BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 2, 2008

VILAIRE COMMUNICATIONS, INC.'S MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO COMPEL

COMES NOW, VCI Company d/b/a Vilaire Communications, Inc. (hereinafter "VCI"), and files this Motion for Reconsideration ("Reconsideration") of the Prehearing Officer's order granting Staff's motion to compel ("Motion"), Order No. PSC-08-0258-PCO-TX ("Discovery Order"), issued April 25, 2008. VCI respectfully states that the Discovery Order must be reconsidered and reversed, because it is founded on mistakes of fact and misapplication of the pertinent law.

I. Background

This case arises from a Lifeline audit conducted by the Florida Public Service Commission staff ("Staff") between September and November 2007, culminating in an auditor's report issued November 19, 2007. VCI understands that, based on the audit findings, information obtained from both VCI and AT&T after the audit, and possibly other sources,[1] Staff formally presented its allegations and recommended penalties to the Commission, asking the Commission to initiate compliance proceedings against VCI. The Commission accepted Staff's recommendation and memorialized its decision in Order No. PSC-08-0090-PAA-TX, issued February 13, 2008. Thereafter, VCI timely filed its Protest of Proposed Agency Action and

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[1] On February 2, 2008, VCI filed a public records request seeking production of, in sum, all documents regarding complaints by Florida consumers against VCI, all documents relied upon by Staff in making its allegations in the recommendation, and all documents by and between Staff and third-parties.

Petition for Formal Hearing on March 5, 2008, pursuant to which this matter has been set for a Section 120.57, Florida Statutes, hearing. In accordance with the requirements of Cherry Communications, Inc. v. Deason, 652 So. 2d 803 (Fla. 1995), the Staff assigned to this case have now been bifurcated into Prosecutorial Staff and Advisory Staff.

In furtherance of the anticipated hearing schedule, the Prosecutorial Staff conducted an Issues Identification meeting in which VCI participated, as did Advisory Staff. During that meeting, the two parties to this proceeding, Prosecutorial Staff and VCI, reached an accord regarding the wording of the specific issues to be addressed in this proceeding. The Prehearing Officer subsequently issued the Order Establishing Procedure on March 26, 2008, which accepted those issues and set forth the procedural requirements and filing dates for this proceeding.

Thereafter, Staff served VCI with Interrogatories and Requests for Production of Documents ("Discovery Requests") on March 31, 2008, to which VCI filed timely objections and responses ("Discovery Responses"). Staff then filed a Motion on April 22, 2008, seeking to have discovery compelled by April 30. Order No. PSC-08-0258-PCO-TX ("Discovery Order") was issued on April 25, 2008, before VCI was able to provide its Response to the Motion.

Herein, VCI respectfully suggests that the Discovery Order must be reconsidered, because it is based upon factual inaccuracies, as well as mistakes regarding the application of Florida law. Had the Prehearing Officer had the benefit of VCI's response before he issued his Order, VCI believes it very likely that the Prehearing Officer would have reached different conclusions. By this Motion, VCI urges the Commission to recognize that fundamental fairness and due process require that the Discovery Order be revisited, and to find that VCI has sufficiently demonstrated herein that the mistakes of fact and law in the Order mandate that it be

reversed.

II. Standard of Review

The standard of review in Florida for reconsideration is whether or not the Commission, or in this instance, the Prehearing Officer, made a mistake of fact or law, or overlooked a point of fact or law, in rendering the decision in question. See Stewart Bonded Warehouse v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 362 (Fla. 1st DCA 1981).

III. Jurisdiction/Notice of Intent to Seek Relief

As a preliminary matter, VCI acknowledges that jurisdiction has been identified as an issue for resolution in this proceeding. In fact, VCI questioned the Staff regarding the Commission's authority to audit the Lifeline program as early as September 2007, but did not pursue the issue at that time in the interest of maintaining amicable discussions with Staff. In its Motion, Prosecutorial Staff claims that the Discovery Requests directly impact the issues in this proceeding because "...staff's requests seek information that is directly related to VCI's operations as an ETC." VCI continues to maintain that this Commission lacks subject matter jurisdiction to inquire into matters concerning VCI's operations as an ETC; consequently, 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 jurisdictional questions in Federal District Court.[2] The Discovery Requests that will be most directly impacted by VCI's motion to dismiss are those touching on, wholly or in part, VCI's operations as an ETC, specifically Interrogatory Nos. 2, 4, 5, 7, 8- 32, 35, 36 and 38 and Request

[2] Pursuant to Fl. R. Civ. P. 1.140, a motion to dismiss for lack of subject matter jurisdiction may be brought at any time.

Nos. 2, 3, 4, 5, 6, 7, 8 and 9. This Motion for Reconsideration also provides additional, alternative grounds upon which reconsideration of the Discovery Order may be based.

IV. Argument

A. ISSUANCE WITHOUT BENEFIT OF RESPONSE

As a threshold matter pertaining to the Order as a whole, VCI believes that the timing of the issuance of the Discovery Order was contrary to the plain language of Rule 28-106.204, Florida Administrative Code, and an abrogation of VCI's due process rights, resulting in a clear basis for reconsideration of the decision.

1. There Was No Compelling Reason to Grant Staff's Motion on Shortened Time.

Specifically, as set forth above, Prosecutorial Staff filed its Motion on April 22, 2008, seeking to have discovery responses compelled by April 30. The Discovery Order granting Staff's motion was issued just 3 days later, without benefit of VCI's response.[3] Under Rule 28-106.204, F.A.C., a response may be filed within 7 days, if time allows. The seventh day would have fallen on Tuesday, April 29. The only rationale offered in the Discovery Order for the expedited issuance without benefit of response was that this matter is set for hearing June 6, 2008, a full six weeks from the date the Order was issued. Likewise, as set forth in the Order Establishing Procedure for this proceeding, the discovery cut off date in this matter is not until May 22, 2008. As such, there is absolutely no compelling reason that the Discovery Order had to be issued on an expedited basis without allowing VCI to respond to the

[3] Local counsel for VCI was contacted on April 23 by Advisory Staff, who inquired as to whether VCI would be able to provide an expedited response. Staff indicated that an Order may be forthcoming in view of the date by which Prosecutorial Staff had asked for discovery to be compelled. Local counsel advised Staff that it would endeavor to provide its response on an expedited basis, but in view of the fact that VCI's testimony was due the following day, suggested that it would be difficult to provide the response any earlier than the following Monday, April 28. VCI was not given notice of a date by which a Response to the Motion would have to be filed in order to be considered. Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth., 795 So.2d 940, 948 (Fla. 2001)(Procedural due process requires fair notice and a real opportunity to be heard); see also Massey v. Charlotte County, 842 So.2d 142, 146 (Fla. 2d DCA 2003).

Prosecutorial Staff's Motion.

2. The Discovery Order Should Not Have Been Issued on Shortened Time Pursuant to the Florida Rules of Civil Procedure..

Furthermore, the Discovery Order fails to consider the applicability of Rule 28-106.206, F.A.C., which provides the basis upon which "...the prehearing officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay. . . ." Rule 28-106.206, F.A.C. specifically incorporates the requirements of Rules 1.280 through 1.400, Fl. R. Civ. P., providing that parties may obtain discovery by any means appropriate under those referenced rules.

VCI respectfully submits that the Prehearing Officer erred by overlooking Rule 28-106.206, and consequently, Rule 1.380, F.A.C., as well as the cases interpreting Fl. R. Civ. P. 1.380. Specifically, Fl. R. Civ. P. 1.380 requires that a party be provided "reasonable notice" that a party will seek an order compelling discovery. Courts have determined that this requirement contemplates a reasonable opportunity to be heard with regard to a motion to compel discovery, unless the party from whom discovery is being sought has altogether failed to respond or object to the subject requests. "Where those conditions are not met, Florida Rules of Civil Procedure 1.380(a) and 1.090(d) apply, requiring that the motion not be heard without proper notice." Waters v. American General Corp., 770 So. 2d 1275 (Fla. 4th DCA 2000), *citing* American Cas. Ins. Co. v. Bly Elec. Const. Serv., Inc., 562 So. 2d 825 (Fla. 4th DCA 1990)(quashing order compelling discovery, and remanding for hearing to entertain objections to interrogatories on the merits). VCI had properly and timely responded to Prosecutorial Staff's Discovery Requests by offering valid objections. Consequently, the Prehearing Officer erred by failing to allow VCI an opportunity to be heard with regard to its objections and the Motion.

In Conclusion, by issuing the Discovery Order prior to the 7 day period allowed by Rule

28-106.204(1), F.A.C., without allowing VCI time to respond and without otherwise identifying a date by which VCI needed to provide an expedited response in order to have it considered, a fundamental legal and factual error was created regarding the very issuance of the Order, because time did, in fact, allow for a response to the Motion. This alone constitutes a basis for reconsideration under the standard set forth in Diamond Cab.

B. DISCOVERY MUST BE APPROPRIATELY LIMITED IN SCOPE AND REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

As it pertains to the specific findings regarding the discovery in dispute, the Discovery Order references Rule 28-106.211, F.A.C., as the sole basis for the decision to reject VCI's initial Objections that the Prosecutorial Staff's Discovery Requests are irrelevant, and unlikely to lead to the discovery of admissible evidence (Interrogatory Nos. 1, 4 -13, 15 – 36, and 39, and POD Nos. 2 – 10). Likewise, the Order cites no additional authority or case law, other than Rule 28-106.211, for the decision to reject VCI's objections that Interrogatory Nos. 2, 30, and 32, and POD Nos. 1 and 10 are overly broad and unduly burdensome. The Order simply concludes, without support, that, "This Commission has consistently recognized that discovery is proper and may be compelled if it is not privileged and is, or likely will, lead to, relevant and admissible evidence." Discovery Order at p. 2.

VCI acknowledges that the scope of discovery is, indeed, broad. It is not, however, entirely without bounds. It is on this point that the Discovery Order errs. Specifically, the Discovery Order assumes that unless a privilege has been specifically asserted, then any information, regardless of scope, burden, or relationship to the issues in the case, is discoverable. That is simply not the law in Florida.

1. Unduly Broad and Burdensome Requests

Specifically, Rule 1.280(b)(1), Fl. R. Civ. P., provides that:

> [p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The scope of discovery under Florida rules may be considered liberal. However, this Commission has acknowledged that the Florida Rules of Civil Procedure do not permit unlimited discovery.[4] For example, discovery requests must be narrowly crafted to the issues of the case. Redland Co. v. Atl. Civ., Inc., 961 So. 2d 1004, 1007 (Fla. 3rd DCA 2007). The documents and information requested must be relevant to the subject matter of the case, and litigants are not entitled to "carte blanche" discovery of irrelevant material. Allstate Ins. Co. v. Langston, 655 So. 2d 91, 94, 95 (Fla. 1995). Furthermore, in reviewing Prosecutorial Staff's Discovery Requests for overbreadth and undue burden, the Prehearing Officer should consider the fact that, through the filed Testimony of Robert Casey, it is readily apparent that Prosecutorial Staff seeks expansive discovery for purposes beyond this proceeding. See Direct Testimony of Robert Casey at page 34, lines 15 – 23, and page 38, line 11.

[4] *In Re: Petition for arbitration of unresolved issues resulting from negotiations with Sprint-Florida, Inc. for interconnection agreement, by AT&T Communications of the Southern States LLC, Commission Order No. PSC-03-1014-PCO-TP, 2003 Fla. PUC Lexis 578 at p. 37.*

a. POD Request Nos. 1 and 10 and Interrogatory Nos. 2 and 32 are Not Appropriately Limited as to Scope and Time Period.

To this point, Staff's POD Request No. 1 seeks copies of all monthly bills since VCI became an ETC and Interrogatories Nos. 2 and 32, ask for an exhaustive analysis of these bills. Similarly, POD Request No. 10 seeks all remittance payments to FTRI for the 2-year period since VCI has been a designated ETC. These requests are expansive and unduly burdensome. Moreover, providing the full scope of the information requested does not appear necessary for proving up any issue in this proceeding.

Make no mistake, this process of providing all its monthly bills in Florida in paper format, pursuant to POD No. 1, would be burdensome to VCI due to the number of bills at issue over the time period requested.[5] Specifically, in order to respond to POD Request 1, VCI would have to incur an unreasonable amount of time, expense and effort to produce and copy between 18,000 and 25,000 paper bills issued to VCI customers over 18 months. Compliance with POD No. 10, copies of all FTRI payments over two (2) years, would be equally burdensome.

Furthermore, as has been communicated to Staff, VCI's billing system will not permit the download of bills into electronic format. To provide electronic copies, VCI would have to print out thousands of bills, scan them, and download the scans onto computer disks, a labor and time intensive process. (See Attachment 1, Affidavit of Stanley Johnson). Thus, the Order errs in its apparent acceptance of Prosecutorial Staff's assertion that providing the bills in electronic format would reduce the burden on VCI.

VCI further anticipates that the extensive analysis in Interrogatories No. 2 and 32 will entail substantial employee time. VCI is a small company with

[5] Discovery must be restricted in subject matter, scope and time. Life Care Ctrs. of Am. v. Reese, 948 So. 2d 830, 832 (Fla. 5th DCA 2007).

limited personnel. Thus, personnel assigned to the task of analyzing VCI's bills would be unable to perform duties necessary to the company's core business operations during the pendency of this project, to VCI's detriment.

Florida courts have quashed discovery orders permitting production of voluminous documents not limited in scope and time, finding such requests to be unduly oppressive, burdensome and overbroad. See, e.g., Union Fidelity Life Insurance Co. v. Seay, 378 So. 2d 1268, 1269 (Fla. 2d DCA 1979) (request for production of insurance documents, without limitation as to time or to the number of claims, amounting to 45,000 insurance policies, was unduly oppressive and burdensome) See also Redland Co. v. Atl. Civ., Inc., 961 So. 2d 1004, 1006-1007 (Fla. 3rd DCA 2007) (tax information was requested over an unreasonably broad time frame and wholesale turnover of documents without regard to issues was overbroad). Requiring VCI to produce and copy each and every bill issued since it became an ETC and each and documents regarding each and every FTRI payment, are likewise unduly oppressive and burdensome, and the Order errs in not recognizing that fact.[6]

b. The Prehearing Office Should Not Give Weight to Prosecutorial Staff's "Advance Notice"

The Discovery Order also seems to give weight to Prosecutorial Staff's mention that it had informed VCI at the Issues Identification meeting that it would be seeking the billing information, and that therefore, VCI "had as much notice as possible". Discovery Order at p. 2. While is undisputed that Prosecutorial Staff informed VCI that it would seek to discover VCI's bills, VCI's understanding at the time was that Prosecutorial Staff sought VCI's bills to confirm information already provided by VCI demonstrating its amendment of

[6] Furthermore, the request would be duplicative, at least in part, of information already supplied to Prosecutorial Staff through the audit process.

E911 billing errors. VCI was also of the understanding that an actual discovery request would be forthcoming in short order. VCI did not have the benefit of reading the actual discovery requests for billing information and understanding the full scope of the request, including the bill analysis requested, until a full two weeks later when Prosecutorial Staff actually served the Discovery Requests. Only then did VCI realize the difficulty it would have in providing the number of bills covered by the Discovery Requests and the related analysis sought.[7]

c. Discovery for the Purposes of "Fishing" for Other Possible Causes of Action is Improper

Requiring VCI to produce each and every bill since it became an ETC (and documents pertaining to FTRI payments) and extensively analyze information on the bills, is overly broad and unduly burdensome for the company for the reasons set forth above. Moreover, it seems unlikely that Prosecutorial Staff could effectively review and synthesize in time for the June 6 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. Consequently, one might reasonably assume that these extremely broad requests are interposed for either of two possible purposes: (1) to hinder VCI's ability to prepare for trial by seeking a "data dump;" and/or (2) to provide Prosecutorial Staff with a deep pool in which to "fish" for other violations apparently anticipated by Prosecutorial Staff -- whether at issue in this proceeding or not.

[7] When VCI received Prosecutorial Staff's Discovery Requests, it informed Prosecutorial Staff that providing all bills ever issued in Florida would be extremely burdensome, but that a sampling might be a more reasonable alternative. In response, Prosecutorial Staff indicated that it would consider what sort of sampling would be statistically valid. Prosecutorial Staff later informed VCI that a sampling would not be acceptable, but that it would accept the bills in electronic format as an alternative. VCI informed Prosecutorial Staff that its billing information could not be provided in true bill format, as viewed by customers, electronically, and that to provide bills, as viewed by customers, the bills would still have to be printed out electronically. VCI again suggested a sampling might be a reasonable alternative. VCI received no response until the Motion to Compel, wherein Prosecutorial Staff now seems to suggest that it might consider four (4) months worth of bills to be a reasonable alternative. It is unfortunate that this information was not conveyed to VCI prior to the filing of Staff's Motion to Compel, as it is likely that VCI would have agreed that four (4) months worth of bills was an acceptable resolution of the issue.

"Fishing," which appears to be the most likely basis for these requests, is entirely inappropriate. In fact, the courts have specifically found that discovery may not be so expansive as to authorize a "fishing expedition" through which a party could uncover "potential other causes of action." See, State Farm Mut. Auto. Ins. Co. v. Parrish, 800 So. 2d 706, 707 (Fla. 5th DCA 2001) (Discovery order quashed because judge expressly authorized fishing expedition).

d. POD Request Nos. 4, 5 and 7 and Interrogatory Nos. 1 and 12 are Unduly Burdensome because Duplicative or Equally Accessible to Prosecutorial Staff.

Other requests are also unduly burdensome, albeit for a somewhat different reason. Specifically, Prosecutorial Staff has already obtained the documents sought in POD Request Nos. 4[8], 5 and 7 either from VCI or from third-parties, as has been disclosed in documents produced in response to VCI's public records request. Furthermore, the definition of the term "resale" (Interrogatory No. 1) may be obtained as easily by Staff as VCI. VCI should not be required to produce duplicate documents or provide Staff with information it can easily obtain itself. Thus, as to these Discovery Requests, the Motion should have been denied.

With respect to documents in Staff's possession, VCI provided the Staff auditor with copies of invoices for Lifeline advertising (Request No. 4) and copies of FCC Forms 497 (Request No. 5) during the audit. As for Interrogatory 12 and Request No. 5, Prosecutorial Staff has already obtained and, upon information and belief, continues to receive copies of VCI's FCC Forms 497 directly from the Universal Service Administrative Company. Further, to the extent that POD Request No. 7 seeks copies of VCI's interconnection agreement and local wholesale complete agreement with ATT-Florida, VCI provided those documents to

[8] This tribunal should also note that whether VCI has advertised its Lifeline services is not an issue identified in this proceeding. As such the advertising invoices are irrelevant and the Discovery Order should be reversed on POD Request for this reason.

the Staff auditor, and the wholesale agreement currently is on file, under seal, with the Commission Clerk's Office.

Thus, for the foregoing reasons, the Discovery Order should be reconsidered and reversed as it pertains to Interrogatories Nos. 2 and 32, and POD Requests 1 and 10. The finding therein that these expansive discovery requests are allowable under Florida law is erroneous as a matter of law, and the assumption therein that Prosecutorial Staff's statements at the March 13 Issues Identification meeting served as sufficient "notice" of the full scope of discovery at issue in these requests constitutes a mistake of fact. As for Interrogatory Nos. 1 and 12, and POD Requests Nos. 4, 5, and 7, the Order errs in assuming that this information is not either readily available to Prosecutorial Staff or already in their possession and consequently failing to recognize that providing duplicative responses would be unduly burdensome.

2. Irrelevant Requests

While material need not be specifically relevant to a matter at issue in a proceeding in order to be deemed discoverable, material that is otherwise irrelevant must be reasonably calculated to lead to the discovery of admissible evidence in order to be deemed discoverable. Rule 1.280(b)(1), Florida Rules of Civil Procedure [emphasis added]. This simply means that there must be a readily apparent and "reasonably calculated" causal connection between the information sought and evidence relevant to the issues in the case. Calderbank v. Cazares, 435 So. 2d 377, 379 (Fla. 5th DCA1983). If the causal connection is not readily apparent, the party seeking discovery must point out the reasoning process using facts and inferences. Id. Arguments that irrelevant inquiries "might" lead to evidence that would be relevant to the issues of a case, and that would be admissible, are insufficient. Id. In other

words, it should not require a "leap of faith" to see how the information might lead to other, relevant information.[9]

a. Requiring all of VCI's Bills to Review 911 Surcharges is Overbroad in Scope and Not Reasonably Calculated to Lead to the Admissibility of Discoverable Evidence.

Specifically, Interrogatories 2, 30, and 32, as well as POD Requests 1 and 10, are not likely to lead to the discovery of admissible evidence on the 911 issue for the following reasons: 1) VCI has admitted overcharging customers the 911 surcharge; 2) VCI has submitted to Staff a spreadsheet disclosing the number of customers who overpaid the 911 surcharge and the amount of the overcharge; 3) VCI submitted a plan for refunding or crediting the customers who overpaid and 4) VCI responded in Interrogatory No. 14 that the company has compensated customers who overpaid the 911 fee. The 911 issue has been resolved and no further discovery is warranted. There is no rational basis for a discovery inquiry of this magnitude regarding an issue upon which VCI has already conceded culpability.

This is not an issue upon which VCI has offered a vigorous defense; thus, the scope of the request should be more appropriately tailored to confirming that VCI has satisfactorily resolved the issue. If this tribunal determines review of VCI's bills is necessary to verify that VCI has corrected the surcharge amount, Prosecutorial Staff can surely determine this fact by examining one or two recent bills for each county where VCI's customers reside.

[9] Furthermore, requests for irrelevant information and things, and requests that are unreasonably expansive in nature may be so burdensome as to constitute a departure from the essential requirements of the law causing irreparable injury and may be quashed on appeal. Life Care Ctrs. of Am., 948 So. 2d at 832-833.

b. No Causal Connection Has Been Established to Warrant Production of All of VCI's Bills on the Late Payment Charge Issue

These same requests are also not likely to lead to the discovery of admissible evidence on the late payment charge issue, nor has any causal connection been established. For instance, only one VCI customer has complained to the Commission that he was incorrectly assessed a late payment fee, and that customer is on record admitting that his payments were made after the payment due date. See Exhibit SJ2-A to the Direct Testimony of Stanley Johnson. While Prosecutorial Staff has alleged that VCI has incorrectly charged other customers,[10] Prosecutorial Staff has thus far refused to provide VCI with identifying information for those customers and such information should have been produced in response to VCI's public records request.[11] As a result, VCI is unable to investigate Staff's allegations, clear the company's name, or alternatively substantiate the allegations.[12] On the basis of deminimis complaints of record and the statements of unnamed sources and undisclosed facts, Prosecutorial Staff "thinks" that VCI is charging a late payment fee incorrectly. Prosecutorial Staff is, in essence, seeking information that "might" lead to relevant evidence without establishing any causal relationship. In other words, Prosecutorial Staff is on a "fishing expedition," which, as set

[10] Staff has never informed VCI of the exact number of customers it surveyed who claimed incorrect late payment fee billing.

[11] VCI's public records request submitted to the Commission on February 7, 2008, requested, in pertinent part, all documents regarding complaints by Florida consumers against VCI, all documents relied upon by Staff in making its allegations in the PAA, and all documents by and between Staff and third-parties. As VCI's customers are third-parties, Staff has alleged incorrect assessment of late fees, and a customer's statement concerning a billing error would be considered a complaint, VCI should have received any and all documentation about these alleged customers, including staff notes and e-mails, in response to the public records request.

[12] "In addition to *substantial* evidence to support a license revocation, the cases require that the accusation state with specificity the acts complained of, to allow the licensee a fair chance to prepare a defense." Davis v. Dept. of Prof. Reg., 457 So. 2d 1074 (Fla. 1st DCA 1984), *citing* Hickey v. Wells, 91 So.2d 206 (Fla. 1957).

forth herein, is inappropriate.[13] Thus, the Order erred as a matter of law in compelling VCI to provide this information.

If the Commission determines that some amount of information or documents sought by Interrogatories 2, 30, and 32, and POD Requests Nos. 1 and 10 are responsive on the late payment issue, the scope of the request should be narrowed significantly. Prosecutorial Staff should likewise be ordered to produce identifying information about those customers it believes have been mischarged by VCI, as should have done pursuant to the public records request.

c. Other irrelevant requests

In several instances, Prosecutorial Staff provided no rational explanation regarding the likelihood discovery sought would lead the discovery of admissible evidence. Consequently, the Order errs in relying on Prosecutorial Staff's arguments in compelling responses. Specifically, Interrogatory No. 6 and Request Nos. 8 and 10 seek a list of VCI's payments to ATT-Florida for service and corporate income tax returns for reconciliation with VCI's regulatory assessment fee form as well as information and documents regarding VCI's FTRI payments.[14] Neither VCI's regulatory assessment fees nor VCI's FTRI payments are at issue in this proceeding.[15]

Similarly, Interrogatory Nos. 11, 29(a), 35 and 36 and Request No. 9 seek information about VCI's operations in states other than Florida, as well as documents and information filed in

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[13] Supra at p. 8.

[14] In addition, VCI should not be compelled to comply with Request No. 10 because documents produced pursuant to VCI's public records request demonstrate that Staff requested and received directly from the FTRI administrator a report of VCI's payments to this fund and other documents. Because Staff has this information already in its possession and can easily obtain this information directly from the FTRI, VCI should not be compelled to produce these documents.

[15] Furthermore, in this compliance proceeding in which VCI's ETC designation and certificate are at stake, fundamental principles of fairness and due process would prevent Prosecutorial Staff from bringing any additional charges at this point in the proceeding without significant modifications to the schedule to allow VCI a full and adequate opportunity to respond to said charges. An agency cannot find a defendant in violation on an issue not charged in the original complaint against the defendant. Willner v. Dept. of Prof. Reg., 563 So. 2d 805 (Fla. 1st DCA 1990).

an FCC proceeding regarding VCI's operations in states other than Florida. VCI's operations in states other than Florida are not at issue in this proceeding and this Commission has no jurisdiction to inquire into VCI's operations in states other than Florida.

In addition, Interrogatory No. 9 and Request No. 7 request documents and information regarding VCI's business relationships with third-parties who have supplied or are supplying VCI with equipment or services. The quality or quantity of VCI's provision of service to its customers is not an issue identified in this proceeding. It was certainly not called into question in the Commission's PAA Order that initiated this proceeding. Furthermore, as is discussed below, the Commission is without jurisdiction to inquire into the details of VCI's business relationship with any third-party.

Interrogatory No. 34, which seeks information about VCI employees and subcontractors also should have been rejected on these same bases.[16] The information sought is not relevant or reasonably calculated to lead to the discovery of admissible evidence because the quality of work or the type of work performed by VCI's employees is not at issue. Furthermore, VCI employees are not parties and no employee other than Stanley Johnson is a witness in this proceeding. Prosecutorial Staff identified no causal relationship between this information and any issue in this proceeding. Instead, Prosecutorial Staff lumped this Interrogatory under its general argument that essentially says, all roads lead to Lifeline and Linkup issues. See, Motion at p. 3. It is simply unfathomable how information about VCI's employees and subcontractors can possibly lead to relevant, admissible information about VCI's provision of Lifeline and Linkup services.

[16] The Commission's inquiry into VCI employee functions is directly related to VCI's operations as an ETC and will be addressed in VCI's motion to dismiss. The fact that VCI provided limited information about its employees post-audit does not require VCI to provide additional information. Subject matter jurisdiction cannot be waived.

Finally, as to Interrogatory Nos. 2 and 32, these requests demand information about VCI customers' disconnect dates. Again, in the context of this proceeding, the requests are simply irrelevant, and unlikely to lead to the discovery of admissible evidence as to any issue identified in the Order Establishing Procedure. There is no identifiable causal relationship between the information sought and matters at issue, and one must stretch the imagination to come up with a rational relationship. These requests are simply further casts of the fly in Prosecutorial Staff's ongoing fishing expedition, and as such, should have been rejected by the Prehearing Officer.

Without benefit of VCI's arguments addressing these Discovery Requests, the Prehearing Officer accepted Prosecutorial Staff's assertions as to the relevance of Interrogatory Nos. 2, 6, 8, 9, 10, 11(a), 29, 32, 34-36, and 39, and POD Requests Nos. 7 and 9. As a direct result, the Order Granting Motion was in error as a matter of fact and law for the reasons set forth herein.

C. DISCOVERY BEYOND THE SCOPE OF THE COMMISSION'S INQUIRY AUTHORITY

Staff Interrogatory Nos. 4, 5, 6, 7, 8, 9, 10, 15-31, 34, 38 and 39, as well as POD Nos. 2, 3, 7 and 9 seek, *inter alia.*, copies of ATT-Florida bills to VCI, the number of lines purchased under a private contract with ATT-Florida, and details of the ongoing operations between VCI and ATT-Florida and VCI and other third-parties, including the USAC.[17] These Discovery Requests seek information that is beyond the reach of the Commission's inquiry, and thus, the information sought is not relevant nor is it reasonably calculated to lead to the discovery of admissible evidence. As such, the Prehearing Officer erred in compelling VCI to respond to these requests.

[17] VCI's objections to Interrogatory No. 6, request for payments made to ATT-Florida are addressed above to the extent that it relates to VCI's reporting of regulatory assessment fees.

1. The Legislature Has Passed No Law Authorizing the Commission to Regulate ETCs. Inquiry into VCI's ETC Operations are Beyond the Scope of the Commission's Inquiry Authority.

First and foremost, the Commission's jurisdiction is prescribed by the Florida Legislature. As set forth in Florida Public Service Commission v. Bryson, 569 So. 2d 1253, 1254-1255 (Fla. 1990):

> The PSC has the authority to interpret the statutes that empower it, including jurisdictional statutes, and to make rules and to issue orders accordingly. *PW Ventures, Inc. v. Nichols,* 533 So. 2d 281 (Fla. 1988). It follows that the PSC must be allowed to act when it has at least a colorable claim that the matter under consideration falls within its exclusive jurisdiction as defined by statute.

However, an "[a]dministrative agency has only such power as expressly or by necessary implication is granted by the legislative enactment." Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081, 1082 (Fla. 1st DCA 1995); State, Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So. 2d 787, 793 (Fla. 1st DCA 1982).[18] A reasonable doubt as to a power that is being exercised by the PSC must be resolved against such exercise. Lee County Electric Cooperative, Inc. v. Jacobs, 820 So. 2d 297 (Fla. 2002); City of Cape Coral v. GAC Utilities, 281 So. 2d 493, 496 (Fla. 1973); and Florida Bridge Co. V. Bevis, 363 So. 2d 799 (Fla. 1978).[19]

Specifically, nothing in Chapter 364 approximates Federal law regarding ETC operations, authorizes the Commission to adopt rules similar to, or permits the Commission to

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[18] Similarly, in speaking to the powers of federal agencies, the U.S. Supreme Curt has explained that:

> An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are unwilling and unable to do.

Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374, 375 (1986).

[19] For instance, the PSC was found not to have authority to address a private contractual matter in Teleco Communications Co. v. Clark, 695 So. 2d 304, 309 (Fla. 1997).

enforce the FCC's universal service rules relied upon by Prosecutorial Staff as the basis for their prosecution of this matter. A state agency is simply not authorized to take administrative action based upon federal statutes. Curtis v. Taylor, 648 F.2d 946 (5th Cir. 1986). State agencies only can act pursuant to federal law if the federal law contemplates that the state agency will act and there is a specific state statute allowing the state agency to take action. Louisiana Public Service Commission v. FCC, 476 U.s. 355, 374, 375 (1986). The Telecommunications Act of 1934, as amended, of which the Universal Service provisions are a part, is a jurisdictional scheme referred to as "cooperative federalism," whereby Congress specifically designated roles for the FCC and for state commissions. See MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 112 F. Supp. 2d 1286; *affirmed* by 298 F. 3d 1269 (11th Cir. 2002).

In this instance, Congress did not designate a role for the state commissions with regard to regulation of ETCs, including auditing and enforcing FCC universal service rules, regarding application for and disbursements from USAC under the Low-Income Program, nor did the Florida Legislature enact a law authorizing the Commission to do so. More than a reasonable doubt exists as to the Commission's authority to inquire into these matters. Thus, Prosecutorial Staff's pursuit of information regarding VCI's compliance with Federal Rules reaches beyond the scope of the Commission's authority, and consequently, beyond the scope of discovery as provided in Rule 1.280, Florida Rules of Civil Procedure, and Section 364.183, Florida Statutes.

2. This Commission Has No Authority to Inquire Into the VCI's Private Business Relationships with Third-Parties.

Furthermore, the Commission cannot unilaterally inquire into the mechanics of the business relationship between a competitive carrier and its underlying carrier. These parties' business relationship is governed, first, by the provisions of an interconnection

agreement. Section 364.162 F.S. grants the Commission authority to arbitrate disputes between parties to an interconnection agreement, if the parties cannot agree to the terms within 60 days and if the parties petition the Commission. The Commission also is authorized to arbitrate interconnection agreement disputes, if the parties so request, after the interconnection agreement is approved.[20]

In this case, VCI's interconnection agreement with ATT-Florida has been approved by the Commission and neither party to that agreement has requested arbitration. The fact is that once an interconnection agreement is approved, the ongoing implementation of the agreement and business operations of the parties in accordance with that agreement is akin to a private contractual arrangement, and is not subject to Commission general jurisdiction or oversight.

Furthermore, this Commission also has no authority whatsoever to inquire into business operations conducted pursuant to private contract, such as the local wholesale agreement or private contracts entered into between VCI and other third-parties.[21]

In sum, this Commission has not been granted authority to unilaterally inquire into the details of VCI's private business relationship with ATT-Florida and has no authority to inquire into VCI's business relationships with other-third parties. Thus, the Commission has no authority to compel the production of documents concerning those relationships.

3. As Jurisdiction is at Issue, the Discovery Order is in Error. A Motion to Dismiss for Lack of Subject Matter Jurisdiction May be Brought at Any Time.

While jurisdiction is, in fact, a specific issue identified for resolution on the Tentative Issues List attached to the Order Establishing Procedure, VCI has never committed,

[20] Fla. Stat. Section 364.162.
[21] See, e.g., Teleco Communications Co. v. Clark, 695 So. 2d 304 (Fla. 1997) and United Tel. Co. of Fla. V. Public Service Commission, 496 So. 2d 116, 118 (Fla. 1986).

nor was it asked, to refrain from seeking resolution of the jurisdictional question prior to hearing. In fact, VCI does intend to seek resolution of the jurisdictional question prior to hearing. Thus, the Discovery Order is in error to the extent that it compels discovery over the jurisdictional arguments that have been plainly raised on the basis that jurisdiction is an issue in the proceeding.

The fact of the matter is that the Commission is without jurisdiction to interpret and enforce Federal rules pertaining to Lifeline; consequently, Prosecutorial Staff has no right to discovery on these subjects. In pronounced support of this argument is the plain language of Section 364.183, Florida Statutes, which specifically says that the Commission shall have access to documents and records "reasonably necessary for the disposition of matters within the commission's jurisdiction." [emphasis added].

Furthermore, to the extent that any weight has been given in the Order to assertions by Prosecutorial Staff that a Motion or Petition on the jurisdictional question should have been raised prior to issuance of the Order Establishing Procedure, VCI emphasizes that Florida law is clear that jurisdiction can be raised at any time and may be properly asserted in a motion to dismiss. See Fla. R. Civ. P. 1.140(b).[22] Presentation of the question need not be posed at time deemed convenient by Prosecutorial Staff.

[22] As concisely set forth in In re: D.N.H.W., 955 So. 2d 1236, 1238 (Fla. 2nd DCA 2007): "Subject matter jurisdiction — the 'power of the trial court to deal with a class of cases to which a particular case belongs' — is conferred upon a court by constitution or by statute." Strommen v. Strommen, 927 So.2d 176, 179 (Fla. 2d DCA 2006) (quoting Cunningham v. Standard Guar. Ins. Co., 630 So.2d 179, 181 (Fla. 1994)). Parties cannot agree to jurisdiction over the subject matter where none exists, and the defense of lack of subject matter jurisdiction can be raised at any time. Cunningham, 630 So.2d at 181; Strommen, 927 So.2d at 179; Ruble v.Ruble, 884 So.2d 150, 152 (Fla. 2d DCA 2004). "A trial court's lack of subject matter jurisdiction makes its judgments void. . . ." Strommen, 927 So.2d at 179. Furthermore, "subject matter jurisdiction cannot be waived or conferred upon a court by consent or agreement of the parties." Williams v. Starnes, 522 So.2d 469, 471 (Fla. 2d DCA 1988).

To the same point, VCI also notes that this proceeding has been scheduled on an unusually expedited time frame. This was certainly not done at VCI's urging. Consequently, any delay that may result from VCI's anticipated filing of a Motion to Dismiss for Lack of Subject Matter Jurisdiction, or any similar federal court filing, is unavoidable in the context of a schedule that already has little room to spare and should not be interpreted as being interposed simply for purposes of delay, as suggested by Prosecutorial Staff at Footnote 7 to its Motion. Any reliance on these assertions by Prosecutorial Staff by the Prehearing Officer is rendering his decision to compel discovery over the jurisdictional objections is in error both as a matter of law and of fact.

For all these reasons, the Discovery Order as it relates to Staff Interrogatory Nos. 4, 5, 6, 7, 8, 9, 10, 15-31, 34, 38 and 39, as well as POD Nos. 2, 3, 7 and 9, is in error to the extent that it apparently accepts Prosecutorial Staff's assertions that jurisdiction is a matter for hearing and should not bar discovery of this information.

D. INFORMATION SUBJECT TO WORK-PRODUCT OR ATTORNEY-CLIENT PRIVILEGE.

Staff's Interrogatory Nos. 11, 12, 13 and 33 as well as Request No. 9 seek documents and information protected by the attorney work-product doctrine and/or the attorney client privilege. As such, this information is not discoverable. Thus, in accordance with the Prehearing Officer's directive in the Discovery Order at page 2, VCI hereby specifically sets forth its arguments regarding these assertions of protected information and described the information at issue.

Florida Rule of Civil Procedure 1.280 states, in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged.... ...[A] party may obtain discovery of documents and

> tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative...only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. ...Without the required showing a party may obtain a copy of a statement concerning the action or its subject matter previously made by that party.

The work product doctrine encompasses fact work product, *i.e.*, information relating to a case and gathered in anticipation of litigation, and opinion work product, *i.e.*, the attorney's mental impressions, conclusions, opinions and theories. Fact work product is discoverable upon a showing of need and undue hardship, but opinion work product is not subject to discovery. S. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1384 (Fla. 1994).

The attorney-client privilege protects from disclosure confidential communications made by an attorney in rendering legal services to a client. Id. at 1380. Communications between a corporate attorney and a corporate employee who personifies the corporation are protected by attorney-client privilege. Id. at 1381. A corporate employee personifies the corporation if he is in a position to control or take a substantial part in a decision about an action an attorney may advise the corporation to take. Id. The Commission is not entitled to unfettered access to a regulated company's confidential communications. Id. at 1382. Where a party seeks to abrogate a privilege claim, that party bears the burden to prove facts that would make an exception to the privilege applicable. Eight Hundred, Inc. v. Fla. Dep't of Revenue, 837 So. 2d 574, 576 (Fla. 1st DCA 2003).

Specifically, Interrogatory No. 11 and Request No. 9 seek specific documents and information concerning VCI's participation in an FCC proceeding. This information is protected by the attorney-client privilege and work-product doctrine and, thus, is not subject to discovery.

In Interrogatory No. 11, Prosecutorial Staff seeks information concerning legal advice proffered by VCI's attorney to the corporation in an ongoing administrative proceeding. Revealing this information would disclose VCI's attorney's mental impressions, conclusions, opinions and theories of this case. Communications between an attorney and client with respect to an ongoing proceeding are protected from discovery pursuant to the attorney-client privilege. VCI's opinion work product similarly is not discoverable.

Request No. 9 seeks copies of documents filed in response to the FCC's inquiries in that ongoing proceeding concerning VCI's operations in states other than Florida.[23] Because all responsive documents filed with the FCC were prepared in anticipation of litigation or trial, these documents constitute attorney work-product and are protected from disclosure thereby. Further, to the extent the FCC does not permit the public to inspect and copy VCI's filings, these documents are subject to the confidentiality rules of another tribunal and not subject to discovery. In the Motion, Prosecutorial Staff did not make the required showings of "need" for these documents and "undue hardship."

Similarly, Interrogatory Nos. 12 and 33 seek information concerning actions taken by VCI in relation to its case in this proceeding. This information is protected by the Attorney-Client privilege, as well as the attorney work-product doctrine. In this request, Prosecutorial Staff requests information regarding legal advice with respect to this case and that would disclose VCI's counsel's mental impressions, conclusions, opinions and theories of this case. VCI's opinion work product is protected from disclosure; thus, the Motion on this point should have been denied.

[23] VCI has addressed the relevance of information sought in Request No. 9 and whether such information is reasonably calculated to lead to discovery of admissible evidence elsewhere in this Response.

Prosecutorial Staff also seeks information, in Interrogatory No. 13, that would disclose whether and from whom certain information has been obtained by VCI in preparation for this case. This information is protected from disclosure by the work-product doctrine in that it seeks information pertinent to the strategy, timing, and related mental impressions of VCI's counsel in preparation for hearing. Thus, the Order errs in compelling a response that entails the disclosure of privileged information.

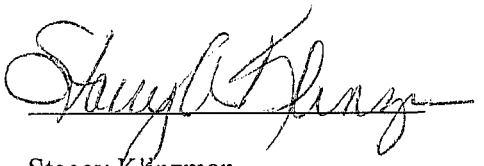
In accordance with the Prehearing Officer's direction on pages 2 and 3 of the Discovery Order, VCI has fully set forth its assertions of privilege, and respectfully asks that the Commission accept these assertions and not seek to further compel responses to this discovery. To do so would constitute a mistake of law and reversible error susceptible to an interlocutory appeal.

V. Conclusion

For all the foregoing reasons, VCI respectfully requests that the Commission grant VCI's Motion for Reconsideration of Order No. PSC-08-0258-PCO-TX to the extent that it seeks to compel VCI to respond to Interrogatories 1 – 13, 15 – 36, 38 and 39 and POD Requests Nos. 1 – 10. To the extent the Discovery Order allows VCI to more fully explicate its objections based upon privilege, VCI has now done so and respectfully asks that these be accepted and that VCI no longer be compelled to respond to Interrogatories 11, 12, 13, and 33 and POD Request No. 9.

[SIGNATURE NEXT PAGE]

Respectfully submitted this 2nd day of May, 2008.



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Attorneys for Vilaire Communications, Inc

ATTACHMENT 1

AFFIDAVIT OF STANLEY JOHNSON

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 2, 2008

AFFIDAVIT OF STANLEY JOHNSON IN SUPPORT OF VILAIRE COMMUNICATIONS, INC.'S MOTION FOR RECONSIDERATION

I, Stanley Johnson, President of VCI Company, doing business in Florida as Vilaire Communications, Inc., depose and state the following:

1. VCI Company is comprised of 13 employees located at the company's headquarters, 2228 S. 78th Street, Tacoma, Washington, 98409-9050. VCI provides local exchange service in 9 states including Florida.

2. Upon receipt of Staff's Request for Production No. 1 and Interrogatory No. 2, I estimated the number of documents involved, the availability of staff to be assigned to the project and estimated the time that staff would spend in complying with these requests.

3. I estimate that VCI has issued between 18,000 and 25,000 bills to Florida consumers since June 2006.

4. VCI's computer system will not permit the download of customer bills in electronic format. Bills are generated by the system to be printed out on paper only.

5. To produce bills in electronic format, VCI staff would be required to print out paper bills, scan these bills in portable document format onto a computer and download them onto computer disks. The process of doing so is labor intensive and time consuming.

6. I estimate that it will take VCI staff a minimum of one week to print out and organize the bills. I further estimate it will take three to four weeks for staff to review each bill and input the information required in Interrogatory No. 2 into an excel spreadsheet for review by Staff.

7. My staff's core business functions include serving VCI's customers in 9 states, resolving customer complaints, interacting with underlying carrier staff to facilitate delivery of service to customers, accounting functions such as posting customer payments for service and assembling and mailing bills to VCI's current customers.

8. Assigning staff to print-out or scan the number of bills in POD No. 1, organize and review them, and create an excel spreadsheet of the information required in Interrogatory No. 2 , will distract staff from their normal duties and interfere substantially with the company's core business functions, to the detriment of VCI's business.

9. It was my hope that Staff would agree to the production of a random sampling of bills, as audit staff did during the Commission audit conducted between September and November 2007. Staff, however, did not disclose the possibility of reducing the scope of POD No. 1 to four (4) months rather than eighteen (18) months until filing the Motion to Compel.

10. Reducing the number of documents requested and refining the scope of the analysis necessary on those documents will facilitate VCI's ability to comply with Staff's discovery requests in a reasonable amount of time in a manner greatly reducing the burden on its staff as well as the negative affect such the effort of compliance would have on VCI's core business.

[SIGNATURE NEXT PAGE]

Respectfully submitted this 2nd day of May, 2008.

Stanley Johnson, President

AFFIDAVIT

STATE OF WASHINGTON)
) ss: Tacoma
COUNTY OF PIERCE)
)

I hereby certify that on this 2nd day of May, 2008, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared Stanley Johnson , who is personally known to me, and who acknowledged before me that the information provided by him in the Affidavit of Stanley Johnson in Support of Vilaire Communications Inc.'s Motion for Reconsideration is true and correct to the best of his personal knowledge.

IN WITNESS WHEREOF, I have hereunto set my hand and seal in the State and County set forth above as of this 2nd day of May, 2008.

ALEXIS N. STECKLER NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 03-31-09

Alexis Steckler, Notary Public in and for the
State of Washington, residing at Pierce County.

My Commission Expires: 3-31-2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice has been served via Electronic Mail* to the persons listed below this 1st day of May, 2008:

Lee Eng Tan, Senior Attorney* Florida Public Service Commission, Office of the General Counsel 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 LTan@psc.state.fl.us	
Adam Teitzman, Supervising Attorney* Florida Public Service Commission, Office of the General Counsel 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 ateitzma@psc.state.fl.us	Beth Salak, Director/Competitive Markets and Enforcement* 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 bsalak@psc.state.fl.us

By: 

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