IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

VCI COMPANY D/B/A VILAIRE
Petitioner,

CASE NO. 1D08-_____

_____/

APPENDIX

VOLUME II

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

[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

[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.

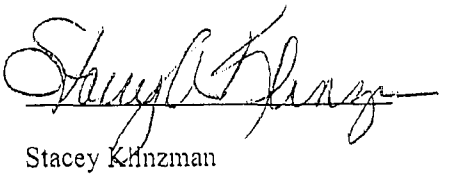
In accordance with the Prehearing Officer's direction on pages 2 and 3 of the Discovery Order, VCI has fully set forth its assertions of privilege, and respectfully asks that the Commission accept these assertions and not seek to further compel responses to this discovery. To do so would constitute a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

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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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

FLORIDA PUBLIC SERVICE COMMISSION

ADDENDUM

COMMISSION CONFERENCE AGENDA

CONFERENCE DATE AND TIME: Tuesday, May 6, 2008, 9:30 a.m.

LOCATION: Betty Easley Conference Center, Joseph P. Cresse Hearing Room 148

DATE ISSUED: May 5, 2008

NOTICE

Persons affected by Commission action on certain items on this agenda may be allowed to address the Commission, either informally or by oral argument, when those items are taken up for discussion at this conference. These items are designated by double asterisks (**) next to the agenda item number.

To participate informally, affected persons need only appear at the agenda conference and request the opportunity to address the Commission on an item listed on agenda. Informal participation is not permitted: (1) on dispositive motions and motions for reconsideration; (2) when a recommended order is taken up by the Commission; (3) in a rulemaking proceeding after the record has been closed; or (4) when the Commission considers a post-hearing recommendation on the merits of a case after the close of the record. The Commission allows informal participation at its discretion in certain types of cases (such as declaratory statements and interim rate orders) in which an order is issued based on a given set of facts without hearing.

See Rule 25-22.0021, F.A.C., concerning Agenda Conference participation and Rule 25-22.0022, F.A.C., concerning oral argument.

To obtain a copy of staff's recommendation for any item on this agenda, contact the Office of Commission Clerk at (850) 413-6770. There may be a charge for the copy. The agenda and recommendations are also accessible on the PSC Website, at http://www.floridapsc.com, at no charge.

Any person requiring some accommodation at this conference because of a physical impairment should call the Office of Commission Clerk at (850) 413-6770 at least 48 hours before the conference. Any person who is hearing or speech impaired should contact the Commission by using the Florida Relay Service, which can be reached at 1-800-955-8771 (TDD). Assistive Listening Devices are available in the Office of Commission Clerk, Betty Easley Conference Center, Room 110.

Video and audio versions of the conference are available and can be accessed live on the PSC Website on the day of the Conference. The audio version is available through archive storage for up to three months after the conference.

Addendum to the
Agenda for
Commission Conference
May 6, 2008

ITEM NO.	CASE
3A	**Docket No. 080065-TX** – Investigation of Vilaire Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange company certificate status in the State of Florida.

Critical Date(s): None

Commissioners Assigned: All Commissioners
Prehearing Officer: Skop

Staff: GCL: Gervasi
CMP: Dowds

(Decision on Motion for Reconsideration of Non-Final Order - Participation Dependent Upon Commission's Vote on Issue 1.)
Issue 1: Should VCI's Request for Oral Argument be granted?
Recommendation: Yes, the Request for Oral Argument should be granted. VCI and the prosecutorial staff should be allowed 10 minutes per side to address the Commission on the matter.
Issue 2: Should VCI's Motion for Reconsideration of Order No. PSC-08-0258-PCO-TX be granted?
Recommendation: No, the Motion for Reconsideration should be denied. VCI should be ordered to submit its full and complete responses to Staff's First Set of Interrogatories (Nos. 1-38) and First Request for Production of Documents (Nos. 1-10) by the close of business on Friday, May 9, 2008.
Issue 3: Should this docket be closed?
Recommendation: No, the docket should remain open pending the Commission's decision on the merits of the issues after a full evidentiary proceeding is conducted.

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 ORDER NO. PSC-08-0304-PCO-TX ISSUED: May 8, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

I. Background

By Order No. PSC-08-0090-PAA-TX, issued February 13, 2008, in this docket, we proposed to rescind Vilaire Communications, Inc.'s (VCI or company) eligible telecommunications carrier (ETC) status and to cancel its certificate (PAA Order). On March 5, 2008, VCI timely filed a protest of the PAA Order and a petition for formal hearing. Therefore, this matter is scheduled for a formal hearing on June 4, 2008. An Order Establishing Procedure, Order No. PSC-08-0194-PCO-TX, was issued on March 26, 2008, and included a Tentative List of Issues which is attached to this Order as Attachment A.

On March 31, 2008, our prosecutorial staff served its First Set of Interrogatories (Nos. 1-38) and First Request for Production of Documents (POD Nos. 1-10) on VCI (discovery requests). A copy of the discovery requests is attached to this Order as Attachment B. VCI timely filed general and specific objections thereto on April 7, 2008, and a partial discovery response on April 15, 2008, which was the due date for VCI to respond to the discovery requests. On April 22, 2008, prosecutorial staff filed a Motion to Compel Discovery (Motion to Compel), seeking full and complete responses to the discovery requests by 12 p.m. on April 30, 2008.

By Order No. PSC-08-0258-PCO-TX, issued April 25, 2008, in this docket (Discovery Order), the Prehearing Officer found that time did not allow for VCI to file a response in opposition to the Motion to Compel, granted the Motion to Compel, and required VCI to respond to the discovery requests within seven days of the issuance date of the Discovery Order, by May 2, 2008. On May 2, 2008, VCI instead filed a Motion for Reconsideration of the Discovery Order and a Request for Oral Argument. Prosecutorial staff filed a Response to the Motion for Reconsideration on May 5, 2008.

Because of the nature of the issues involved in this proceeding (see Attachment A), and the need for immediate resolution of the pending discovery dispute in order for the parties to fully prepare for the June 4, 2008, hearing, this item was added to our May 6, 2008, agenda conference pursuant to section 120.525(2), Florida Statutes (F.S.). This Order addresses VCI's Request for Oral Argument and Motion for Reconsideration, and prosecutorial staff's Response thereto.

II. Oral Argument

Pursuant to Rule 25-22.0022(1), Florida Administrative Code (F.A.C.), VCI filed its Request for Oral Argument by separate written request filed concurrently with its Motion for Reconsideration. VCI stated that oral argument would be beneficial in that the complexity of the Motion for Reconsideration was heightened by the fact that VCI was not provided an adequate opportunity to respond to the underlying Motion to Compel. VCI further stated that it could be beneficial for us to hear further explanation as to the difficulties associated with providing some of the information requested. VCI requested that parties be allowed 10 minutes per side to address us.

In their Response, our prosecutorial staff stated that they did not believe oral argument was appropriate, given that VCI's Motion for Reconsideration is insufficient on its face as a matter of law. The prosecutorial staff did not believe that oral argument would assist us in rendering a decision. Based on the arguments set forth in the Motion for Reconsideration, prosecutorial staff believed VCI's Request for Oral Argument was an attempt to argue the merits of its case and should be denied.

Rule 25-22.0022(3), F.A.C., provides that granting or denying a request for oral argument is within our sole discretion. We found that oral argument would be beneficial to us in our decision on the Motion for Reconsideration. We therefore granted VCI's Request for Oral Argument and allotted VCI and our prosecutorial staff ten minutes per side to address us on the matter.

III. Motion for Reconsideration

A. Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that we overlooked or failed to consider in rendering an Order.[1] This is the sole and only purpose of a motion for reconsideration.[2] Moreover, in a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.[3] Reconsiderations granted based on rearguing facts and evidence available to us at the time the Motion to Compel was granted is a reversible error on appeal.[4] A motion for reconsideration

[1] See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981).
[2] State ex. Rel Jaytex Realty Co. v. Green, 105 So. 2d 817, 818 (Fla. 1st DCA 1958).
[3] Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959) (citing State ex. rel. Jaytex Realty Co. v. Green, supra).
[4] Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317-318 (Fla. 1974).

should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." [5]

B. Motion for Reconsideration

1. Jurisdiction/Notice of Intent to Seek Relief

VCI acknowledges that jurisdiction has been identified as an issue for resolution in this proceeding. However, VCI maintains that we lack subject matter jurisdiction to inquire into matters concerning its operations as an ETC. In its Motion for Reconsideration, VCI "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." According to VCI, the discovery requests that are most directly impacted by such a motion to dismiss are Interrogatory Nos. 2, 4, 5, 7, 8-32, 35, 36, and 38 and POD Nos. 2-9.

2. Issuance of Discovery Order without Benefit of Response

The Discovery Order did not allow for VCI to file a response or otherwise identify a date by which VCI needed to provide an expedited response in order to have it considered. VCI argues that, therefore, a fundamental legal and factual error was created regarding the very issuance of the Discovery Order. VCI believes that the timing of the issuance of the Discovery Order was contrary to the plain language of Rule 28-106.204, F.A.C., and an abrogation of its due process rights. The Discovery Order was issued just three days after the prosecutorial staff filed its Motion to Compel, without the benefit of VCI's response thereto. VCI acknowledges that under Rule 28-106.204, F.A.C., a response may be filed within seven days, if time allows. VCI states that the only rationale offered in the Discovery Order for its expedited issuance was that this matter is set for hearing on June 4, 2008, a full six weeks from the date the Discovery Order was issued. The discovery cut off date in this matter is not until May 22, 2008. As such, VCI argues that there is no compelling reason that the Discovery Order had to be issued on an expedited basis without allowing VCI to respond to the Motion to Compel. Citing Keys Citizens for Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth.[6] and Massey v. Charlotte County,[7] VCI asserts that procedural due process requires fair notice and a real opportunity to be heard.

VCI further argues that the Discovery Order fails to consider the applicability of Rule 28-106.206, F.A.C., which specifically incorporates the requirements of Rules 1.280 through 1.400, Florida Rules of Civil Procedure, in providing that parties may obtain discovery by any means appropriate under those rules. According to VCI, the Prehearing Officer erred by overlooking Rule 28-106.206, F.A.C., and consequently, Rule 1.380, Florida Rules of Civil Procedure, as well as the cases interpreting it. Rule 1.380 requires that a party be provided "reasonable notice" that a party will seek an order compelling discovery. VCI states that courts have determined that this requirement contemplates a reasonable opportunity to be heard with regard to a motion to

[5] Id. at 317.
[6] 795 So. 2d 940, 948 (Fla. 2001).
[7] 842 So. 2d 142, 146 (Fla. 2d DCA 2003).

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."[8] VCI properly and timely responded to the prosecutorial staff's discovery requests by filing valid objections.

3. Burdensome or Overly Broad Discovery Requests

VCI argues that the Discovery Order concludes, without support, that "[t]his 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."[9] VCI argues that although the scope of discovery is broad, it is not entirely without bounds. VCI states that the Discovery Order errs by assuming that unless a privilege has been specifically asserted, any information, regardless of scope, burden, or relationship to the issues in the case, is discoverable. Discovery requests must be narrowly crafted to the issues of the case.[10] Furthermore, VCI states that page 34, lines 15-23, and page 38, line 11, of staff witness Robert Casey's prefiled direct testimony shows that prosecutorial staff seeks expansive discovery for purposes beyond this proceeding.

a. Interrogatory Nos. 2 and 32 and POD Nos. 1 and 10

VCI argues that POD Nos. 1 and 10 and Interrogatory Nos. 2 and 32 are overly broad. VCI states that providing the full scope of the information requested does not appear necessary for proving up any issue in the case. POD 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 No. 10 seeks all remittance payments to the Florida Telecommunications Relay, Inc. (FTRI) for the two-year period since VCI has been a designated ETC. The company states that the process of providing all of VCI's monthly bills in Florida in paper format would be burdensome due to the number of bills at issue over the time period requested. In order to respond to POD No. 1, VCI asserts that it 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. According to VCI, compliance with POD No. 10 would be equally burdensome. Moreover, VCI states that its billing system will not permit the download of bills into electronic format. VCI further states that 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.[11]

The affidavit of Stanley Johnson, VCI President, attached to the Motion for Reconsideration, attests to this. Mr. Johnson estimates that it will take VCI staff a minimum of

[8] 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)).
[9] Order No. PSC-08-0258-PCO-TX at p. 2.
[10] Redland Co. v. Atlantic Civil, Inc., 961 So. 2d 1004, 1007 (Fla. 3d DCA 2007).
[11] Union Fidelity Life Ins. Co. v. Seay, 378 So. 2d 1268, 1269 (Fla. 2d DCA 1979) (finding that tax information requested over an unreasonably broad timeframe and wholesale turnover of documents without regard to issues was overbroad). See also Redland Co. v. Atlantic Civil, Inc., supra, note 8, at 1006-1007.

one week to print out and organize the bills, and three to four weeks for VCI staff to review each bill and input the information requested in Interrogatory No. 2 into an excel spreadsheet for review by Commission staff. Mr. Johnson states that he hoped the Commission staff would agree to the production of a random sampling of bills. However, staff did not disclose the possibility of reducing the scope of POD No. 1 to four months until filing the Motion to Compel.

VCI argues that the Discovery Order seems to give weight to the prosecutorial staff's mention that it had informed VCI at the Issue Identification meeting that it would be seeking the billing information, and that therefore VCI "had as much notice as possible." VCI did not realize the difficulty it would have in providing the number of bills covered by the discovery requests and the related analysis sought until the prosecutorial staff served them.

VCI further argues that it seems unlikely that prosecutorial staff could effectively review and synthesize the information from each and every one of the thousands of bills sought by the discovery requests in time for the June 4, 2008, hearing. VCI argues that one might reasonably assume that the staff has propounded these extremely broad discovery requests either to hinder VCI's ability to prepare for the hearing by seeking a "data dump," or to provide the prosecutorial staff with a deep pool in which to "fish" for other violations apparently anticipated by the prosecutorial staff, whether at issue in this proceeding or not. VCI states that the courts have 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.[12]

b. Interrogatory Nos. 1 and 12 and POD Nos. 4, 5, and 7

VCI argues that the prosecutorial staff has already obtained the documents sought in POD Nos. 4, 5, and 7 either from VCI or from third parties, as staff disclosed to VCI in documents produced in response to a VCI public records request. Regarding Interrogatory No. 1, which requests VCI to define the term "resale," that definition may be obtained as easily by staff as VCI. VCI provided the staff auditor with copies of invoices for Lifeline advertising (POD No. 4) and FCC Forms 497 (POD No. 5). VCI asserts that prosecutorial staff has already obtained and continues to receive copies of VCI's FCC Forms 497 directly from the Universal Service Administrative Company (USAC) (Interrogatory No. 12 and POD No. 5). VCI provided copies of its interconnection agreement and local wholesale complete agreement with ATT-Florida to the staff auditor and the wholesale agreement is currently on file, under seal, with our Clerk's Office. (POD No. 7). The company states that providing duplicative responses would be unduly burdensome.

4. Relevancy

VCI argues that there must be a readily apparent and reasonably calculated causal connection between the information sought through discovery and evidence relevant to the issues in the case.[13] If the causal connection is not readily apparent, the party seeking discovery must

[12] See State Farm Mut. Auto. Inc. Co. v. Parrish, 800 So. 2d 706, 707 (Fla. 5th DCA 2001).
[13] Calderbank v. Cazares, 435 So. 2d 377, 379 (Fla. 5th DCA 1983).

point out the reasoning process using facts and inferences.[14] VCI states that 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.

a. Interrogatory Nos. 2, 30, and 32 and POD Nos. 1 and 10

VCI argues that there is no rational basis for the discovery requested by Interrogatory Nos. 2, 30, and 32 and POD Nos. 1 and 10 because the 911 issue has been resolved and no further discovery is warranted. VCI has admitted overcharging customers the 911 surcharge. VCI has submitted a spreadsheet to staff disclosing the number of customers who overpaid the 911 surcharge and the amount of the overcharge, as well as a plan for refunding or crediting the customers who overpaid. In response to Interrogatory No. 14, VCI stated that the company has compensated customers who overpaid the 911 fee. Because VCI has not offered a vigorous defense to the 911 issue, the company argues that the scope of the discovery request should be more appropriately tailored to confirming that VCI has satisfactorily resolved the issue. If the tribunal determines review of VCI's bills is necessary to verify that VCI has corrected the surcharge amount, staff could determine this fact by examining one or two recent bills for each county where VCI's customers reside.

VCI further argues that these requests are not likely to lead to the discovery of admissible evidence on the late payment charge issue, nor has any causal connection been established to warrant the production of all of its bills on the late payment charge issue. Only one VCI customer has complained to us that he was incorrectly assessed a late payment fee, and that customer admitted that his payments were made after the payment due date.[15] While prosecutorial staff has alleged that VCI has incorrectly charged other customers, staff has thus far refused to provide VCI with identifying information for those customers. VCI asserts that such information should have been produced by staff in response to VCI's public records request submitted to us on February 7, 2008, for, among other things, all documents regarding complaints by Florida consumers against VCI. The company states that prosecutorial staff seeks information that might lead to relevant evidence and is engaging in an inappropriate "fishing expedition."

VCI argues that if we determine that some amount of information or documents sought by these discovery requests is responsive on the late payment issue, the scope of the request should be narrowed significantly. Moreover, prosecutorial staff should be ordered to produce identifying information about those customers it believes have been mischarged by VCI, as should have been done pursuant to the public records request.

b. Interrogatory Nos. 6, 11, 29(a), 34, 35, and 36 and POD Nos. 8- 10

Interrogatory No. 6 and POD 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 (RAF) form, as well as information and documents regarding VCI's FTRI payments. VCI

[14] Id.
[15] See Exhibit No. SJ2-A to the prefiled direct testimony of Stanley Johnson.

states that neither VCI's RAFs nor its FTRI payments are at issue in this proceeding. Furthermore, it asserts that prosecutorial staff may not bring 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. It states that an agency cannot find a defendant in violation of an issue not charged in the original complaint against the defendant.[16]

c. Interrogatory Nos. 11, 29(a), 35, and 36 and POD No. 9

Interrogatory Nos. 11, 29(a), 35, and 36 and POD No. 9 seek information about VCI's operations in states other than Florida, as well as documents and information filed in an FCC proceeding regarding VCI's operations in states other than Florida. VCI argues that its operations in states other than Florida are not at issue in this proceeding and that we have no jurisdiction to inquire into VCI's operations in states other than Florida.

d. Interrogatory Nos. 2, 9, 32, and 34 and POD No. 7

Interrogatory No. 9 and POD No. 7 request information and documents regarding VCI's business relationships with third parties who have supplied or are supplying VCI with equipment or services. VCI argues that the quality or quantity of VCI's provision of service to its customers is not an issue identified in this proceeding, nor do we have jurisdiction to inquire into the details of VCI's business relationship with third parties.

Interrogatory No. 34 seeks information about VCI employees and subcontractors and VCI states that it should have been rejected for these same reasons. VCI argues that prosecutorial staff lumped this interrogatory under its general argument that essentially says that "all roads lead to Lifeline and Linkup issues."[17] VCI states that it is unfathomable how information about its employees and subcontractors can possibly lead to relevant, admissible information about its provision of Lifeline and Linkup services.

Interrogatory Nos. 2 and 32 request information about VCI customers' disconnect dates. VCI argues that there is no identifiable causal relationship between the information sought and matters at issue, and that these requests are simply further casts of the fly in the prosecutorial staff's ongoing fishing expedition.

5. Jurisdiction

Interrogatory Nos. 4-10, 15-31, 34, 38, and 39 and POD Nos. 2, 3, 7, and 9 seek, among other things, 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. VCI argues that nothing in Chapter 364, F.S., approximates Federal law regarding ETC operations, authorizes us to adopt rules similar to, or permits us to 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

[16] Willner v. Department of Professional Regulation, 563 So. 2d 805 (Fla. 1st DCA 1990).
[17] See Motion to Compel at 3.

administrative action based upon federal statutes.[18] Prosecutorial staff's pursuit of information regarding VCI's compliance with Federal rules reaches beyond the scope of our authority, and consequently, beyond the scope of discovery as provided in Rule 1.280, Florida Rules of Civil Procedure, and Section 364.183, F.S.

VCI also argues that we cannot unilaterally inquire into the mechanics of the business relationship between a competitive carrier and its underlying carrier. These parties' business relationship is governed by the provisions of an interconnection agreement. Section 364.162, F.S., grants us authority to arbitrate disputes between parties to an interconnection agreement if the parties so request. VCI asserts that, in this case, we have approved its interconnection agreement with ATT-Florida and neither party to that agreement has requested arbitration. It further asserts that the ongoing implementation of the agreement and business operations of the parties in accordance with it is not subject to our jurisdiction or oversight.

Further, VCI argues that it intends to seek resolution of the jurisdictional questions prior to the hearing. Thus, according to VCI, the Discovery Order is in error to the extent it compels discovery over the jurisdictional arguments that have been raised on the basis that jurisdiction is an issue in the proceeding. 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.[19] It states that any delay that may result from its anticipated filing of a motion to dismiss for lack of subject matter jurisdiction, or any similar federal court filing, should not be interpreted as being interposed simply for purposes of delay, as suggested by prosecutorial staff at Footnote 7 of its Motion to Compel. VCI argues that any reliance on these assertions by the Prehearing Officer in rendering the Discovery Order over VCI's jurisdictional objections is in error both as a matter of law and of fact.

6. Privilege

VCI argues that Interrogatory Nos. 11-13 and 33 and POD No. 9 seek documents and information protected by the attorney work-product doctrine and/or the attorney-client privilege, and as such, are not discoverable. In accordance with the Prehearing Officer's directive in the Discovery Order at page 2, VCI specifically sets forth its arguments regarding these assertions of protected information and describes the information at issue in its Motion for Reconsideration at pages 22-25.

In Interrogatory No. 11, prosecutorial staff seeks information concerning legal advice proffered by VCI's attorney to the corporation in an ongoing administrative proceeding. VCI argues that revealing this information would disclose its 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.

POD No. 9 seeks copies of documents that have been filed in response to the FCC's inquiries in an ongoing proceeding before the FCC concerning VCI's operations in states other

[18] Curtis v. Taylor, 648 F. 2d 946 (5th Cir. 1986).
[19] See Rule 1.140(b), Florida Rules of Civil Procedure.

than Florida. VCI argues that because they were prepared in anticipation of litigation, these documents constitute attorney work-product and are protected from disclosure. Moreover, VCI states that they are subject to the FCC's confidentiality rules and, in its Motion to Compel, staff did not make the required showings of "need" for these documents and "undue hardship."

Interrogatory Nos. 12 and 13 seek information concerning actions taken by VCI in relation to its case in this proceeding. Prosecutorial staff requests information regarding legal advice with respect to this case which would disclose VCI counsel's mental impressions, conclusions, opinions, and theories of this case. VCI argues that this information is protected by the attorney-client privilege, as well as the attorney work-product doctrine. VCI asserts that the Motion to Compel should have been denied on this point.

In Interrogatory No. 13, prosecutorial staff also seeks information that would disclose whether and from whom VCI obtained certain information in preparation for this case. VCI argues that 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 its counsel in preparation for the hearing. Thus, VCI asserts that the Prehearing Officer erred by compelling a response that entails the disclosure of privileged information.

VCI asks us to accept the foregoing assertions of privilege and not seek to further compel responses to this discovery. VCI argues that to do so would constitute a mistake of law and reversible error susceptible to an interlocutory appeal.

C. Prosecutorial Staff's Response to Motion for Reconsideration

1. Delay Tactics

Prosecutorial staff argues that VCI's Motion for Reconsideration is nothing more than an attempt to delay the ultimate resolution of this proceeding. In the Motion, VCI simply reargues its Objections to Staff's First Set of Interrogatories (Nos. 1-38) and Production of Documents (1-10) (Objections). VCI's Motion should be summarily denied for this reason alone, and VCI should be required to respond to prosecutorial staff's discovery as soon as feasible.

According to the prosecutorial staff, from the inception of our investigation into VCI's operations as an ETC and CLEC in Florida, VCI has utilized delay tactics on several fronts, ranging from its reluctance to meet with prosecutorial staff to its frivolous objections to the staff's discovery requests. VCI filed a protest to the PAA Order, yet now states that it will seek dismissal, or alternatively, abeyance of the proceeding pending resolution of our jurisdiction in Federal District Court. As set forth in the Motion to Compel, VCI should have requested that we address jurisdiction as a threshold issue. VCI incorrectly relies on this argument to support its Objections.

Moreover, prosecutorial staff argues that an appeal to Federal District Court would surely fail because there has yet to be a final agency action upon which to appeal. VCI made a calculated decision to protest the PAA Order. Therefore, as a matter of law, we have made no legal or factual findings regarding VCI's operations as an ETC or CLEC in Florida. Since the

issuance of the PAA Order, VCI has received $51,966 and $53,461 in universal service funds from USAC for March and April, respectively, for Florida. Until we issue a Final Order, an appeal to Federal District Court would surely fail due to a lack of ripeness. Ripeness is a judicial 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."[20] Prosecutorial staff would not oppose VCI's withdrawal of its protest and request for hearing to allow VCI to have this matter addressed in Federal District Court.

2. Relevancy

Prosecutorial staff takes great issue with VCI's erroneous allegation that staff's discovery is an attempt at fishing. 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. VCI alleges that prosecutorial staff seeks expansive discovery for purposes beyond this proceeding and cites to the direct testimony of Robert Casey filed in this case. VCI refers to prosecutorial staff's assertion that VCI may have violated section 364.336, F.S., by not paying a 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. [VCI] has violated the terms and conditions upon which its CLEC certificate was granted, and has violated Commission rules and orders. (emphasis added.)

Prosecutorial staff states that Issue 11 (see Attachment A) specifically requires us 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 us to consider whether VCI has accurately reported its annual revenue on the Commission's RAF Form is clearly within the scope of this proceeding.

VCI argues that prosecutorial staff has not properly informed VCI of "additional charges." 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 Identification meeting. Furthermore, page 1 of the Order Establishing Procedure specifically

[20] Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967).

states 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."

3. Burdensome or Overly Broad Discovery Requests

In its Motion, VCI asserts that prosecutorial staff did not notify VCI that it would be requesting all monthly bills since we granted ETC status to VCI. Prosecutorial staff disputes this assertion. Staff Witness Robert Casey is prepared to testify under oath or file an affidavit if we so require, that prosecutorial staff's intentions to request all monthly bills was clearly expressed to counsel for VCI at the Issue Identification meeting 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.

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 . . . 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."[21] Members of prosecutorial staff review a significant number of documents and bills related to the provisioning of telecommunications services in Florida. Prosecutorial staff states that it was fully aware that its request would yield thousands of bills and has already made preliminary plans to review those bills in preparation for the hearing.

Prosecutorial staff disputes assertions made by Mr. 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 PAA Order, we have previously noted suspicious similarities in the sampling of 130 bills provided to our staff by VCI. Therefore, in good conscience, staff could not agree to allow VCI to determine the billing sample to be provided.

[21] Motion for Reconsideration at 10.

Further, prosecutorial staff states that it incurred delays in receiving information from VCI's local counsel in working toward resolution of this matter. Prosecutorial staff 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. Subsequently, in recognition of the need to receive VCI's bills and responses to additional discovery requests in a timely manner, and VCI's apparent reluctance to work with prosecutorial staff in good faith, prosecutorial staff filed its Motion to Compel to prevent further unreasonable delay.

4. Privilege

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

> [t]he [C]ommission 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.

The prosecutorial staff argues that we clearly have authority pursuant to section 364.183, F.S., to require VCI to provide any documents within our jurisdiction. It is not appropriate for VCI to allege that we lack jurisdiction in order to avoid responding to prosecutorial staff's discovery requests.

VCI alleges that Interrogatory Nos. 11, 12, 13, and 33 and POD No. 9 are protected by the attorney work product doctrine/attorney-client privilege. Prosecutorial staff argues that section 90.502(1)(c), F.S. (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."

Prosecutorial staff argues that none of its discovery requests 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 ETC, and information provided to the FCC. Prosecutorial staff further points out that VCI has failed to provide prosecutorial staff or this 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), Florida Rules of Civil Procedure. In fact, in its Objections, VCI does not even raise the attorney-client and/or attorney work-product privilege for Interrogatory Nos. 12, 13, or 33 that it now adds as privileged in its Motion for Reconsideration.

5. 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 this claim. 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. Moreover, prosecutorial staff argues that its concerns regarding VCI's assessment of late payment fees was not solely based on the customers contacted. Rather, they 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.[22] Prosecutorial staff further argues that, in the interest of full cooperation and disclosure, staff 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.

6. Duplicative Requests

Regarding VCI's claims that prosecutorial staff is in possession of certain material requested in POD Nos. 4, 5, and 7 and Interrogatory Nos. 1 and 12, prosecutorial staff argues that it believed it necessary to request these materials and responses from VCI in anticipation of objections at hearing based on lack of proper authentication and/or hearsay. 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. Prosecutorial staff states that 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 our consideration of this matter.

[22] See February 14, 2008, Agenda Conference, Item 4, Transcript at 44.

D. Analysis and Ruling

1. Analysis

a. Jurisdiction/Notice of Intent to Seek Relief

VCI's "notice of intent" to file a motion to dismiss in this proceeding in Federal District Court has nothing to do with whether the Prehearing Officer overlooked or failed to consider a point of fact or law in rendering the Discovery Order. VCI acknowledges that jurisdiction is an issue for resolution in this proceeding. As such, the Prehearing Officer made no mistake of fact or law by compelling discovery on the issue of our jurisdiction.

b. Issuance of Discovery Order without Benefit of Response

VCI argues that the Prehearing Officer erred by failing to provide VCI an opportunity to file a Response to the Motion to Compel in advance of issuing the Discovery Order. We disagree. There is no legal requirement for the Prehearing Officer to have articulated a "compelling reason" to issue the Discovery Order on an expedited basis. Rule 28-106.204(1), F.A.C., provides that parties may file a response in opposition to a written motion within seven days of service thereof, when time allows. We have found that this Rule "suggests that there is no right to a response time at all when time does not allow for one."[23] The cases cited by VCI, Keys Citizens for Responsible Gov't and Massey,[24] involve whether procedural due process was accorded to adequately apprise interested parties of the pendency of a government action. As such, they are inapplicable here. Rule 28-106.211, F.A.C., which is applicable, provides that the presiding officer may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case. The Discovery Order at issue does just that.

VCI's reliance upon Rule 1.380(a), Florida Rules of Civil Procedure, in arguing that the Prehearing Officer erred in this instance is also misplaced. That rule provides that a party may apply for an order compelling discovery upon reasonable notice to other parties, which is precisely what the prosecutorial staff did here by serving a copy of the Motion to Compel on VCI. The Waters case that VCI relies upon in construing Rule 1.380 is also inapplicable.[25] In that case, the lower court ruled ex parte on a motion to compel. The petitioner did not attend the motion hearing because he claimed he did not receive notice thereof. The reviewing court found that ex parte orders compelling discovery may be entered pursuant to a specific local 17th Judicial Circuit rule only when certain conditions are met. The court found that otherwise, a motion may not be heard without proper notice.[26] The local 17th Judicial Circuit rules are

[23] Order No. PSC-04-1156-FOF-WS, at page 5, issued November 22, 2004, in Docket Nos. 020896-WS and 010503-WU, In re: Petition by customers of Aloha Utilities, Inc. for deletion of portion of territory in Seven Springs area in Pasco County; and In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc. (denying a motion for reconsideration and finding that it was within the Prehearing Officer's discretion to allow for a shortened response time in that instance).
[24] Supra, notes 4 and 5.
[25] Supra, note 6.
[26] Id.

inapplicable here. Moreover, in this case, the Motion for Reconsideration was considered at a duly noticed agenda conference at which parties were heard pursuant to our oral argument rule.

c. Burdensome or Overly Broad Discovery Requests

VCI argues that the Prehearing Officer erred by assuming that any information, regardless of scope, burden, or relationship to the issues in the case, is discoverable unless the information is privileged. The Prehearing Officer does not make that assumption; VCI does. The Discovery Order acknowledges 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. The Prehearing Officer did not find that the scope of discovery is so broad as to be entirely without bounds. VCI reads more into the language of the Discovery Order than what is there.

VCI further argues that pursuant to Redland Co., discovery requests must be narrowly crafted to the issues of the case.[27] The underlying dispute in Redland Co. involved an alleged breach of certain provisions of a settlement agreement. The reviewing court found that the challenged order was overbroad because it required the production of documents for certain years prior to the execution of the settlement agreement, and required "the wholesale turnover of documents without regard to the issues framed by the alleged breaches of [the paragraphs of the settlement agreement that were at issue in the case]."[28] The Discovery Order at issue here does not compel VCI to respond to discovery requests that are outside the scope of the issues. Issue 11 involves whether VCI has willfully violated any lawful Commission rule or order, or provision of Chapter 364. The discovery requests are tailored to address that issue, as well as the other issues identified by VCI and the prosecutorial staff. (See Attachment A)

With respect to VCI's remaining arguments that Interrogatory Nos. 2 and 32 and POD Nos. 1 and 10 are burdensome or overly broad because they are time-consuming and voluminous, VCI made those same arguments in its Objections. The Prehearing Officer considered VCI's Objections in rendering the Discovery Order. In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.[29] VCI's argument that it seems unlikely that prosecutorial staff could effectively review this information in time for the June 4, 2008, hearing underscores the necessity for the expedited issuance of the Discovery Order.

VCI's argument that Interrogatory Nos. 1 and 12 and POD Nos. 4, 5, and 7 are unduly burdensome because VCI has already provided the information is without merit. Stating when and how VCI or third persons previously provided the information to staff would have been a proper response to discovery. Nor did VCI state that the information was previously provided to staff in its Objections. The Discovery Order does not compel the production of documents or information that VCI has already provided or that staff already has in its possession. Therefore,

[27] Supra, at note 8.
[28] Id.
[29] Supra, at note 2.

the Prehearing Officer made no mistake of fact or law in the Discovery Order with respect to those discovery requests.

d. Relevancy

VCI argues that there is no rational basis for the discovery requested by Interrogatory Nos. 2, 30, and 32 and POD Nos. 1 and 10 because VCI has admitted to overcharging customers the 911 surcharge and because VCI has not offered a vigorous defense to the 911 issue. Nevertheless, the appropriate refund amount for 911 customer overbilling is an issue in the case. See Attachment A, Issue 6. Therefore, the Prehearing Officer did not err in requiring VCI to provide this information over VCI's Objections.

With respect to VCI's argument that prosecutorial staff should be ordered to produce identifying information about those customers it believes have been mischarged by VCI, as should have been done pursuant to VCI's public records request, a motion for reconsideration of a Discovery Order that is silent on this Commission's response to VCI's public records request is not the proper way to resolve the matter. The Prehearing Officer did not address the matter of the public records request, and the Discovery Order contains no mistake of fact or law with respect to it.

Regarding VCI's argument that Interrogatory No. 6 and POD Nos. 8 and 10 concern VCI's RAF and FTRI payments, which payments are not at issue in this proceeding, Issue 11 involves whether VCI has willfully violated any lawful Commission rule or order, or provision of Chapter 364. The discovery requests address that issue, as well as the other issues identified by VCI and the prosecutorial staff. See Attachment A. The Discovery Order contains no mistake of fact or law with respect to those discovery requests.

In its remaining arguments concerning relevancy and our jurisdiction to inquire into the details of VCI's business relationship with third parties, VCI expands upon the same arguments it made in its Objections. The Prehearing Officer considered VCI's Objections in rendering the Discovery Order. In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.[30]

e. Jurisdiction

VCI argues that because we lack jurisdiction to take administrative action based upon Federal law, VCI's compliance with Federal rules reaches beyond the scope of discovery. VCI expands upon the same arguments it made in its Objections on this point, and the Prehearing Officer considered these arguments in rendering the Discovery Order. In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.[31]

Further, VCI argues that it intends to seek resolution of the jurisdictional questions in Federal Court prior to the hearing. Filing a court action is certainly within VCI's rights.

[30] Supra, note 2.
[31] Supra, note 2.

Nevertheless, it has nothing to do with whether the Prehearing Officer erred in rendering the Discovery Order. The extent of our jurisdiction in the matter is identified in the issues of the case. See Attachment A.

f. Privilege

VCI argues that Interrogatory Nos. 11-13 and 33 and POD No. 9 seek privileged documents and information. VCI made this same argument in its Objections, but only with respect to Interrogatory No. 11. In its Response, the prosecutorial staff disputes VCI's assertions of privilege. This is a matter to be resolved by the Prehearing Officer. The Discovery Order at issue did not require VCI to divulge any information that VCI asserts is privileged, nor did the Prehearing Officer make any mistake of fact or law by requiring VCI to "describe the nature of the documents, communications or things not produced or disclosed," as required by Rule 1.280(b)(5), Florida Rules of Civil Procedure.

2. Ruling

For the foregoing reasons, VCI's Motion for Reconsideration of Order No. PSC-08-0258-PCO-TX is denied. VCI has failed to identify a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Discovery Order. VCI shall submit its full and complete responses to Staff's First Set of Interrogatories (Nos. 1-38) and First Request for Production of Documents (Nos. 1-10) by the close of business on Friday, May 9, 2008.

It is, therefore

ORDERED by the Florida Public Service Commission that Vilaire Communications, Inc.'s Motion for Reconsideration of Order No. PSC-08-0258-PCO-TX is denied. It is further

ORDERED that Vilaire Communications, Inc. shall submit its full and complete responses to Staff's First Set of Interrogatories (Nos. 1-38) and First Request for Production of Documents (Nos. 1-10) by the close of business on Friday, May 9, 2008. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 8th day of May, 2008.

ANN COLE
Commission Clerk

By: Hong Wang
Hong Wang
Office of Commission Clerk

(SEAL)

RG

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

ATTACHMENT A

Tentative List of Issues

1. Is the PSC authorized to audit an ETC's records for compliance with applicable Lifeline, Link-Up, and ETC statutes, rules, processes, procedures, and orders?

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. 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?

7. Does the PSC have the authority to enforce an FCC statute, rule or order pertaining to ETC status, Lifeline, and Link-Up service?

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.(a) Does the Commission have authority to rescind VCI's ETC status in the state of Florida?

(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?

ATTACHMENT B

STAFF'S FIRST SET OF INTERROGATORIES TO VILAIRE COMMUNICATIONS, INC. (NOS. 1-38)

INTERROGATORIES

1) Please provide a definition of the term "resale".

2) For the following request, please refer to each monthly bill provided in Production Of Documents Request No. 1.

   a. Please list the date payment was received from the customer for that bill. If payment was not received, list the disconnection date, if any, for that customer.

   b. Please list how many monthly bills provided include a late payment charge?

   c. Please list how many monthly bills provided include an incorrect 911 fee?

3) Please list the collection steps taken by VCI if a customer does not pay his monthly bill when due.

4) Did VCI use AT&T Wholesale Local Platform (WLP) lines (formerly UNEs) to provision any customers from June 1, 2006, through November 30, 2006? If so, please list how many WLP lines were purchased each month.

5) Please provide a spreadsheet showing by month the number of Wholesale Local Platform lines and the number of resale Lifeline lines VCI purchased from AT&T-Florida since becoming an ETC in Florida.

6) Please provide a schedule showing all monthly payments made to AT&T Florida. For each month show the amount paid to AT&T, the date the payment was made, and the reconciliation with the PSC's regulatory assessment form.

7) Has VCI been receiving a $10.00 credit from AT&T for each Lifeline resale line purchased from AT&T?

   a. Has VCI filed for and received reimbursement of $10.00 from USAC for any resale Lifeline lines purchased from AT&T?

8) Has VCI received a $23.00 credit from AT&T for Link-Up on Lifeline resale lines purchased from AT&T?

   a. Has VCI filed for and received reimbursement of $30.00 from USAC for any Link-Up for resale Lifeline lines purchased from AT&T?

9) When a VCI customer calls the 1-800 VCI number to obtain directory assistance, what database is used to provide the requested number? Please provide the name of the database provider and cost to VCI to use the database. VCI's price list on file with the PSC shows a $2.00 per call charge for directory assistance. Is this information current?

10) Does VCI claim pro rata amounts on USAC Florida Form 497 for Lifeline customers whose service is initiated during the month or whose service is disconnected during the month? If not, why not?

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?

14) Has VCI made any refunds to Florida customers for excess E-911 fees collected?

15) Does AT&T provide VCI with toll limitation service for each Lifeline resale customer at no charge to VCI?

For Request Nos 16-27, please refer to VCI's January 16, 2008, response to staff post-audit question number one.

16) In its January 16, 2008, response, VCI asserts that its incremental cost of TLS is calculated using a non-recurring equipment cost of $803,900 and a recurring cost of $17,142.50 per month. Since receiving ETC disbursements from USAC in January 2004, VCI has received $7,839,139 in TLS reimbursements from USAC for all states. A $17,142.50 recurring cost per month for 38 months (Jan 2004-February 2008) totals $651,415. Adding the non-recurring equipment cost of $803,900 totals $1,455,315. Please explain what the remaining $6,383,824 received from USAC by VCI for TLS was used for.

17) What is the physical location of all equipment listed in VCI's response to staff's post-audit question number one and which VCI asserts is used exclusively for toll limitation service?

18) Please define what the ESS-Phone switching system is and the functions it performs besides TLS?

19) Please define what the Inter-tel IP-Phone system is and the functions it performs besides TLS?

20) Please define what the Mercom-Monitoring & recording/computer system is and the functions it performs besides TLS?

21) Please define what a Main Computer router is and what functions it performs besides TLS?

22) Please explain the function of MPLS and how it is used to provide TLS.

23) Please define what the MPLS routers are and what functions they perform besides TLS?

24) Please define what the T-1s are and what functions they perform besides TLS?

25) What other functions do the four personnel (identified in response to post-audit question number one) perform besides TLS functions?

26) Please provide a spreadsheet showing the different allocation of TLS costs among each of the states where VCI is provided Lifeline service for the month of December 2007.

27) In its January 16, 2008 response, VCI provided the monthly investment to be recouped and the total customers needed per month to meet the goal. Please provide a spreadsheet showing how these costs were broken down by each state which VCI had ETC status in and identify how many of the customers were served through Lifeline resale lines and how many were served through WLP lines.

28) With regards to the AT&T toll restriction, which is provided to VCI for Lifeline customers, please respond to the following requests.

    a. Can a VCI Lifeline customer dial 411? If so, to whom is the customer connected?

    b. Can a VCI Lifeline customer dial 0+? If so, to whom is the customer connected?

    c. Can a VCI Lifeline customer dial 0 and receive an operator? If so, is it an AT&T operator, VCI operator, or other?

    d. Please provide a spreadsheet showing the amount of AT&T 411 charges and the amount of AT&T toll connection charges incurred on Lifeline accounts in Florida each month by VCI since becoming an ETC in Florida.

For following request, please refer to VCI's January 16, 2008, response to staff post-audit question number three.

29) In the January 16, 2008, response, VCI states that for December 2007, it invoiced 5,409 total VCI customers and 4,912 Lifeline customers. Did VCI have a total of 10,321 customers or a total of 5,409 customers and of those 4,912 were Lifeline customers?

    a. How many Lifeline customers did VCI have in December 2007 in all states where VCI is providing service?

For the following request, please refer to VCI's January 16, 2008, response to staff post-audit question number four.

30) In response to post-audit question number four, VCI states that it had overcharged the E911 fee on 17,817 access lines from August 2006 through January 2008. Payments to Florida Telecommunications Relay, Inc. from August 2006 through November 2007 show a total of 49,917 lines (not including September 2007 where no filing was made). Also, from June 2006 through November 2007, VCI claimed 77,188 lines on the Florida Form 497s filed with USAC. Please explain the discrepancies in the line numbers.

31) Has VCI claimed or received reimbursement from USAC for any Lifeline customers who did not have an active access line? If so, please explain why.

32) Please provide a spreadsheet showing for the time period June of 2006 through March 2008 (by month) the number of VCI Florida customers on the first of each month, the number of customers added each month and the number of customers disconnected each month since becoming an ETC in Florida. Also note whether or not these customers were Lifeline customers.

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?

34) Please provide a spreadsheet showing all employees on VCI's payroll, their job functions, and the location of their workplace. If sub-contractors are used to provide services, provide the name of the sub-contractor, the amount paid to the sub-contractor in 2007, and job functions they perform on behalf of VCI.

35) Please provide a spreadsheet showing:

    a. all states in which VCI has applied for ETC status;
    b. the date in which ETC status was approved if it was granted;
    c. which states VCI withdrew its request for ETC status and the reason why;
    d. which states VCI withdrew its ETC status and the reason why;
    e. which states where VCI has ETC petitions pending.

36) What is the present status of the FCC's Notice of Apparent Liability for Forfeiture and Order (FCC 07-148, released August 15, 2007)?

For the following request please refer to page 11, lines 2-3 of the February 12, 2008 agenda conference Item 4 transcript.

37) At the February 12, 2008 agenda conference, Mr. Johnson stated that "we do believe we have some wrongdoing." Describe what "wrongdoing" Mr. Johnson was speaking of.

For the following request please refer to page 41, lines 7-9 of the February 12, 2008 agenda conference Item 4 transcript.

38) At the February 12, 2008 agenda conference, Mr. Johnson stated that "...we bill no different than any of the other wireless carriers there. The billing system we developed comes from a Verizon, or AT&T." Please explain to what Mr. Johnson is referring.

For the following request please refer to page 41, lines 15-21 of the February 12, 2008 agenda conference Item 4 transcript.

39) At the February 12, 2008 agenda, Mr. Johnson stated that:

> "We are in a one-year contract, one-year agreement with every customer based on the FCC's rules, and we are not allowed to collect early on any of those customers until the year is up. So every single month whether the line is active or not, which there's no rules in the FCC rules that says the line has to be active. Every month they get a connection fee.

Has VCI claimed Lifeline reimbursement from USAC for any VCI customers who have signed a contract, but have no active service? If so, list the customers and any money claimed for reimbursement.

LEE ENG TAN
Senior Attorney
FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
(850) 413-6185

STAFF'S FIRST SET OF PRODUCTION OF DOCUMENTS TO VILAIRE COMMUNICATIONS, INC. (NOS. 1 - 10)

1) Please provide copies of all monthly bills for each VCI Florida customer since becoming an ETC in Florida.

2) Please provide invoices and proof of payment for all equipment asserted to be used exclusively for TLS (see post-audit response to question number one). If it is not shown on the invoice, list the brand and model number of each piece of equipment listed in response to staff post-audit question number one regarding TLS.

3) Please provide copies of all AT&T-Florida billing to VCI for from June 2006 through March 2008, since becoming an ETC in Florida.

4) Please provide invoices for all Lifeline advertising contracted and paid for in the state of Florida since becoming an ETC in Florida.

5) Please provide copies of all Form 497 forms filed with the Universal Service Administrative Company for Florida since becoming an ETC in Florida.

6) Please provide copies of any contracts between VCI and Lifeline customers, and any VCI contracts between VCI and non-Lifeline customers

7) Please provide any contracts or agreements from June 2006 through March 2008 with any vendors, agents or other parties that have supplied or are presently supplying equipment or services to VCI in or for the state of Florida.

8) Please provide VCI Florida corporate income tax returns for 2006 and 2007.

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.

10) Please provide copies of all FTRI payments and remittance forms for the Florida relay surcharge from June 2006 through March 2008.

LEE ENG TAN
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VCI
Company

P.O. Box 98907
Lakewood, WA 98496-8907
Phone: (800) 923-8375
Fax: (253) 475-6328

Via Electronic Mail

May 5, 2008

Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399

Re: Docket No. 080065-TX - Motion to Dismiss Proceeding for Lack of Subject Matter Jurisdiction or in the alternative to Abate Proceedings Pending Federal District Court Decision on Subject Matter Jurisdiction ("Motion to Dismiss")

Sir/Madam:

Attached for filing in Docket No. 080065-TX is Vilaire Communications, Inc.'s Motion to Dismiss filed pursuant to 28-106-204(1) F.A.C. and a Motion for Oral Argument. Electronic copies of these documents also have been served upon the individuals listed on the service lists attached to these documents.

As jurisdiction is a threshold matter in this case, VCI respectfully submits that the Commission may not rule on VCI's pending motion for reconsideration of the Commission's discovery order until it has investigated this matter. Before the Commission can rule on what documents and information the parties must provide pursuant to the discovery phase of this proceeding, it must be determined if, or to what extent, the Commission has jurisdiction over the issues to be adjudicated therein. Further, VCI respectfully submits that irreparable harm will result if the Commission orders VCI to submit documents and information on matters outside of the Commission's jurisdiction.

Sincerely,

VCI Company

Stacey A. Klinzman
Regulatory Attorney

Enclosures

CMP
COM
CTR
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SEC
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DOCUMENT NUMBER-DATE
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FPSC-COMMISSION CLERK

DOCUMENT NUMBER-DATE
03981 MAY 13 08
FPSC-COMMISSION CLERK

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 5, 2008

VILAIRE COMMUNICATIONS, INC.'S MOTION TO DISMISS PROCEEDING FOR LACK OF SUBJECT MATTER JURISDICTION OR IN THE ALTERNATIVE, TO ABATE PROCEEDINGS PENDING FEDERAL DISTRICT COURT DECISION ON SUBJECT MATTER JURISDICTION

Comes now, VCI Company, doing business in Florida as Vilaire Communications, Inc. ("VCI"), and, pursuant to Rule 28-106-204(1), moves the Florida Public Service Commission for an order dismissing this proceeding for lack of subject matter jurisdiction. Should the Commission choose not to dismiss this case, VCI moves this Commission for an order abating this proceeding pending the Federal District Court's decision regarding the Commission's jurisdiction to hear the subject matter of this proceeding.

I. EXECUTIVE SUMMARY

This proceeding arises out of Staff's interpretation and construal of the results of the Commission's audit of VCI's administration if the Lifeline and Link-Up program conducted between September and November 2006 and of responses to additional requests for information submitted by to Commission staff ("Staff") by VCI post-audit. In January, 2008, Staff recommended that the Commission take punitive action against VCI for alleged violations of federal law, federal rules, state statutes and Commission

rules[1], which recommendation was memorialized in the Commission's Notice of Proposed Agency Action issued February 13, 2008. The Commission seeks to rescind VCI's status as an Eligible Telecommunications Carrier and cancel its certificate to provide local exchange service as a competitive local telecommunications carrier ("CLEC Certificate")[2] on the basis of alleged violations of federal law and FCC rules governing ETCs. VCI protested the PAA Order and requested a hearing to resolve disputed issues of fact.[3]

The overarching issues in this case are 1) whether the Commission has the subject matter jurisdiction to disqualify VCI from participating in the federal universal service program and cancel VCI's CLEC Certificate based on alleged violations of the Communications Act of 1934, as amended (the "Act") and the FCC's ETC rules; 2) whether the Commission has the subject matter jurisdiction to disqualify VCI from participating in the federal universal service program and to cancel VCI's CLEC Certificate for alleged violations of the Florida law and Commission rules pertaining to universal service. In this proceeding, the Commission seeks to adjudicate issues regarding and compel discovery with respect to VCI's operations[4] as an ETC.[5]

---

[1] Among the rules and statutes cited in the Commission's order are: 47 C.F.R. § 54.201(d)(1), 47 C.F.R. § 54.201(i), § 364.10(2)(b), F.S., 47 C.F.R. § 54.201(c) and Section 214(e) of the Telecommunications Act of 1934, as amended (the "Act").

[2] In re: Investigation of Vilaire Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange carrier certificate status in the State of Florida, Docket No. 080065-TX, Order No. PSC-08-0090-PAA-TX ("PAA Order"), issued February 13, 2008.

[3] Vilaire Communications, Inc.'s Protest of Proposed Agency Action Order No. PSC-08-0090-PAA-TX Issued February 13, 2008 and Petition for Formal Hearing, filed March 5, 2008.

[4] VCI's operations as an ETC are operational duties VCI has with respect to its offering of Lifeline and Link-Up service pursuant to the Act and the FCC's universal service rules. Its operations as an ETC encompass the method by which it provides Lifeline and Link Up service to eligible Florida consumers and reporting to the Universal Service Administrative Company ("USAC") to obtain reimbursement for revenues foregone in providing Lifeline and Link-Up service. VCI is required to report using FCC form 497's solely pursuant to federal rules to obtain reimbursement from the federal universal service fund. The Florida Legislature has not enacted law creating a Florida state universal service fund.

Of immediate import is the Commission's Motion to Compel VCI to comply with discovery requests pertaining solely to VCI's operations as an ETC under the federal universal service program. These discovery requests seek, inter alia., copies of VCI's FCC Forms 497 and information regarding the company's methods of reporting data on those Forms 497, documents and information regarding VCI's provision of toll limitation service under the FCC's universal service rules, copies of documents certifying that VCI's customers are eligible for the federal universal service program, information as to the number of Lifeline and Link-Up customers served and the method of delivery of local service to those customers, and information regarding VCI's private business relationship with ATT-Florida with respect to the provision of Lifeline and Link-Up service.

VCI has filed a Motion for Reconsideration of the Commission's order compelling discovery on these matters. However, this Commission cannot rule on the Motion for Reconsideration, nor can Staff depose VCI's witness with respect to the Universal Service issues, until the Commission has determined its jurisdiction to consider

[5] Order Establishing Procedure in Docket No. 080065-TX, Order No. PSC-08-0194-PCO-TX, issued March 26, 2008 ("Procedural Order"), lists the following issues to be adjudicated with respect to VCI's operations as an ETC ("the Universal Service Issues"):

1. Is the PSC authorized to audit an ETC's records for compliance with applicable Lifeline, Link-Up, and ETC statutes, rules, processes, procedures, and orders?
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. 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. Does the PSC have the authority to enforce an FCC statute, rule or order pertaining to ETC status, Lifeline, and Link-Up service?
6.(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?
7(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?

these matters. Were VCI to be ordered to comply with the Commission's discovery requests prior to the determination of subject matter jurisdiction, VCI would be irreparably harmed. As the Florida Appellate Court stated in Redland, if discovery is wrongfully granted, the complaining party is beyond relief as it has no adequate remedy on appeal. *The Redland Co., Inc. v. Atlantic Civil, Inc.*, 961 So. 2d 1004, 1005 (Fla. App. 2007).

Upon a review of relevant law and regulations, as set forth below, VCI concludes that by its actions, the Commission has assumed authority not delegated either by the United States Congress under the Act, by the Florida state legislature under Florida law, or otherwise authorized by law. Thus, the Commission lacks jurisdiction over the issues of this case regarding the Universal Service Issues and should dismiss this case as to those matters.

If the Commission should decline to dismiss these proceedings as to the Universal Service Issues, VCI will file a complaint in Federal District Court for the Northern District of Florida requesting the court to adjudicate this issue. Accordingly, the Commission should abate this proceeding until the Federal District Court issues a ruling on the Commission's assumption of jurisdiction over the Universal Service issues.

II. BACKGROUND

VCI holds Competitive Local Exchange Carrier ("CLEC") Certificate No. 8611 and was designated an Eligible Telecommunications Carrier by the Commission on May 22, 2006 in Docket No. 060144-TX. The company provides local exchange service to Lifeline and Link-Up eligible Florida consumers, in accordance with federal law and Federal Communication Commission rules, in the service area of Bell South

Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast Florida ("AT&T").

The Lifeline program clarifies the Federal Communications Commission's ("FCC") and the states' commitments to making local exchange service universally available to consumers and is codified at Section 254 of the Communications Act of 1934, as amended. Lifeline service furthers the FCC's policy that consumers throughout the United States, including low-income consumers, have access to comparable telecommunications and information services at affordable rates. The Lifeline program requires that carriers designated as ETCs provide discounted local exchange service to consumers who participate in Lifeline eligible programs, such as food stamps, Section 8 and LIHEAP, and provide qualified consumers with a discount off of the carrier's service connection fee.

As an ETC, VCI passes through to eligible consumers the FCC mandated discounts off of local exchange service and the connection fee. VCI also is eligible to obtain reimbursement, pursuant to the FCC's rules, for revenues forgone in service Lifeline and Link-Up eligible consumers from the Universal Service Administrative Company ("USAC"), which administers the federal programs. VCI reports its foregone revenues on a monthly basis to the USAC on FCC Forms 497. VCI provides only Lifeline and Link-Up service and thus obtains reimbursement from the Low-Income Division of the USAC. VCI does not participate in the High-Cost funding program administered by the USAC.

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 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 an amicable working relationship with Staff. It is VCI's understanding that, based on the audit findings, information obtained from both VCI and AT&T after the audit, and possibly other sources,[6] 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 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

[6] 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.

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

On May 2, 2008 VCI filed its Motion for Reconsideration, respectfully suggesting that Order No. PSC-08-0258-PCO-TP must be reconsidered, because it is based upon factual inaccuracies, as well as mistakes regarding the application of Florida law. Before this case can move forward, indeed before the Commission can rule on VCI's Motion for Reconsideration of the Commission's Order regarding discovery, the Commission's jurisdiction over these matters must be determined.

III. STANDARD FOR MOTION TO DISMISS

A motion to dismiss for lack of subject matter jurisdiction may be brought at any time. *Fl. R. Civ. P 1.140(b).* Where, as here, a motion to dismiss questions the Commission's authority to hear the subject matter of a case, the Commission must determine whether it has subject matter jurisdiction regardless of whether the allegations in a complaint are facially correct.[7] If a motion to dismiss for lack of subject matter jurisdiction does not implicate the merits of a cause of action, a court must satisfy itself that it has the power to hear the case. *Garcia, M.D. v.Copernhaver, Bell & Associates, M.D.'s,* 104 F3d 1256, 1261 (11th Cir. 1997). Neither the truthfulness of allegations nor the existence of disputed facts are relevant to an adjudicatory body's evaluation of whether it has subject matter jurisdiction. *Id.*

[7] *See, In re: Request for arbitration concerning complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes,* Docket No. 001097-TP, Order No. PSC-02-0484-FOF-TP issued April 8, 2002.

It is well settled that the Commission must possess jurisdiction over the parties as well as the subject matter. *Keena v. Keena,* 245 So. 2d 665, 666 (Fla. Dist.Ct. App. 1971. Subject matter jurisdiction arises by virtue of law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence. *Jesse v. State,* 711 So. 2d 1179, 1180 (Fla. 2nd Dist. Ct. App. 1998. Subject matter jurisdiction is the power to hear and determine a cause. *Fla. Power & Light Co. v. Canal Auth.*, 423 So. 2d 421, 424 (Fla. App. 5th Dist. 1982). A complaint is properly dismissed if the Commission is asked to address matters over which it has no jurisdiction or if it seeks relief that the Commission is not authorized to grant. *See, Order No. PSC 01-02178-FOF-TP.*

IV. ARGUMENT

A. NEITHER THE UNITED STATES CONGRESS NOR THE FCC CAN CONFER JURISDICTION UPON THE COMMISSION TO ADMINISTER THE FEDERAL UNIVERSAL SERVICE PROGRAM. THIS COMMISSION IS WITHOUT SUBJECT MATTER JURISDICTION UNDER FEDERAL LAW TO ADJUDICATE THE UNIVERSAL SERVICE ISSUES AND SHOULD DISMISS THIS CASE.

The Commission submits that in addition to the authority to designate ETCs, state commissions also "possess the authority to rescind ETC designations for failure of an ETC to comply with the requirements of Section 214(e) of the Telecommunications Act or any other conditions imposed by the state."[8] However, the United States Congress cannot neither confer jurisdiction upon nor require the Commission to adjudicate federal law pertaining to the federal universal service program. Congress also cannot confer jurisdiction upon or require a state commission to apply the provisions of federal law or

[8] PAA Order, P. 8, citing *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Released March 17, 2005, FCC 05-46 (¶ 71-72) ("March 2005 Order") as authority therefor.

the FCC's universal service rules upon state regulated carriers. The Commission obtains its powers and duties solely from the Florida Legislature pursuant to statute. Further the FCC has no authority to *subdelegate* duties and obligations conferred to it by Congress to any state commission. The upshot is that this Commission has no authority with respect to the ETCs or federal universal service fund other than that which the Florida Legislature has conferred upon it. Thus the Commission has no jurisdiction pursuant to the Act or FCC Orders to apply federal law as to or the FCC's federal universal service rules against VCI.

1. Congress Did Not Specify a Role for State Commissions with Respect to ETCs other than Designation thereof and Permitting ETCs to Relinquish Their Designations.

   a. In the Act, a State Commission's Primary Role is to Designate ETCs. State Commissions Also May Permit ETCs to Relinquish their Designations. Regardless of the Act's provisions, Congress Cannot Constitutionally Mandate State Commissions to Do Anything.

47 USC Section 214(e)(2) sets forth a state commission's primary responsibility with respect to universal service, namely designation of ETCs:

> ...A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1)....

The Act also provides for a state commission to permit an ETC to relinquish its designation under 47 U.S.C. § 214(e)(4).

It is also true that Section 254(f) of the Act permits states to "adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service," determine the method by which interstate telecommunications carriers will contribute to the preservation and enhancement of universal service, and adopt regulations to preserve and advance universal services within that state. 47 U.S.C. § 254 (f).

However, both the FCC and Federal Courts have construed Section 254(f) to apply to regulations promulgated by states for state universal service funding mechanisms only. For example, the FCC found CMRS providers required to contribute to state universal service support mechanisms pursuant to Section 254(f) of the Act. *In the matter of Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 1735, 1737 (FCC 1997). The FCC further found that Section 254(f) merely imposes an obligation on carriers within a state to contribute if the state establishes universal service programs. *In the Matter of Federal-State Joint Board on Universal Service; High-Cost Universal Service Support*, 20 FCC Rcd 19731, 19739 (FCC 2005).

Federal Courts agree with the FCC's interpretation of the language in Section 254(f). *See Sprint Spectrum, L.P. v. State Corp. Comm'n*, 149 F.3d 1058, 1061 (10th Cir. 1998) (Section 254(f) empowers states to require telecommunications carriers that provide intrastate services to contribute financially to state universal service mechanisms); WWC Holding Co. v. Sopkin, 488 F.3d 1262, 1271 (10th Cir. Colo. 2007) (Section 254(f) authorizes a state to create its own universal service standards only to the extent that a state is providing state funding to meet those standards.)

The Act, then, does not provide for or contemplate duties for state commissions with respect to ETCs post-designation.[9] Congress could have prescribed a larger role for state commissions with respect to universal service, but did not.[10] Further, under the statutory construction maxim of *expressio unis est exclusion alterius*, it may be presumed that Congress intended to limit a state commission's role with respect to universal service.

b. Congress' Mandate that State Commissions Designate ETCs is Unconstitutional. The Commission Cannot Derive Authority to Regulate ETCs from Congress's Command to Designate ETCs.

Furthermore, Congress was without constitutional authority to compel state commissions to take any action with respect to any provisions of the Act. Simply put, the Federal Government cannot commandeer Florida's legislative processes by compelling it "to enact or administer a federal regulatory program." *New York v. United States,* 505 U.S. 144, 188 (1992). Moreover, "Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Printz v. United States,* 521 U.S. 898, 935 (1997). The Supreme Court explained:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the State's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not that whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system

[9] Similarly, the FCC's universal service rules do not provide for action on a state commission's part, other than designation or relinquishment, for a carrier seeking low income funding. 47 C.F.R. § 54.313(a) provides that states must certify to the administrator that a recipient of high-cost funding is using that support for the purposes it is intended. Certification of low-income providers is unnecessary. The FCC has determined that a Lifeline provider uses universal service support for the purpose it was intended when that carrier passes through discounts to its Lifeline eligible customers. *In the Matter of Federal-State Joint Board on Universal Service; Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i),* 20 FCC Rcd 15095, 15105-15106 (FCC 2005).

[10] Compare Sections 251, 252, and 271 of the Act, in which Congress prescribed a larger role for state commissions.

of dual sovereignty. *Id.*

By commanding that the Commission "shall" designate the ETCs that will be eligible to receive specific federal universal service support, *see* 47 U.S.C. §§ 214(e)(2) and 254(e), Congress crossed the constitutional separation of powers by commanding state commissions to act with respect to the federal universal service program. *See Petersburg Cellular Partnership v. Bd. of Supervisors of Nottoway County,* 205 F.3d 688, 701-05 (4th Cir. 2005). This Commission derived no authority from Congress's unconstitutional act of ordering state commissions to designate ETCs.

c. The FCC Cannot Presume Authority Not Provided in the Act or Subdelegate Authority Delegated to it by Congress to Third-Parties, Such as State Commissions.

1. FCC Orders Opining that States Have Authority to Rescind ETC Designations Have No Basis in Law. The FCC Itself Has No Authority to Rescind ETC Designations.

To Commission also is mistaken to the extent that it relies on FCC orders for authority to rescind or revoke ETC designations. A review of FCC decisions reveals that the Commission has misconstrued language in FCC decisions or that the FCC itself fails to bolster its pronouncements with relevant cites to the Act. In fact, Congress did not authorize the FCC to revoke or rescind ETC designations in the Act. Federal law provides that the FCC cannot subdelegate its Authority to third parties. Beyond that, the FCC certainly cannot delegate to state commissions authority Congress did not confer in the Act, and the Act does not provide the FCC with authority to revoke or rescind ETC designations.

For example, Robert Casey, in his testimony, cites to the FCC's March 17, 2005 Order at para. 60 for the proposition that, "[t]he FCC has stated

that states exercising jurisdiction over ETC proceedings should apply requirements in a manner that will best promote the universal service goals found in Section 254(b) of the Telecommunications Act of 1996 (Act)." *In the Matter of Federal-State Joint Board on Universal Service*, 20 FCC Rcd 6371, 6397 (FCC 2005), Para. 60 ("the March 17, 2005 Order"). The Commission's reliance on this order is misplaced because the order was issued based on the Joint Board's order making recommendations on the ETC *designation* process and the FCC's rules regarding high-cost support. *Id.* at 6375, para. 9.

Upon review of the March 17, 2005 Order, it becomes clear that where the order references "states exercising jurisdiction over these proceedings," the proceedings referenced are state ETC *designation* proceedings. Further, the "requirements" to be applied are the ETC *designation* requirements the FCC permits states to adopt pursuant to the March 17, 2005 Order. As the FCC states in the March 17, 2005 Order at para. 58: "We encourage state commissions to require all ETC applicants over which they have jurisdiction to meet the same conditions and to conduct the same public interest analysis outlined in this Report and Order." In the March 17, 2005 Order at para. 59, the FCC further clarifies, "...we encourage state commissions to consider the requirements adopted in this Report and Order when examining whether the state should designate a carrier as an ETC." Finally, it also becomes clear that the states are to apply the universal service principles enumerated in 47 U.S.C. § 254(b) with respect to ETC designations only.

With respect to revocation of ETC designations, the March 17, 2005 Order references the Joint Board's statement that "state commissions possess the authority to rescind ETC designations for failure of an ETC to comply with the requirements of

section 214(e) of the Act or any other conditions imposed by the state." Id. at 6402, para. 72. In n205, the FCC cites to the following order in support of this statement: *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling*, CC Docket No. 96-45, 15 FCC Rcd 15168, 15174, para. 15 (2000) ("the Western Wireless Order"). In the Western Wireless Order, the FCC states, at para. 15, "We also note that the state commission may revoke a carrier's ETC designation if the carrier fails to comply with the ETC eligibility criteria." Upon review, it is clear that the FCC provides no legal authority for its opinion.[11]

Indeed, no such authority exists. The FCC is subject to the provisions of the federal Administrative Procedure Act ("APA"), which provides that "[a] sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). Moreover, the federal APA requires an express grant of statutory authority for an agency to impose a sanction. *See American Bus Ass'n v. Slater*, 231 F.3d 1, 6 (D.C. Cir. 2000). Neither the Act nor any other statute expressly authorizes the FCC to revoke its designation of an ETC under 47 U.S.C. § 214(e)(6). If the FCC cannot revoke an ETC designation under federal law, the Commission cannot evoke federal law for its authority to rescind VCI's ETC designation.

2. The Commission Cannot Rely On FCC Orders for Authority to Regulate ETCs Because The FCC Cannot Subdelegate to Third-Parties, Such as State Commissions, Authority Conferred to it by Congress.

[11] The FCC cites to the Western Wireless Order for this proposition in at least one other document, also without citing to legal authority. *See, e.g., In the Matter of Federal-State Joint Board on Universal Service*, 19 FCC Rcd 10800 at Para. 76, n186.

In addition, the Commission cannot rely upon FCC orders for authority to regulate ETCs because the FCC cannot empower the Commission under the Act. In the Act, Congress delegated to the FCC specific duties and obligations. For example, Congress delegated to the FCC the authority to "execute and enforce" the provisions of the Act, 47 U.S.C. § 151, and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act. *Id.* § 201(b). *See National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 980-81(2005); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-78 (1999). Congress also granted the FCC broad authority to enforce compliance with its rules through various administrative sanctions. *See* 47 U.S.C. §§ 154(i), 159(c), 214(d), 225(e), 401(b), 503(b); *DeYoung v. Patten,* 898 F.2d 628, 634 (8th Cir. 1990).

However, in the Act, Congress delegated authority solely to the FCC to promulgate rules to implement the new universal service requirements, *see* 47 U.S.C. § 254(a), in accordance with universal service principles enumerated in the statute. *See id.* § 254(b). Congress did not delegate to the FCC the authority to *subdelegate* to state commissions its universal service rulemaking or its enforcement authority. Thus, any attempt by the FCC to subdelegate its § 254(a) authority or its power to determine violations of its universal service rules would be contrary to federal law.

Federal courts have provided guidance as to what duties may and may not be delegated to third-parties, such as state commissions, as well as the state commission's proper role with respect to federal agency decision-making. The D.C. Circuit Court's decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir.2004),

where the court determined that the FCC could not lawfully subdelegate its authority under 47 U.S.C. § 251(d)(2) to "determine which network elements shall be made available to CLECs on an unbundled basis," is squarely on point. The court stated, "[w]hen a statute delegates authority to a federal officer or agency, subdelegation to a subordinate *federal officer or agency* is presumptively permissible absent affirmative evidence of a contrary congressional intent." *Id.* However, subdelegations to parties other than federal agencies are presumed to be improper unless expressly authorized by Congress. *See id.* Nowhere in the Act does Congress expressly authorize a non-federal agency to enter into decision making with respect to the federal universal service fund or ETCs. Thus, any attempt by the FCC to subdelegate its § 254(a) authority or its power to determine violations of its universal service rules to state commissions would be unlawful.

In conclusion, Congress can neither confer jurisdiction upon nor require the Commission to adjudicate federal law pertaining to the federal universal service program. Congress also cannot confer jurisdiction upon or require a state commission to apply the provisions of federal law or the FCC's universal service rules upon state regulated carriers. The Commission obtains its powers and duties solely from the Florida Legislature pursuant to statute. Further, the Commission cannot rely on FCC orders or rules for authority to enforce federal law or federal universal service rules. It is unlawful for the FCC to *subdelegate* duties and obligations conferred to it by Congress to any state commission. In short, the Commission has no jurisdiction pursuant to the Act or FCC Orders to enforce federal law or the FCC's federal universal service rules against VCI.

B. THE LEGISLATURE HAS NOT GRANTED THE COMMISSION THE AUTHORITY TO ADMINISTER THE FUSF, OVERSEE ETCS' OPERATIONS OR RESCIND AN ETC DESIGNATION.

The Commission further must consider whether it has the authority under Florida law to interpret or enforce federal law or the FCC's regulations pertaining to universal service as well as whether the Florida legislature has enacted statutes under which the Commission has adopted rules pertaining to universal service that it can enforce against VCI. Florida courts have recognized that "State agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they were created" *Supra Telecommunications & Information Systems, Inc. v. BellSouth Telecommunications, Inc.*, 2003 WL 22964278, at *2 (Fla. P.S.C. 2003).

The Commission should find that Chapter 364 of the Florida Statutes does not authorize the Commission to enforce federal law pertaining to universal service or the FCC's universal service rules. The Commission should further find that the Legislature has not enacted statutes with respect to universal service that can be enforced against VCI in this proceeding. Finally, the Commission should find that it has not adopted the FCC's federal universal service rules it seeks to enforce against VCI. Thus, the Commission cannot revoke VCI's ETC designation or cancel VCI's CLEC Certificate for alleged violations of universal service rules.

A. <u>The Commission Must Dismiss This Case as to the Universal Serivce Issues Because Nothing in Chapter 364, Florida Statutes, Authorizes the Commission to Enforce Federal Law Pertaining to ETCs or the FCC's Universal Service Rules.</u>

The Commission may not *presume* legislative grants of authority. The Legislature has never conferred upon this Commission any general authority to regulate

public utilities, including telephone companies. *City of Cape Coral v. GAC Util., Inc.*, 281 So. 2d 493, 496 (Fla. 1973). This Commission agrees that, because the Commission derives its power from the Legislature, jurisdiction requires a grant of legislature authority. *Sprint-Florida, Inc. v. Jaber*, 885 So. 2d 286, 290 (Fla. 2004). The Commission concedes this point. *See, e.g., Supra Telecommunications & Information Systems, Inc. v. BellSouth Telecommunications, Inc.*, 2003 WL 22964278, at *2 (Fla. P.S.C. 2003) ("State agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they were created"). The Commission recognizes that, despite its broad authority to regulate the telecommunications industry under § 364.01 Fla. Stat., it only has "those powers expressly granted by statute or necessarily implied." *AT&T Communications of the Southern States, Inc.*, 213 P.U.R.4th 383, 387 (Fla. P.S.C. 2001). The Commission must find that it has statutory authority in Chapter 364, Florida Statutes, to enforce federal law or the FCC's universal service rules against VCI. Because no such statute exists in Chapter 364, this Commission must find that it does not have subject matter jurisdiction to enforce federal law or the FCC's universal service rules. Thus, the Commission must dismiss this case as to the Universal Service issues.

1. No Statute in Chapter 364 Expressly Grants the Commission the Authority to Enforce Federal Law or Rules Against VCI and None Can be Interpreted to Grant that Authority.

In considering whether the Legislature has granted the Commission authority to enforce federal law, the Commission should bear in mind the rules of statutory construction. When the meaning of the statute is clear and unambiguous and conveys a clear and definite meaning, courts do not apply the rules of statutory interpretation. *A.R. Douglas, Inc. v. McRainey*, 137 So. 157, 151 (Fla. 1931). Terms

within statutes must be given their plain and ordinary meanings, which may be determined by reference to a dictionary or to case law when the term is not defined in statute. *Crist v. Jaber*, 908 So. 2d 426, 432 (Fla. 2005).

Where an agency charged with the enforcement of a statute has interpreted that statute, the courts will defer to the enforcing agency's interpretation and will not depart from that construction unless it is clearly erroneous. *P.W. Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla. 1988). Courts do not, however, rely solely on the principle of deference in interpreting statutes because all parts of a statute must be read together to achieve a consistent whole. *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452. 455 (Fla. 1992). Furthermore, the rules of statutory construction provide that the more specific statute controls over the general. *State ex rel. Johnson v. Vizzini*, 227 So. 2d 205, 207 (Fla. 1969). Finally, Florida law requires a reasonable interpretation of statutes and one which avoids an absurd result. *Goehring v. Broward Builders Exchange, Inc.*, 222 So.2d 801, 802 (Fla. Dist. Ct. App. 1969).

a. Section 364.10(2) Does Not Vest the Commission with Authority to Enforce Federal Law or the FCC's Rules

First of all, while the Commission claims in the PAA Order that it is "vested with authority under Section 364.10(2), Florida Statutes (F.S.), to regulate eligible telecommunications carriers pursuant to 47 C.F.R. Section 54.201,"[12] upon review and analysis of Section 364.10(2), F.S., the Commission must find that it is vested

[12] PAA Order, p. 3.

with authority under Section 364.10(2) F.S., if at all, only to *designate* ETCs. Fla. Stat. § 364.10(2) F.S.[13] provides as follows:

> (2) (a) ... an eligible telecommunications carrier shall provide a Lifeline Assistance Plan to qualified residential subscribers, as defined in a commission-approved tariff or price list, and a preferential rate to eligible facilities as provided for in part II. *For the purposes of this section, the term "eligible telecommunications carrier" means a telecommunications company, as defined by s. 364.02, which is designated as an eligible telecommunications carrier by the commission pursuant to 47 C.F.R. s. 54.201.* [Emphasis added.]

It would strain credulity if the Commission were to attempt to base subject matter jurisdiction to enforce federal law and rules on this the sentence in Section 364.10(2)(a). In merely referencing 47 CFR 54.201, a federal rule, section 364.10 F.S. does not specify the Commission's authority to enforce federal law and rules. The plain meaning of this section is that Section 364(2)(a) merely defines the manner in which a telecommunications company, which is itself defined in Section 364.02 F.S., is *designated* an ETC.

It is clear from the plain meaning of the terms in the statute that the Legislature has authorized the Commission only to designate ETCs, not enforce federal law and rules. To "designate" means, in pertinent part, "[t]o indicate, select, appoint, nominate or set apart for a purpose or duty...." *Black's Law Dictionary* 447 (6th Edition, 1990. The purpose for the designation under 364.10(2) is to be an eligible telecommunications carrier. The remainder of Section 364.10 specifies the duties for ETC's designated by the Commission: 1) provide Lifeline assistance to qualified consumers; 2) offer Lifeline

[13] Section 364.10(2)(a) provides, in pertinent part: "For the purposes of this section, the term "eligible telecommunications carrier" means a telecommunications company, as defined by s. 364.02, which is designated as an eligible telecommunications carrier by the Commission pursuant to 47 C.F.R. 54.201.

eligible consumers the option of toll blocking; 2) forbear from collecting deposits from Lifeline eligible consumers if the consumer elects toll blocking; 3) forbear from charging Lifeline consumers for local number portability; 4) notify a Lifeline eligible consumer of impending termination of service and permit the subscriber 60 days to demonstrate continued eligibility 5) timely credit a Lifeline eligible consumer's bills with the Lifeline assistance discount; 6) notify agencies of the availability of the company's Lifeline service; and 7) forbear from discontinuing basic local exchange service for a consumer's failure to make payment for non-basic services.

The Commission itself has interpreted this statute to limit its authority with respect to ETCs. *See, In re: Petition of Alltel Communications, Inc. for designation as eligible telecommunications carrier (ETC) in certain rural telephone company study areas located partially in Alltel's licensed area and for redefinition of those study areas*, 2007 Fla. PUC LEXIS 180 at *14 (Fla. PUC 2007) (The Commission uses Section 364.10, F.S. to designate ETCs and to require ETCs to provide a Lifeline Assistance Plan.). *See also VCI's ETC designation order*, Order No. PSC 06-0436-PAA-TX, Docket No. 060144-TX, issued May 22, 2006 at p. 2, 4 ("We have authority under Section 364.10(2), Florida Statutes, to decide a petition by a CLEC seeking designation as an eligible telecommunications carrier pursuant to 47 C.F.R. § 54.201.")

The Commission has heretofore assumed jurisdiction to enforce federal law and rules in other cases based on express legislative grants of authority. For example, the Commission determined it had jurisdiction over federal rules limiting air emissions, but cited to Section 366.8255, F.S. for jurisdictional authority, which defines the term "Environmental laws or regulations" to include "all *federal*, state, or local statutes,

administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities and are designed to protect the environment." Section 366.8255, F.S. *In re: Petition for approval of Integrated Clean Air Regulatory Compliance Program for cost recovery through Environmental Cost Recovery Clause, by Progress Energy Florida, Inc.*, 2005 Fla. PUC LEXIS 642, *3 (Fla. PUC 2005).

The Commission also has cited to express legislative grants of authority to resolve complaints arising under interconnection agreements. *See, e.g., In re: Request for arbitration concerning complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes,* 2002 Fla. PUC LEXIS 275, *37-*38 (Fla. PUC 2002) (stating that the Commission is not authorized to resolve disputes arising out of approved interconnection agreements without a grant of authority under state law and citing to Section 364.162(1) F.S. as express authority.)

It seems reasonable to assume that the Legislature knew and desired to limit the Commission's duties and obligations with respect to ETCs, as there are other instances where the Legislature explicitly has directed the state and state agencies to comply with federal law. For example, Fl. Stat. 421.55 requires compliance with the federal Surface Transportation and Uniform Relocation Assistance Act of 1987 and Fla. Stat. 403.061 explicitly authorizes the Florida Department of Environmental Regulation to adopt rules and regulations consistent with federal law.[14] The Legislature attached no similar requirement to Fla. Stat. 364.10.

[14] Pursuant to Fl. Stat. § 403.061, the department [of public health] has have the power and duty to control and prohibit pollution... . ...(7)...Any rule adopted pursuant to this act shall be consistent with the provisions of federal law....

b. Section 364.012(1) Does Not Vest the Commission with Authority to Enforce Federal Law or the FCC's Rules

Neither does Fl. Stat. 364.012(1) grant the Commission authority to enforce federal law or rules against ETCs. Fl. State. 364.012(1) directs the Commission to maintain liaisons with federal agencies whose policies and rulemaking affect Florida jurisdictional telecommunications companies, and encourages the Commission to participate in federal agency authority proceedings. Arguably, this statute permits the Commission to keep abreast of developments in federal law and federal regulations and to file comments in federal proceedings affecting Florida carriers. This interpretation rings true as the role of advisor is one that is appropriate for state commissions pursuant to federal law *See United States Telecom Ass'n,* 359 F.3d at 568. It does not, however, authorize the Commission to expend state funds to administer the federal universal service program, enforce federal law, or enforce the FCC's universal service rules.

c. Sections 120.80 and 364.025 F.S. Do Not Vest the Commission with Authority to Enforce Federal Law or the FCC's Rules

The Commission's reliance on Fla. Stat. §§ 120.80(13)(d) and 364.025 for the Commission's jurisdiction to enforce federal law or the FCC's rules is similarly misplaced. In its most pertinent part, Fla. Stat. § 364.025 authorizes the Commission to grant the petition of a CLEC to becomes a universal service provider and a carrier of last resort if it determines that the CLEC will provide "high-quality, reliable service." Fla. Stat. 364.025(5). The Commission also is authorized to set a period of time in which a CLEC must meet these "objectives and obligations." *Id.* Those provisions do not constitute "specific provisions of law" to be implemented by adopting the FCC's universal service rules. Fla. Stat. 120.52(8)(c).

Nor does the Florida Administrative Procedures Act grant such authority. APA § 120.80(13)(d) authorizes the Commission to employ "procedures" consistent with the Act when it is "implementing" that act. Clearly, § 120.80(13)(d) is not a jurisdictional grant. It simply allows the Commission to use procedures similar to those employed by the FCC under the Act, when it is obligated "to give practical effect to" the federal statute. *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 278 F.3d 12231238 (11th Cir. 2002) (defining "implement"). Arguably, the Commission followed the dictates of Fla. Stat. 120.80(13)(d) during proceedings to designate VCI and ETC. In any event, § 120.80(13)(d) gives the Commission the limited authority to employ Act procedures and clearly does not authorize the Commission to adopt any substantive rules, much less the FCC's rules.

d. The Legislature Has Not Enacted A Law With the Same Provisions as 47 U.S.C. 214(e) Pertaining to Eligible Telecommunications Carriers that it Seeks to Enforce Against VCI.

The Commission also claims that it possesses the authority to rescind ETC designations for failure of an ETC to comply with the requirements of Section 214(e) of the Act.[15] [16]However, Chapter 364 F.S. provides the Commission with no support for this statement. Simply put, the Legislature has not enacted a law with provisions that are the same as or even similar to 47 U.S.C. Section 214(e) that it seeks to enforce against VCI.[17]

[15] PAA Order, P. 8.
[16] The Commission should be reminded that Section 214(e) contains no express delegation to state commissions other than designation of ETCs. Congress delegated to the FCC all other provisions in 214(e) and the FCC cannot subdelegate to state commissions pursuant to federal law.
[17] 47 U.S.C. § 214(e)(1) provides: (1) Eligible telecommunications carriers. A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 [47 U.S.C. § 254] and shall, throughout the service area for which the designation is received--
(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) [47 U.S.C. § 254(c)], either using its own facilities or a combination of its own facilities and resale

Nor has the Legislature authorized the Commission to regulate ETCs or administer the Universal Service program "as authorized by federal law." The term "federal law" is mentioned in three (3) statutes found in Chapter 364. Two of the three statutes provide that certain types of services are either exempt from oversight by the Commission, Section 364.011, or free of state regulation whatsoever, 364.013, *except as specifically authorized by federal law.* In the third statute, the Legislature speaks to Lifeline providers, not the Commission. In Fla. Stat. Section 364.10(3)(a), Lifeline providers are cautioned that a Lifeline income eligibility test "must augment, rather than replace, the eligibility standards established by federal law...." Fl. Stat. Section 364.10(3)(a).

e. Sections 364.01(1)(2) and (4) Do not Grant the Commission the Authority to Enforce Federal Law or the FCC's Universal Service Rules Against VCI.

Finally, the Commission cannot rely upon the Legislature's general grant of authority over telecommunications carriers Fla. Stat. Sections 364.01(1), (2) and (4), for the proposition that it can enforce federal law and the FCC's universal service rules against VCI.

First, 364.01(1) and (2) give the Commission authority to exercise powers conferred Chapter 364 and exclusive jurisdiction to regulate telecommunications companies pertaining to matters set forth in Chapter 364. Furthermore, Sections 364(1) and (2) must be read with Section (4) in mind.

Section 364(4) enumerates the reasons for which the Commission must exercise jurisdiction conferred in Chapter 364, which are, in sum a) to protect the public

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of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

health, safety and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices; b) encourage competition; c) ensure that monopoly services continue to be subject to price, rate and service regulation; d) promote competition; e) encourage providers to introduce new services; f) eliminate rules or regulations that delay or impair competition; g) ensure the fair treatment of all providers; 7) recognize the continuing emergency of a competitive telecommunications environment through flexible regulatory treatment of competitive local telecommunications services; and 8) continue to act as a surrogate for competition for monopoly services.

However, Section 364(4) has been amended by the Legislature with respect to competitive local telecommunications carriers. The Legislature adopted at least one statute governing competitive local exchange companies that implements a less stringent regulatory scheme than that developed for incumbent local exchange carriers. Specifically Fla. Stat. 364.337(5), provides that the Commission has continuing jurisdiction over *competitive local exchange carriers only* for the purposes of 1) establishing reasonable service quality criteria; 2) assuring resolution of service complaints, and 3) ensuring the fair treatment of all telecommunications providers in the telecommunications marketplace. Fla Stat. § 364.337 also exempts CLECs from the provisions of other statutes in Chapter 364.[18],[19] The Commission, then, can exercise its

[18] CLECs are exempt from, *iter alia*, Fla. Stat. § 364.17. *The commission may, in its discretion, prescribe the forms of any and all reports, accounts, records, and memoranda to be furnished and kept by any telecommunications company whose facilities extend beyond the limits of this state...*, and Fla. Stat., 364.18: *The commission, or any person authorized by the commission, may inspect the accounts, books, records, and papers of any telecommunications company....*

[19] Commission rule 25-24.800, pertaining to CLECs, states that provisions of chapters 25-4, 25-9 and 25-14 don't apply to CLECs unless specified. Rule 25-24-835, which sets forth rules pertaining to CLECs, does not specify that 25-4.0201 or 25-4.019 (Records and reports in general) apply to CLECs. As Commission

exclusive jurisdiction over matters in Chapter 364, with respect to competitive telecommunications carriers, only for the limited purposes set forth in Section 354.337 F.S.

The Commission cannot rely on Section 364.01 for authority to enforce federal law and FCC rules against VCI for the following reasons. As an initial matter, it is impossible for the Commission to exercise *exclusive* jurisdiction over ETCs because the federal universal service program administered by the FCC under under § 254 of the Act cannot be within the exclusive purview of the Commission and the Legislature has not enacted a state universal service program. The Legislature also was aware that the FCC's jurisdiction undoubtedly extends to enforcing its own universal service rules and, therefore, those rules were beyond the reach of the Commission's exclusive jurisdiction.

Second, a review of Chapter 364 reveals that nowhere does the Legislature confer to the Commission jurisdiction over ETCs other than designation. Finally, the Commission's jurisdiction over CLECs is limited to the purposes enumerated in Section 364.337(5).[20] None of the purposes numerated in Section 364.337(5) are issues identified in this proceeding or addressed in the PAA Order and VCI's ETC operations pursuant to the federal universal service program implicate none of the purposes for which the Commission is permitted to oversee competitive local exchange companies in Fla.

The law favors a reasonable interpretation of statutes and one which avoids an absurd result. *See, e.g., Goehring v. Broward Builders Exchange, Inc.*, 222 So.2d 801, 802 (Fla. Dist. Ct. App. 1969). Because the Commission cannot exercise exclusive

rule 25-4-0665, Lifeline, is not among the rules listed as applicable to CLECs in Rule 25-24.835, it may be argued that Commission rule 25-4.0665 does not apply to CLECs.

[20] *See Sprint-Florida, Inc.*, 885 So 2d. at 292, wherein the Commission acknowledges that Fla. Stat. §§ 364.16(3)(a) and 364.163 restrict the Commission's broader authority with respect to definition of local calling areas set forth in 364.01(4).

jurisdiction over a federal program, has no specific authority elsewhere in Chapter 364 to regulate ETCs, and cannot oversee the ETC operations of competitive local exchange carriers under Chapter 364, it would be absurd to imply that Section 364.01 grants the Commission authority to enforce federal law pertaining to ETCs or the FCC's universal service rules.

f. This Commission Cannot Maintain This Proceeding Solely on Federal Law and Thus, Must Dismiss this Proceeding as to the Universal Service Issues

In sum, none of the provisions of Chapter 364 of the Florida Statutes expressly or impliedly grant the Commission jurisdiction to enforce federal law pertaining to ETCs or enforce the FCC's universal service rules against VCI. Where only federal law applies, this Commission must dismiss this proceeding pursuant to the dictates of *Curtis v. Taylor,* 648 F. 2d 946 (5th Cir. 1986), stating that a state agency cannot take administrative action solely on federal statutes. See, also Order No. PSC-03-1892-FOF-TP, issued December 11, 2003, in Docket No. 030349-TP, In re: Complaint by Supra Telecommunications and Information Systems, Inc. Against BellSouth Telecommunications, Inc. Regarding BellSouth's Alleged Use of Carrier-to-Carrier Information (Sunrise Order), p. 4-5 (Dismissed as to complaint under 47 USC Section 222); In re: Complaint against BellSouth Telecommunications, Inc. for alleged overbilling and discontinuance of service, and petition for emergency order restoring service, by IDS Telecom, 2004 Fla. PUC LEXIS 419 at *21 (Fla. PUC 2004) (Count Five of complaint that BellSouth engaged in anticompetitive behavior under the Act dismissed because federal statute relied upon as sole the basis for relief).

C. THE FLORIDA LEGISLATURE HAS NOT ENACTED A STATUTE PERMITTING THE COMMISSION TO ADOPT THE FCC UNIVERSAL SERVICE RULES IT SEEKS TO ENFORCE AGAINST VCI AND NO SUCH RULES HAVE BEEN ADOPTED. THE COMMISSION MUST DISMISS THIS PROCEEDING AS TO THE UNIVERSAL SERVICE ISSUES.

4. The Florida Legislature Did not Enact A Statute Authorizing the Commission to Adopt the Federal Rules It Seeks to Enforce Against VCI and No Such Rules were Adopted.

The statutory scheme adopted by Congress to preserve and advance universal service permitted states to adopt universal service rules that are "consistent" with § 254 of the Act, 47 U.S.C. § 253(b), and "not inconsistent" with the FCC's universal service rules. *Id.*, § 254(f). The Federal Government left it to the states to decide whether to expend state funds to regulate telecommunications companies in the interest of preserving and advancing universal service. Thus, the Legislature was free to enact laws concerning universal service and to authorize the Commission to adopt rules, pursuant to provisions of the FAPA, to advance universal service and to regulate ETCs, so long as the state's rules were consistent with the FCC's rules.

Similarly, the FAPA provides that "in the pursuance of state implementation, operation, or enforcement of federal programs," the Commission is empowered "to adopt rules substantially identical to regulations adopted pursuant to federal regulations" provided it does so in accordance with statutory procedures. Fla. Stat. § 120.54(6). But the Commission may do so only if there is a "specific law to be implemented" and only to adopt rules that "implement or interpret specific powers and duties granted by [its] enabling statute." *Id.* § 120.536(1). However, the FAPA also confines agency rulemaking to the specific powers and duties conferred by the agency's enabling statute.

See Golden West Financial Corp. v. Florida Dep't of Revenue, 975 So.2d 567, 571 (Fla. Dist. Ct. App. 2008). It is clear that the Commission has the rulemaking authority to adopt rules "only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties." *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.,* 794 So.2d 696, 700 (Fla. Dist. Ct. App. 2001). To date, the Florida Legislature has not done so.

The Legislature has not enacted a statute empowering the Commission specifically to adopt the FCC's universal service rules. Specifically, the Legislature granted the Commission the Authority to adopt rules only to administer the provisions of the statute under Fla. Stat. 364.10(3)(j), which provides, "The commission shall adopt rules to administer this section." Commission Rule 25-4.0665, adopted by the Commission pursuant to Fla. Stat. 364.10(3)(j), in sum, requires ETCs to 1) provide 60 days written notice of termination of Lifeline service; 2) reinstate terminated customers who subsequently prove eligibility; 3) participate in the Lifeline service Automatic Enrollment Process; and 4) provide current Lifeline service company information to the Universal Service Administrative Company for posting on the USAC's website. 25-4.0665 F.A.C.

The Commission does not seek to enforce the rules promulgated in 25.4.0665 against VCI, indeed neither the PAA Order nor Staff's testimony allege that VCI violated any of the provisions of 25-4.0665 F.A.C. Instead, the Commission seeks to enforce against VCI federal universal service rules that the Legislature has not granted the Commission the authority to adopt and that the Commission has not adopted as well as

provisions of FCC orders not adopted as rules or enacted into law. *See* testimony of Robert Casey, pp. 27-32.

4. The Commission Cannot Enforce Unadopted Rules or Law Not Enacted by the Legislature Against VCI. The Commission's Attempt to Do So Violates the FAPA and VCI's Constitutional Rights to Due Process.

The FAPA provides, "Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by § 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practical." Fla. Stat. § 120.54(1)(a). The FAPA "places an affirmative duty on the part of all state agencies to codify their policies in rules adopted in the formal rulemaking process." *Florida Dep't of Business and Professional Regulation v. Investment Corp. of Palm Beach,* 747 So.2d 374, 380 (Fla. 1999). A clear purpose of the rulemaking provisions of the FAPA "is to force or require agencies into the rule adoption process." *Osceola Fish Farmers Ass'n v. Division of Administrative Hearings,* 830 So.2d 932, 934 (Fla. Dist. Ct. App. 2002).

The Commission has not adopted the FCC's universal service rules it seeks to enforce against VCI, indeed it is without authority to do so, yet the Commission, by this proceeding, persists in attempting to do so despite the FAPA's clear requirements. The Commission's reliance on WWC Holding Co. for the proposition that the Commission is not required to promulgate rules is misplaced. (Testimony of Robert Casey at 32). The Commission cannot avoid its rulemaking responsibilities under the FAPA with respect to standards it chooses to enforce against ETCs using an inapposite federal case.[21]

[21] In WWC Holding Co., Western Wireless sought the court's review of conditions imposed upon it by the Colorado PUC's in order to designate the company an ETC. WWC, 488 F.3d at 1262, and the court held

When the FAPA authorizes it to adopt FCC rules on the condition that statutory rulemaking procedures are followed, the Commission cannot eschew the requisite rulemaking in favor of simply enforcing FCC rules against VCI in an adjudication. These FCC rules are agency statements of general applicability, falling within the meaning of the term "rule" defined in Fla. Stat. Section 120.52:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. Fla. Stat. Section 120.52(15).

The Commission's attempt to enforce the FCC's universal service rules on an ad hoc basis constitutes an invalid agency action taken without rulemaking, in violation of Fla. Stat. Section 120.56(4).[22] *See Kerper v. Dep't of Environmental Protection,* 894 So.2d 1006, 1010 (Fla. Dist. Ct. App. 2005).

4. The Enforcement of the FCC's ETC Rules Violates Section 364.27 and Constitutes an Invalid Exercise of Delegated Legislative Authority

The Commission is empowered to investigate interstate rules of practice for or in relation to the transmission of messages or conversations taking place within Florida which in the Commission's opinion violate the Act or the FCC's orders and regulations. *See* Fla. Stat. § 364.27. But the Commission's power with respect to such interstate matters is limited to referring the violations to the FCC by petition. *See id.* The

that the FCC did not require the PUC "to engage in a rule-making proceeding when imposing conditions pursuant to making an ETC designation." WWC, 488 F.3d at 1278.

[22] VCI does not waive its right to bring a complaint under Fla. Stat. Section 120.56(4) to any other agency competent to hear such a complaint and to the extent the Commission is authorized to adjudicate violations of Fla. Stat. Section 120.56, VCI submits that this motion qualifies as such a complaint.

Legislature has not granted the Commission the authority to impose a penalty for violations of the Act or the FCC's rules. *See id.* That limitation on the Commission's authority clearly expresses the Legislature's intent that the Commission not enforce the Act or the FCC's rules, and that it not impose a penalty for carrier practices that violate federal law.[23]

The Commission's belief that VCI may have violated the FCC's ETC rules should have led it to do no more than file a complaint with the FCC under Section 208(a) of the Act, which provides:

> Any person ... or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. * * * If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

The Commission clearly exceeds the limit on its jurisdiction imposed by Section 364.27 by attempting to penalize VCI for alleged violations of Section 214(e) of the Act and the FCC's ETC rules. If it wanted to enforce the FCC's rules, the Commission should have adopted those rules in the rulemaking required by the FAPA. *See* Fla. Stat. §

[23] Again, the Commission has recognized that it is without authority to take an administrative action based solely on federal statutes. *See BellSouth Telecommunications, Inc.*, 2004 WL 962756, at *6 (Fla. P.S.C. 2004); *Supra Telecommunications*, 2003 WL 22964278, at *2.

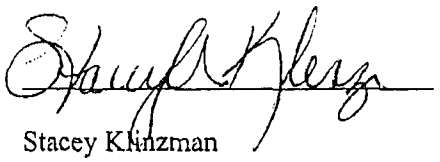
120.54(6). Having failed to do so, the Commission is left without any authority beyond the specific powers given it by Section 364.27. And it grossly exceeded those powers by attempting to penalize VCI for its alleged violations of federal law instead of referring the matter to the FCC as required by law.

4. By Seeking to Enforce Unadopted Rules and Law not Enacted by the Legislature, the Commission is Violating VCI's Due Process Rights

The Commission's attempt to enforce against VCI the provisions of federal law not enacted by the Legislature, and enforce rules it has not adopted, also constitutes a violation of VCI's due process rights under the Fourteenth Amendment of the United States Constitution and Section 9 of the Florida Constitution. The Commission's ETC designation confers upon VCI the right to obtain reimbursement from the federal Universal Service fund, and, as such, constitutes a property right. The Commission cannot deprive VCI of property without due process of law, which includes notice and an opportunity to be heard. To deprive VCI of its property rights in the ETC designation the Legislature and the Commission must provide VCI with "notice" of the circumstances under which the company can be deprived of this property right. Florida statutes as enacted and rules as adopted fail to provide VCI with the required Constitutional "notice" that it may be deprived of its property. In doing so, the Commission has violated VCI's due process rights under the Fourteenth Amendment of the United States Constitution and Section 9 of the Florida Constitution.

[SIGNATURE NEXT PAGE]

Respectfully submitted this 5th day of May, 2008.



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Attorneys for Vilaire Communications, Inc

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss has been served via Electronic Mail* to the persons listed below this 5th 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	
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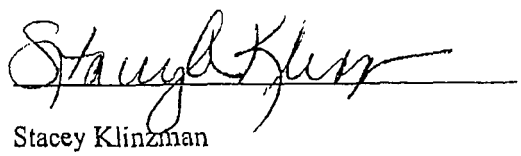
By: 

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Via Electronic Mail

May 9, 2008

Ms. Ann Cole, Clerk of the Commission
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399

Re: Docket No. 080065-TX - Response to Staff's Discovery Requests

Dear Ms. Cole:

The additional information Staff seeks by its discovery requests is integrally related to the jurisdictional question presented to the Florida Public Service Commission ("Commission") in Vilaire's Motion to Dismiss for Lack of Subject Matter Jurisdiction, filed with the Commission on Monday, May 5, 2008, and ultimately, subject to federal review. Absent a decision on its motion, Vilaire is intent on preserving the issue of the Commission's jurisdiction for judicial review and is unwilling to waive its objections by providing further discovery. Vilaire believes that the Commission is without jurisdiction in this matter and, therefore, was without authority to compel discovery. Consequently, the Commission's discovery ruling was an invalid exercise of authority. Under these circumstances, Vilaire must respectfully decline to provide the information sought.

Sincerely,

VCI Company

Stacey A. Klinzman
Regulatory Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Staff's Discovery Requests has been served via Electronic Mail* to the persons listed below this 9th 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	Beth Salak, Director/Competitive Markets and Enforcement* 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 bsalak@psc.state.fl.us
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By: _____

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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 13, 2008

PROSECUTORIAL STAFF'S MOTION TO IMPOSE SANCTIONS DUE TO VILAIRE COMMUNICATIONS, INC'S FAILURE TO COMPLY WITH ORDER NO. PSC-08-0304-PCO-TX

The Prosecutorial staff of the Florida Public Service Commission, by and through its undersigned counsel, and pursuant to Rule 28-106.206, Florida Administrative Code, and Rule 1.380, Florida Rules of Civil Procedure, moves the Florida Public Service Commission (Commission) to enter an order imposing sanctions on Vilaire Communications, Inc. (VCI) because its failure to respond to Prosecutorial staff's discovery requests constitutes a willful and deliberate failure to comply with Commission Order No. PSC-08-0304-PCO-TX, issued May 8, 2008. Prosecutorial staff respectfully requests the Commission dismiss VCI's Protest of Order No. PSC-08-0090-PAA-TX and Request for a Section 120.57(1), Florida Statutes, administrative hearing and that Order No. PSC-08-0090-PAA-TX be reinstated and consummated as a final order. As grounds therefore, staff states:

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 Competitive Local Exchange ("CLEC") Certificate. An ETC is a telecommunications company that is designated to offer Lifeline and Link-Up programs[1] to qualified low-income consumers.[2] In response, VCI filed its Protest of PAA Order PSC-08-0090-PAA-TX, issued February 13, 2008, and Petition for Formal Hearing ("Protest"). An Issue Identification Conference held between Prosecutorial staff and VCI, on March 13, 2008,

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[1] Lifeline service in Florida provides a $13.50 discount on basic monthly telephone service to qualified low-income individuals. Eligibility can be determined by customer enrollment in any one of the following programs: Temporary Cash Assistance (TCA); Supplemental Security Income; Food Stamps; Medicaid; Federal Public Housing Assistance (Section 8); Low-Income Home Energy Assistance Plan; National School Lunch Program's Free Lunch Program; or Bureau of Indian Affairs Programs. In addition to the program-based criteria, AT&T, Embarq, and Verizon customers with annual incomes up to 135 percent of the Federal Poverty Guidelines may be eligible to participate in the Florida Link-Up and Lifeline programs.

[2] As defined by Section 364.025(1), Florida Statutes, the term "universal service" means "an evolving level of access to telecommunications services that, taking into account advances in technologies, services, and market demand for essential services, the commission determines should be provided at just, reasonable, and affordable rates to customers, including those in rural, economically disadvantaged, and high-cost areas." The Federal Universal Service Fund pays for four programs. They are Link-Up/Lifeline, High Cost, Schools and Libraries, and Rural Health Care.

identified 11 tentative issues. An Order Establishing Procedure ("OEP") was issued on March 26, 2008, setting out the procedure for the Section 120.57(1), Florida Statutes (F.S.), hearing requested by VCI.

On March 31, 2008, staff served VCI with Commission Staff's First Set of Interrogatories (Nos. 1 - 39) and Production of Documents Nos. (1-10). On April 7, 2008, VCI filed their Objections to Commission Staff's First Set of Discovery. Prosecutorial staff filed a Motion to Compel VCI to respond to Prosecutorial staff's discovery requests on April 22, 2008. Order No. PSC-08-0258-PCO-TX, Granting the Motion to Compel was issued on April 25, 2008. On May 2, 2008, VCI filed its Motion for Reconsideration. Prosecutorial staff filed its Response in Opposition on May 5, 2008. By Order No. PSC-08-0304-PCO-TX, issued May 8, 2008, the Commission denied VCI's Motion for Reconsideration and ordered VCI to submit its full and complete responses to Staff's First Set of Interrogatories (Nos. 1-38) and First Request for Production of Documents (Nos. 1-10) by the close of business on Friday, May 9, 2008. On May 9, 2008, VCI filed a letter with the Commission stating, "it was intent on preserving the issue of the Commission's jurisdiction for judicial review and is unwilling to waive its objections by providing further discovery."

Motion for Sanctions

Pursuant to Rule 28-106.206, Florida Administrative Code, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.390, Florida Rules of Civil Procedure. The presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanction in accordance with the Florida Rules of Civil Procedure, except contempt. Rule 1.380, Florida Rules of Civil Procedure, sets forth in pertinent part that:

(b) Failure to Comply With Order.

(2) If a party or an officer, director, or managing agent of a party or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or rule 1.360, the court in which the action is pending may make any of the following orders:

(A) An order that the matters regarding which the questions were asked or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

(C) An order striking out pleadings or parts of them or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party.

Striking pleadings or entering a default judgment against a party is the most severe of all sanctions, which should be employed only in extreme circumstances. Neal v. Neal, 636 So.2d 810, 812 (Fla. 1st DCA 1994), Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983). However, a "deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evidences a deliberate callousness." Id.

The FPSC has found that the dismissal of a proceeding, even a dismissal without prejudice, is a severe penalty to impose upon a party. It requires an express finding of a willful or deliberate refusal to obey an order regarding discovery.[3]

Whether to impose the sanction of dismissal is within the sound discretion of the trial court. W. G. C., Inc. v. The Man Co., 360 So.2d 1152 (Fla.3d DCA 1978). The exercise of this discretion will not be disturbed absent a clear showing of abuse. Harless v. Kuhn, 403 So.2d 423 (Fla. 1981).

The FPSC has previously recognized its authority to impose sanctions for failure to comply with a Commission Order pursuant to Rule 1.380, Florida Rules of Civil Procedure. See Order No. PSC-03-1025-PCO-SU, issued September 17, 2003, in Docket No. 020745-SU, *In re: Application for certificate to provide wastewater service in Charlotte County by Island Environmental Utility, Inc.* In that Docket, the Commission granted a Motion to Dismiss the party as an intervener because it continued to disobey the Commission's Orders. See Order No. PSC-03-1389-PCO-SU, issued December 10, 2003.

A. VCI's refusal to comply with the Commission's Orders on Discovery is indicative of VCI's deliberate and willful actions to unduly delay the Commission's resolution of this proceeding.

In its Protest of PAA Order No. PSC-08-0090-PAA-TX and Request for Formal Hearing, filed March 5, 2008, VCI specifically requested the Commission "[s]et this matter for a Section 120.57(1), Florida Statutes, 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- PAA-TX should be rescinded."[4] Subsequently, VCI and Prosecutorial staff

[3] Order No. PSC-95-1568-FOF-WS, issued December 18, 1995, in Docket No. 950495-WS, *In Re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.*

[4] Protest at 10-11.

participated in an Issue Identification Conference where the following issues were mutually agreed upon:

1. Is the PSC authorized to audit an ETC's records for compliance with applicable Lifeline, Link-Up, and ETC statutes, rules, processes, procedures, and orders?

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. 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?

7. Does the PSC have the authority to enforce an FCC statute, rule or order pertaining to ETC status, Lifeline, and Link-Up service?

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.(a) Does the Commission have authority to rescind VCI's ETC status in the state of Florida?

(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?

On March 26, 2008, the Prehearing Officer issued the Order Establishing Procedure which set forth that "[d]iscovery shall be conducted in accordance with the provisions of Chapter 120, F.S., and the relevant provisions of Chapter 364, F.S., Rules 25-22, 25-40, and 28-106, F.A.C., and the Florida Rules of Civil Procedure (as applicable), as modified herein or as may be subsequently modified by the Prehearing Officer."[5]

On March 31, 2008, Prosecutorial staff served it First Set of Interrogatories (Nos. 1 - 39) and Production of Documents Nos. (1-10). Prosecutorial staff sought discovery on matters clearly within the scope of the issues agreed upon by the parties. More specifically, Prosecutorial staff sought discovery on matters in relation to both VCI's operations as an ETC in Florida and its operations as a certificated CLEC in Florida. VCI failed to respond to Interrogatory Nos. 1 - 13, 15 - 36 and 39 and Production of Documents (POD) 1-10. Amongst the several general and specific objections raised by VCI, VCI cited the Commission's lack of subject matter jurisdiction. However, VCI had yet to request the Commission address subject matter jurisdiction as a threshold issue in this proceeding.

Although as a matter of law, a party may raise subject matter jurisdiction at any point in a proceeding, VCI's refusal to respond to staff's discovery, without having made any formal request that the Commission address subject matter jurisdiction prior to its objections, was a transparent attempt to delay the Commission's resolution of this proceeding and impeded the Commission's ability to conduct an orderly administrative hearing pursuant to Section 120.57(1), Florida Statutes.

On April 25, 2008, the Prehearing Officer issued Order No. PSC-08-0258-PCO-TX granting Prosecutorial staff's Motion to Compel and required VCI to serve its responses to Prosecutorial staff on May 2, 2008. On May 2, 2008, VCI filed its Motion for Reconsideration of Order No. PSC-08-0258-PCO-TX. It was in this filing that VCI first notified the Commission of its intent to file a Motion to Dismiss or in the alternative, hold the proceeding in abeyance pending a determination of the Commission's subject matter jurisdiction.[6]

By Order No. PSC-08-0304-PCO-TX, issued May 8, 2008, the Commission denied VCI's Motion for Reconsideration and ordered VCI to submit its full and complete responses to Staff's First Set of Interrogatories (Nos. 1-38) and First Request for Production of Documents (Nos. 1-10) by the close of business on Friday, May 9, 2008. On May 9, 2008, VCI filed a letter with the Commission stating, "it was intent on preserving the issue of the Commission's jurisdiction for judicial review and is unwilling to waive its objections by providing further discovery." VCI's refusal to comply with Order No. PSC-08-0304-PCO-TX appears to be a

[5] Order Establishing Procedure at 2.
[6] VCI filed its Motion to Dismiss or in the alternative, hold the proceeding in abeyance on May 5, 2008.

deliberate and willful action to further its attempts to delay the Commission's ability to conduct an orderly administrative hearing as requested by VCI.

Staff notes that VCI has continued to apply for and receive universal service funding during the pendency of the Commission's proceeding. Specifically, VCI received $51,966.00 and $53,461.00 in universal service funds from USAC for March and April for its operations as an ETC in Florida.

B. The Commission should not be misled by VCI's claim that the Commission lacks subject matter jurisdiction to justify its refusal to comply with Order No. PSC-08-0304-PCO-TX.

1. Prosecutorial Staff's discovery seeks information that addresses matters for which VCI has not challenged the Commission subject matter jurisdiction.

Putting VCI's claim that the Commission lacks subject matter jurisdiction to revoke VCI's ETC designation aside, Order No. PSC-08-0304-PCO-TX, compels VCI to respond to staff's discovery which seeks information relevant to VCI's operations as a CLEC in Florida. Specifically, staff seeks information regarding the scope of VCI's admitted overcharging of the E-911 fee and VCI's alleged misapplication of late payment charges. Furthermore, VCI agreed to Issue 11, which asks the Commission to determine if:

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?

Prosecutorial staff notes further that Prosecutorial staff Witness Robert J. Casey has included in his rebuttal testimony allegations that VCI has failed to accurately report its gross operating revenues in its 2006 and 2007 regulatory assessment fee form in violation of Section 364.336, Florida Statutes.[7] Concerns regarding VCI's regulatory assessment fee form were first identified in Staff Audit Finding No. 2.[8]

2. VCI has acknowledged the Commission's authority pursuant to 364.27, Florida Statutes, to investigate violations of the rulings, orders, or regulations of the Federal Communications Commission (FCC).

On page 32 of its Motion to Dismiss, VCI states that "[t]he Commission is empowered to investigate interstate rules of practice for or in relation to the transmission of messages or conversations taking place within Florida which in the Commission's opinion violate the Act or

[7] Rebuttal Testimony of Robert Casey at 2-3.
[8] Direct Testimony of Intesar Terkawi at 5.

the FCC's orders and regulations. But the Commission's power with respect to such interstate matters is limited to referring violations to the FCC by petition."[9] Prosecutorial staff points out that the Commission has yet to take any final agency action with regard to VCI's ETC status.

VCI's acknowledgement that the Commission has explicit authority to investigate such matters is demonstrative of VCI's deliberate and willful disregard of Order No. PSC-08-0304-PCO-TX. While VCI cites the Commission's lack of subject matter jurisdiction in refusing to respond to Prosecutorial staff's discovery in direct violation of Order No. PSC-08-0304-PCO-TX, it clearly acknowledges in its Motion to Dismiss that Section 364.27, Florida Statutes, explicitly grants the Commission authority to investigate violations of the Federal Telecommunications Act and FCC rulings, orders, or regulations. VCI's acknowledgement also further supports Prosecutorial staff's argument, set forth in its Response to VCI's Motion to Dismiss that VCI has failed to exhaust its administrative remedies in this proceeding.

After the opportunity for a Section 120.57(1), Florida Statutes, administrative hearing the Commission may ultimately find it appropriate to forward its factual findings to the FCC pursuant to Section 364.27, Florida Statutes. However, VCI's deliberate and willful refusal to comply with Order No. PSC-08-0304-PCO-TX prevents the Commission from conducting an orderly proceeding and considering evidence from both VCI and Prosecutorial staff in making its final factual determinations.

3. VCI has willfully and deliberately failed to comply with Order No. PSC-08-0304-PCO-TX, by not responding fully and completely to Prosecutorial Staff's Interrogatory Nos. 1, 3, 6, 34, and 39 and Production of Document Request Nos. 1 and 10, for which it did not raise lack of subject matter jurisdiction as an objection.

Once again setting aside VCI's refusal to comply with Order No. PSC-08-0304-PCO-TX due to its claim that the Commission lacks subject matter jurisdiction to revoke VCI's ETC designation, VCI did not include Prosecutorial Staff's Interrogatory Nos. 1, 3, 6, 34, and 39 and Production of Document Request Nos. 1 and 10 in its objection to Prosecutorial staff's discovery requests on the grounds that the Commission lacked subject matter jurisdiction. Specifically, on

[9] Section 364.27, Florida Statutes, **Powers and duties as to interstate rates, fares, charges, classifications, or rules of practice.**--The commission shall investigate all interstate rates, fares, charges, classifications, or rules of practice in relation thereto, for or in relation to the transmission of messages or conversations, where any act relating to the transmission of messages or conversations takes place within this state, and when such rates, fares, charges, classifications, or rules of practice are, in the opinion of the commission, excessive or discriminatory or are levied or laid in violation of the Act of Congress entitled "The Communications Act of 1934," and the acts amendatory thereof and supplementary thereto, or in conflict with the rulings, orders, or regulations of the Federal Communications Commission, the commission shall apply, by petition, to the Federal Communications Commission for relief and may present to the Federal Communications Commission all facts coming to its knowledge as to violation of the rulings, orders, or regulations of that commission or as to violations of the act to regulate commerce or acts amendatory thereof or supplementary thereto.

pages 3-4 of VCI's Motion for Reconsideration VCI states that "[t]he 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 Nos. 2, 3, 4, 5, 6, 7, 8 and 9. Because VCI did not identify Prosecutorial Staff's Interrogatory Nos. 1, 3, 6, 34, and 39 and Production of Document Request Nos. 1 and 10 it cannot now claim lack of subject matter jurisdiction in failing to comply with Order No. PSC-08-0304-PCO-TX.

The nature of this docket requires cooperation and consideration by all parties. VCI's failure to provide full and complete responses to Prosecutorial Staff's Interrogatory Nos. 1, 3, 6, 34, and 39 and Production of Document Request Nos. 1 and 10 is yet another example of VCI's deliberate and willful disregard of Order No. PSC-08-0304-PCO-TX.

WHEREFORE, for the foregoing reasons, Prosecutorial staff respectfully requests that the Commission grant this Motion for Sanctions, and dismiss VCI's Protest of Order No. PSC-08-0090-PAA-TX and Request for a Section 120.57(1), Florida Statutes, administrative hearing and that Order No. PSC-08-0090-PAA-TX be reinstated and consummated as a final order.

Respectfully submitted this 13th day of May, 2008.

LEE ENG TAN
Staff Counsel

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
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(850) 413-6199

ADAM J. TEITZMAN
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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 13, 2008

I HEREBY CERTIFY that a true and correct copy of STAFF'S MOTION FOR SANCTIONS has been served by U.S. Mail to Bruce Culpepper, Akerman Senterfitt Law Firm, 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301, and that a true copy thereof has been furnished to the following by U. S. mail or by (*) hand delivery this 13th day of May, 2008:

Vilaire Communications, Inc.
P. O. Box 98907
Lakewood, WA 98496-8907

(*)Rosanne Gervasi
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

LEE ENG TAN
Senior Attorney
FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
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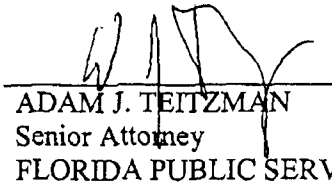
(850) 413-6185



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May 14, 2008

VIA Electronic Filing

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 080065-TX - In re: Investigation of Vilaire Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange company certificate status in the State of Florida.

Dear Ms. Cole:

Enclosed for electronic filing in the above-referenced docket, please find VCI's Prehearing Statement, as well as a version in Word format in compliance with the Order Establishing Procedure for this case.

Thank you for your kind assistance with this filing. Please do not hesitate to call me if you have any questions whatsoever.

Sincerely,

Beth Keating

Beth Keating
AKERMAN SENTERFITT
106 East College Avenue, Suite 1200
Tallahassee, FL 32302-1877
Phone: (850) 224-9634
Fax: (850) 222-0103

Enclosures

{TL158-887.1}

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 14, 2008

VILAIRE COMMUNICATIONS INC.'S
PREHEARING STATEMENT

COMES NOW, VCI Company, doing business in Florida as Vilaire Communications, Inc. ("VCI"), and files its Prehearing Statement pursuant to the Order Establishing Procedure, Order No. 08-0194-PCO-TX, issued by the Prehearing Officer on March 26, 2008:

A. Known Witnesses

VCI intends to offer the direct testimony of Stanley Johnson, filed April 24, 2008. Mr. Johnson will not offer testimony on any issues that touch on, wholly or in part, the company's operations as an ETC as VCI believes the Commission is without subject matter jurisdiction to inquire into, review or adjudicate these matters. With respect to Issue Nos. 11(a) and (b), Mr. Johnson's testimony will be limited to the company's operations as a CLEC that VCI believes are within the jurisdiction of the Commission in accordance with Florida law, rules lawfully adopted by and lawful orders issued by the Commission with respect to CLECs. Mr. Johnson's also will offer testimony as to Issues 5 and 6.

B. Description of Prefiled Exhibits

Vilaire Communications, Inc. intends to offer through its witness Stanley Johnson the following Exhibits:

Exhibit(s)	Subject
SJ1-A-SJ1-G	Audit document and information requests and VCI responses concerning reconciliation of data reported on VCI's RAF Form.
SJ2-A-SJ2-F	Complaints to Commission regarding incorrect billing of late payment fee.

C. Basic Position

VCI's position is that the PSC is without subject matter jurisdiction under federal or state law to inquire into, review or adjudicate matters touching on, wholly or part, VCI's operations as an ETC in Florida, to enforce federal law or the FCC's rules pertaining to ETCs against VCI, to rescind VCI's ETC designation, or to revoke VCI's CLEC certification for any violation of federal law or the FCC's rules.

D. VCI's Positions on Issues Identified by Staff

VCI's positions on the issues identified by Staff are as follows:

Issue No. 1. Is the PSC authorized to audit an ETC's records for compliance with applicable Lifeline, Link-Up, and ETC statutes, rules, processes, procedures, and orders?

VCI: The Commission is without subject matter jurisdiction under federal or state law to inquire into, review or adjudicate this matter.

Issue No. 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?

VCI: The Commission is without subject matter jurisdiction under federal or state law to inquire into, review or adjudicate this matter.

Issue No. 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?

VCI: The Commission is without subject matter jurisdiction under federal or state law to inquire into, review or adjudicate this matter.

Issue No. 4.(a) Does VCI provide toll limitation service to Lifeline customers using its own facilities?

VCI: The Commission is without subject matter jurisdiction under federal or state law to inquire into, review or adjudicate this matter.

Issue No. 4.(b) If so, is VCI entitled to obtain reimbursement for incremental costs of TLS?

VCI: The Commission is without subject matter jurisdiction under federal or state law to inquire into, review or adjudicate this matter.

Issue No. 4.(c) If yes, what is the appropriate amount of reimbursement?

VCI: The Commission is without subject matter jurisdiction under federal or state law to inquire into, review or adjudicate this matter.

Issue No. 5. Were late payment charges correctly applied to VCI Florida customer bills?

VCI: Yes.

Issue No. 6. What is the appropriate refund amount for E-911 customer overbilling?

VCI: The amount submitted to Staff in the Florida 911 Overcharge Worksheet on January 16, 2008 is the appropriate refund amount for E-911 customer overbilling.

Issue No. 7. Does the PSC have the authority to enforce an FCC statute, rule or order pertaining to ETC status, Lifeline, and Link-Up service?

VCI: No.

Issue No. 8.(a). Has VCI violated any FCC statute, rule or order pertaining to ETC status, or Lifeline and Link-Up service?

VCI: The Commission is without subject matter jurisdiction under federal or state law to inquire into, review or adjudicate this matter.

Issue No. 8 (b). If so, what is the appropriate remedy or enforcement measure, if any?

VCI: The Commission is without subject matter jurisdiction under federal or state law to inquire into, review or adjudicate this matter.

Issue No. 9.(a) Has VCI violated any PSC rule or order applicable to VCI pertaining to ETC status or Lifeline and Link-Up service?

VCI: No.

Issue No. 9(b) If so, what is the appropriate remedy, if any?

VCI: No remedy is appropriate.

Issue No. 10.(a) Does the Commission have authority to rescind VCI's ETC status in the state of Florida?

VCI: The Commission is without subject matter jurisdiction under federal or state law to rescind VCI's ETC status in the state of Florida.

Issue No. 10. (b) If so, is it in the public interest, convenience, and necessity for VCI to maintain ETC status in the state of Florida?

VCI: The Commission is without subject matter jurisdiction under federal or state law to rescind VCI's ETC status in the state of Florida.

Issue No. 11.(a) Has VCI willfully violated any lawful rule or order of the Commission, or provision of Chapter 364?

VCI: VCI unintentionally overbilled its customers the E-911 surcharge, but has refunded or credited customers who paid the incorrect charge and has instituted the correct surcharge on its customer bills.

Issue No. 11.(b) If so, should VCI's competitive local exchange company certificate be revoked?

VCI: No.

E. Stipulated Issues

VCI is not a party to any stipulations at this time, although it believes it should be able to reach a stipulation on Issue Nos. 5, 6 and 11(a).

F. Pending Motions

VCI seeks Commission action on its Motion to Dismiss for Lack of Subject Matter Jurisdiction.

G. Pending Requests or Claims for Confidentiality

Today, VCI has filed a Petition for Confidential Classification of Certain Documents Submitted to Staff on January 16, 2008 in Response to Post-Audit Questions and Submitted by Stanley Johnson on April 24, 2008 as Exhibits to his Testimony. VCI filed a Petition for Confidential Treatment of Documents Submitted Pursuant to Audit Control No. 07-250-1-2 on December 4, 2007.

H. Objections to Witness' Qualifications as Expert

VCI objects to the qualification of Robert Casey as an expert on any aspect of the federal Universal Service program and also objects to his qualification to offer legal interpretations and analysis regarding federal and state law.

Respectfully submitted this 14th day of May, 2008.

Stacey Klinzman
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and

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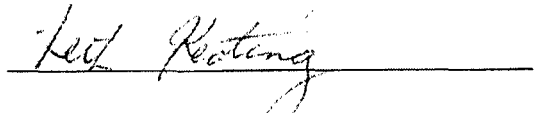
Telephone: (850) 521-8001
Facsimile: (850) 222-0103

Attorneys for Vilaire Communications, Inc

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Prehearing Statement have been served via Electronic Mail to the persons listed below this 14th 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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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

NOTICE OF COMMISSION HEARING AND PREHEARING

TO

AKERMAN SENTERFITT LAW FIRM
VCI COMPANY
VILAIRE COMMUNICATIONS, INC.

AND

ALL OTHER INTERESTED PERSONS

DOCKET NO. 080065-TX

INVESTIGATION OF VILAIRE COMMUNICATIONS, INC.'S ELIGIBLE TELECOMMUNICATIONS CARRIER STATUS AND COMPETITIVE LOCAL EXCHANGE COMPANY CERTIFICATE STATUS IN THE STATE OF FLORIDA.

ISSUED: May 14, 2008

NOTICE is hereby given that the Florida Public Service Commission will hold a public hearing in the above referenced docket.

The hearing will be held at the following time and place:

Wednesday, June 4, 2008, beginning at 9:30 a.m.
Room 148, Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida

PURPOSE:

The purpose of this hearing is to permit parties to present evidence relative to Vilaire Communications, Inc.'s (VCI) protest of Order No. PSC-08-0090-PAA-TX, issued February 13, 2008, proposing to rescind VCI's eligible telecommunications carrier status and cancel VCI's competitive local exchange company certificate.

PREHEARING CONFERENCE

A prehearing conference will be held at the following time and place:

Wednesday, May 28, 2008, beginning at 9:30 a.m.
Room 148, Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida

The purpose of this prehearing conference is: (1) to define and limit, if possible, the number of issues; (2) to determine the parties' positions on the issues; (3) to determine what facts, if any, may be stipulated; (4) to dispose of any motions or other matters that may be pending; and (5) to consider any other matters that may aid in the disposition of this case.

JURISDICTION

This Commission is vested with jurisdiction over the subject matter of this proceeding by the provisions of Chapter 364, Florida Statutes. This proceeding will be governed by Chapter 364 in addition to Chapter 120, Florida Statutes, and Rules 25-4, 25-22, 25-24, and 28-106, Florida Administrative Code.

EMERGENCY CANCELLATION OF PROCEEDINGS

If settlement of the case or a named storm or other disaster requires cancellation of the proceedings, Commission staff will attempt to give timely direct notice to the parties. Notice of cancellation will also be provided on the Commission's website (http://www.psc.state.fl.us/) under the Hot Topics link found on the home page. Cancellation can also be confirmed by calling the Office of the General Counsel at 850-413-6199.

Any person requiring some accommodation at this hearing because of a physical impairment should call the Office of Commission Clerk at (850) 413-6770, at least 48 hours prior to the hearing. Any person who is hearing or speech impaired should contact the Florida Public Service Commission by using the Florida Relay Service, which can be reached at 1-800-955-8771 (TDD).

By DIRECTION of the Florida Public Service Commission this 14th day of May, 2008.

ANN COLE
Commission Clerk

By: Hong Wang
Hong Wang, Supervisor
Case Management Review Section

(SEAL)

RG