

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Initiation of Show Cause Proceedings  
against GTE Communications Corporation  
(n/k/a Verizon Select Services Inc.) for  
Apparent Violation of Rule 25-4.118,  
F.A.C., Local, Local Toll or Toll Provider  
Selection

Docket No. 990362-TI  
Filed: October 29, 2001

**MOTION TO STRIKE TESTIMONY AND EXHIBITS**

Verizon Select Services Inc. ("VSSI") files this Motion to Strike Testimony and Exhibits, stating as follows in support thereof.

1. The Office of Public Counsel ("OPC") has filed the Direct Testimony, Rebuttal Testimony, and Supplemental Direct Testimony of R. Earl Poucher ("Poucher Testimony") in this proceeding.
2. The Poucher Testimony contains substantial segments that are hearsay evidence not within an exception to the hearsay rules set forth in section 90.802, F.S., and that are inadmissible opinion testimony. It is testimony that consists of opinions, inferences and speculations based entirely on raw documents produced in discovery by VSSI, or documents derivative from such documents, concerning whose preparation and authenticity or credibility the witness asserts and can assert no personal or direct knowledge. These segments of the Poucher Testimony, as indicated below, are not offered to supplement, corroborate or explain competent substantial evidence. They are, therefore, inadmissible and must be stricken.
3. Section 120.57(1)(c), F.S., provides that:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.
4. Under Rule 28-106.213, F.A.C., hearsay evidence may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rules found in Chapter 90, F.S.

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5. Although hearsay evidence is admissible in an administrative hearing to corroborate or explain other evidence, it may not be used to support a finding not otherwise supported by competent substantial evidence. *Spicer v. Metropolitan Dade County*, 458 So.2d 792 (Fla. 3d DCA 1984); *Pasco County School Bd. v. Florida Pub. Employees Relations Comm'n*, 353 So.2d 108 (Fla. 1st DCA 1977).
6. Witness Poucher does not represent himself to be other than a lay witness.
7. Section 90.701, F.S., provides that:

If a witness is not testifying as an expert witness, the witness's testimony about what he or she perceived may be in the form of inference or opinion when:

- (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
- (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

#### Direct Testimony

8. On page 4, lines 13-26, witness Poucher offers an opinion, or "clearly an educated guess" as he describes it, that the actual number of slamming incidents in a given case is 100 times the number of slamming complaints filed with the Commission. He provides no foundation for this opinion, which is conclusory, other than an allusion to testimony he was "prepared to give" in an earlier proceeding. This opinion is one requiring specialized knowledge. Moreover, it has the potential to mislead the Commission to VSSI's prejudice. It fails to meet the admissibility criteria of section 90.701, F.S. Thus, the cited testimony must be stricken.
9. On page 5, lines 9-26, page 6, lines 1-12, page 11, lines 11-18, page 12, lines 12-26, and page 13, lines 1-3, witness Poucher offers testimony based on Exhibit REP-1,

Exhibit REP-2, and Exhibit REP-3, which, by sheer extrapolation, purports that VSSI received some number of slamming complaints exceeding the number of complaints filed with the Commission. Each of the exhibits, which is a VSSI document produced in discovery or is derived from VSSI documents produced in discovery, is founded entirely on hearsay as defined in section 90.801(1)(c), F.S., *i.e.*, statements of one other than the witness offered in evidence to prove the truth of the matter asserted. Witness Poucher, who has no personal knowledge of how the underlying documents were prepared, is neither the custodian of those documents nor otherwise qualified to establish their authenticity or credibility. He offers no admissible evidence that these exhibits, which are nothing more than distilled presentations of hearsay evidence, or their underlying documents supplement or explain. Since they are only offered as support in themselves of the witness's allegation, they and the cited associated testimony must be stricken.

10. On page 6, lines 13-26, page 7, lines 1-7, page 10, lines 8-9, 11-13, page 13, lines 17-26, and page 14, lines 1-2 and lines 16-25, witness Poucher offers testimony based on Exhibit REP-4, Exhibit REP-11, and Exhibit REP-5, which, again by sheer extrapolation, purports to divine a Florida slamming experience from the national data in Exhibits REP-1, REP-2, and REP-3. The witness also speculates based on Exhibit REP-5 that Snyder committed some large number of forgeries and that a large number of Snyder sales people were let go for fraudulent conduct. These exhibits, which also are or are derived from VSSI documents produced in discovery, suffer the same hearsay and authentication and credibility infirmities as do Exhibits REP-1, REP-2, and REP-3. The witness offers no admissible evidence that these exhibits supplement or explain. They are only offered as support in themselves of the witness's allegation. They too and the cited associated testimony must be stricken.

11. On page 9, lines 8-20, page 10, lines 8-11, page 11, lines 11-22, witness Poucher offers testimony based on Exhibit REP-6, Exhibit REP-7, and Exhibit REP-12, which purports to establish some incidence of fraud and the volume of Snyder-related complaints. These exhibits, also VSSI documents produced in discovery, are like those already discussed. They suffer the same hearsay infirmities. They and the cited associated testimony must be stricken.

12. On page 13, lines 4-15, witness Poucher offers testimony based on Exhibit REP-13, which, once again by extrapolation, purports to establish a more significant Florida slamming experience than is recognized by the Commission. This exhibit, a VSSI audit produced in discovery, suffers as do all the exhibits already discussed and must, with the cited associated testimony, be stricken.

13. On page 15, lines 1-13, witness Poucher offers testimony based on Exhibit REP-14 and Exhibit REP-15, which speculates that an “estimate[d]” level of fraudulent slams is attributable to Snyder’s sales and commissions volumes. Not only does this testimony rely on documents of the same nature and with the same infirmities as all of those already discussed. It is also opinion testimony that fails the criteria of section 90.701, F.S. These exhibits also and the cited associated testimony must be stricken.

#### Rebuttal Testimony

14. On page 3, lines 23-26, page 4, lines 6-17, page 5, lines 3-13, and page 6, lines 2-10, witness Poucher offers testimony based on Exhibit REP-20 and Exhibit 21, which are summaries of information gleaned from VSSI documents produced in discovery or raw VSSI documents produced in discovery, purporting to establish a level of slamming violations in excess of that recognized by the Commission. Again, witness Poucher, who has no personal knowledge of how the VSSI documents underlying the summaries or the raw VSSI documents, which are hearsay, were prepared, is neither the custodian of the documents nor otherwise qualified to establish their authenticity or credibility. He offers no admissible evidence that these exhibits, which are nothing more than distilled presentations of hearsay evidence or hearsay evidence themselves, supplement or explain. Since they are only offered as support in themselves of the witness’s allegation, they and the cited associated testimony must be stricken.

15. On page 6, lines 18-26, page 7, lines 1-11 and 20-26, and page 8, lines 1-9, witness Poucher offers testimony based on Exhibit REP-22, Exhibit REP-23, and Exhibit REP-24, which purports to establish particular incidences as slams by forgery. These are VSSI investigative documents responsive to Commission inquiries also with all of the foregoing hearsay infirmities. The witness’s testimony is in addition opinion testimony that fails the criteria of section 90.701, F.S. These exhibits and the cited associated testimony must be stricken.

16. On page 9, lines 25-26, and page 10, lines 1-18, witness Poucher offers testimony based on Exhibit REP-26, which purports that VSSI was not forthright in its dealings with the Commission. The witness concludes that the documents establish a slam by forgery. The exhibit contains VSSI documents, obtained in discovery, responding to a particular complaint filed with the Commission. This exhibit, as hearsay, also suffers from all of the foregoing infirmities. The witness's testimony is in addition opinion testimony that fails the criteria of section 90.701, F.S. This exhibit and the cited associated testimony must be stricken.

17. On page 13, lines 9-23, and page 19, lines 3-6, witness Poucher offers testimony based on Exhibit REP-27, which purports once again to establish a level of violations greater than recognized by the Commission. The exhibit contains documents prepared by BellSouth. As before, witness Poucher, who has no personal knowledge of how these documents were prepared, is neither the custodian of the exhibited documents nor otherwise qualified to establish their authenticity or credibility. He offers no admissible evidence that this exhibit, which is hearsay, supplements or explains. Since it is only offered as support in itself of the witness's allegation, it and the cited associated testimony must be stricken.

18. On page 15, lines 12-25, and page 16, lines 1-23, witness Poucher offers testimony based on Exhibit REP-28, concluding that VSSI was focused inappropriately on revenue growth strategies and unmindful of regulatory violations. The exhibit contains documents that pertain to a meeting between VSSI and Snyder that of course Mr. Poucher did not attend. The witness, who has no personal knowledge of the substance of this meeting or how these documents were prepared, is neither the custodian of the exhibited documents nor otherwise qualified to establish their authenticity or credibility. He offers no admissible evidence that this exhibit, which is hearsay, supplements or explains. Since it is only offered as support in itself of the witness's allegation, it and the cited associated testimony must be stricken. The witness's testimony is in addition opinion testimony that fails the criteria of section 90.701, F.S.

19. On page 16, lines 19-23, the witness offers testimony based on Exhibit REP-15, which exhibit has been challenged in paragraph 13 above. It must be stricken together with the cited additional associated testimony.

20. On page 18, lines 1-24, the witness offers further testimony that is apparently derived from Exhibits REP-1, REP-2, REP-3, REP-5, REP-11, and REP-14, which have also been challenged above. The witness, however, here makes no explicit attributions to these exhibits. Nevertheless, since this testimony is unmistakably based on the cited exhibits, which are unredeemed hearsay evidence, it must be stricken as well.

Supplemental Direct Testimony

21. In his Supplemental Direct Testimony, witness Poucher offers testimony based on Exhibit REP-18. This testimony also purports to establish a level of violations greater than recognized by the Commission. The exhibit contains documents prepared by VSSI and produced in discovery. The documents are unredeemed hearsay and inadmissible for the reasons stated numerous times above. The exhibit is only offered as support in itself of the witness's allegation, and, therefore, it and the entire associated testimony, pages 3-6, must be stricken.

WHEREFORE, Verizon Select Services, Inc., requests that the Commission enter an Order striking the testimony and exhibits in this proceeding of Office of Public Counsel witness R. Earl Poucher, the Poucher Testimony, as identified in and for the reasons set forth in the foregoing.

Respectfully submitted,

  
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Patrick K. Wiggins  
Katz, Kutter, Haigler, Alderman, Bryant & Yon, P.A.  
106 East College Avenue, 12<sup>th</sup> Floor  
Tallahassee, Florida 32301  
(850) 224-9634 Telephone  
(850) 222-0103 Facsimile

Attorney for Verizon Select Services, Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Hand

Delivery this 29<sup>th</sup> day of October, 2001, to the following:

Mr. Lee Fordham  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Charles Beck  
Office of Public Counsel  
c/o The Florida Legislature  
111 W. Madison St., #812  
Tallahassee, FL 32399-1400

  
Patrick K. Wiggins