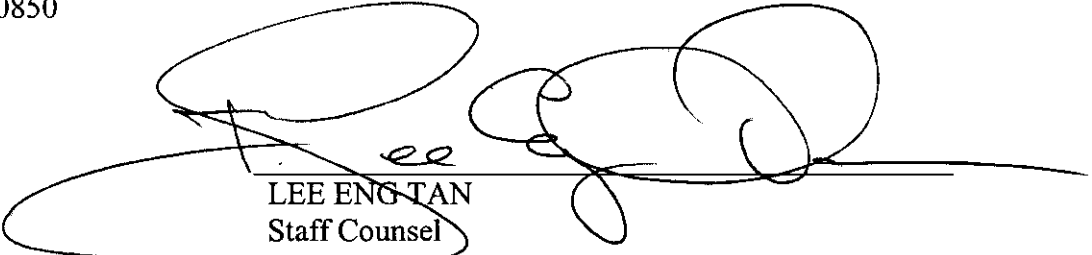
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five correct copies of RESPONSE IN OPPOSITION has 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 5th day of May, 2008:


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