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June 9, 2008 – **VIA ELECTRONIC MAIL**

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

Re: Docket No. 070691-TP
Complaint and request for emergency relief against Verizon Florida LLC for
anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and
364.10, F.S., and for failure to facilitate transfer of customers' numbers to Bright
House Networks Information Services (Florida), LLC and its affiliate, Bright
House Networks, LLC

Docket No. 080036-TP
Complaint and request for emergency relief against Verizon Florida LLC for
anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and
364.10, F.S., and for failure to facilitate transfer of customers' numbers to
Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone

Dear Ms. Cole:

Enclosed for filing in the above-referenced matters is Verizon Florida LLC's Motion for
Reconsideration or Clarification. Service has been made as indicated on the Certificate
of Service. If there are any questions regarding this filing, please contact me at (678)
259-1449.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

tas

Enclosures

DOCUMENT NUMBER-DATE

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and request for emergency relief) Docket No. 070691-TP
against Verizon Florida LLC for anticompetitive) Filed: June 9, 2008
behavior in violation of Sections 364.01(4), 364.3381,)
and 364.10, F.S., and for failure to facilitate transfer)
of customers' numbers to Bright House Networks)
Information Services (Florida), LLC and its affiliate,)
Bright House Networks, LLC)
_____)

In re: Complaint and request for emergency relief) Docket No. 080036-TP
against Verizon Florida LLC for anticompetitive)
behavior in violation of Sections 364.01(4), 364.3381,)
and 364.10, F.S., and for failure to facilitate transfer)
of customers' numbers to Comcast Phone)
of Florida, LLC d/b/a Comcast Digital Phone)
_____)

VERIZON FLORIDA LLC'S MOTION FOR RECONSIDERATION OR CLARIFICATION

Verizon Florida LLC ("Verizon") moves, pursuant to Commission Rule 25-22.0376,¹ that the full Commission reconsider the Second Order Modifying Procedure ("Order")² denying Verizon's motion to add to the issues list in this case the issues identified below concerning the retention marketing practices of Verizon and the complainants³ cable companies.⁴ These issues are highly relevant to claims the complainants have included in their challenges to Verizon's practices. Including them will ensure that the Commission decides this matter on a complete record and that discovery on these issues may be pursued. At a minimum, the Commission should

¹ Rule 25-22.0376 provides in pertinent part that "[a]ny party who is adversely affected by a non-final order may seek reconsideration by the Commission panel assigned to the proceeding by filing a motion in support thereof within 10 days after issuance of the order." To Verizon's knowledge, this matter has not been assigned to a panel, so Verizon has requested reconsideration by the full Commission.

² Order No. 080036-TP (May 28, 2008).

³ The complainants are Bright House Networks Information Services (Florida) LLC and Bright House Networks, LLC (collectively, "Bright House") and Comcast Phone of Florida LLC ("Comcast").

⁴ In accordance with Rule 28-106.204(3), counsel for Verizon conferred with counsel for Bright House and Comcast concerning this motion and has been informed that they both object to this motion.

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clarify the Order to ensure that it does not foreclose discovery on the cable companies' retention marketing and thus preclude the Commission from hearing evidence developed from such discovery.

I. INTRODUCTION

Bright House and Comcast both claim that Verizon's retention marketing program is anticompetitive. The Bright House and Comcast complaints allege that Verizon's program violates section 364.01(4)(g), Florida Statutes (requiring the Commission to exercise its jurisdiction to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint") and 364.3381(3), Florida Statutes (giving the Commission jurisdiction "over cross-subsidization, predatory pricing, or other similar anticompetitive behavior"). Bright House and Comcast claim that it is "plainly anticompetitive" for Verizon to use advance knowledge that a customer is leaving them to engage in retention marketing.⁵ And both their complaints make the identical allegation that "Verizon's 'regulations and practices' surrounding its retention marketing efforts clearly constitute an anticompetitive practice that is harmful to competitive providers and to Florida consumers."⁶ To evaluate these claims, the Commission must consider the competitive environment in which Verizon's program takes place, which includes the *more aggressive marketing practices of the complainants themselves*.

⁵ Bright House Complaint ¶ 20; Comcast Complaint ¶ 19.

⁶ Bright House Complaint ¶ 24; Comcast Complaint ¶ 28.

The fact that the cable companies⁷ engage in retention marketing themselves – and indeed in practices that are considerably more aggressive than those about which Bright House and Comcast complain – is obviously relevant here. Central among their claims is the explicit allegation that Verizon’s retention marketing is “anticompetitive.” But retention marketing cannot be *anticompetitive* when Verizon engages in it, yet *competitive* when the cable companies engage in it themselves. Thus the cable companies’ own actions in the marketplace are highly relevant to determining whether Verizon’s comparable actions are “anticompetitive” or unfair to the cable companies. Moreover, Verizon’s retention marketing does not take place in a vacuum, but in a competitive environment in which the cable companies’ marketing practices play just as significant a role in defining the marketplace norms. The Commission must take that environment and those practices into account when evaluating the complainants’ claims that only Verizon’s practices are “anticompetitive.” The Commission also must consider the truly anticompetitive effect of the relief Bright House and Comcast are requesting, which would place Verizon at a competitive disadvantage by prohibiting its retention marketing program while allowing the cable companies’ retention marketing practices to continue unabated. Such relief not only would harm Verizon, but also customers, who would be prevented from receiving accurate information about available service packages and pricing incentives at a meaningful time – after the customers have canceled their Verizon service but before they have yet left Verizon’s network – when they can still consider available options before they would require another inconvenient network connection or reconnection.

⁷ Bright House Networks, LLC, the Bright House cable company, is a party to this case. Comcast did not name its cable affiliate as a party, but Comcast is obviously also serving the interests of its cable affiliate here.

Bright House and Comcast cannot have it both ways: they cannot invoke the Commission's jurisdiction to challenge Verizon's retention marketing program as "anticompetitive" while attempting to prevent the Commission from considering the marketplace standard set by the cable companies' own retention marketing practices. Although the Commission may not have jurisdiction to *regulate* the cable companies' retention marketing, it certainly may *allow discovery* and *consider evidence* concerning their practices when, as here, they are highly relevant to the claims Bright House and Comcast have themselves brought to the Commission. The Commission therefore should reconsider the Order and add the proposed issues below to ensure that it focuses on all relevant marketing practices and considers the pertinent evidence so it can fairly evaluate the claims and defenses in this case. At a minimum, the Commission should clarify that the Order does not foreclose discovery on the cable companies' retention marketing practices.

II. THE HEARING OFFICER'S ORDER AND THE STANDARD FOR REVIEW

The Hearing Officer denied Verizon's Motion to Add Issues Concerning Retention Market Practices without providing a rationale for the decision. The Second Order Modifying Procedure simply states that "[a]t this time, I am unconvinced of the need to broaden the scope of the Issues List beyond the four modified issues attached."⁸ The Order further states that "[t]his decision should also serve as guidance for discovery,"⁹ which Bright House and Comcast have interpreted to mean that they are not required to

⁸ Order, p. 2.

⁹ *Id.*

respond to Verizon's discovery questions about the retention marketing programs of their cable affiliates.

The standard for review of a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision.¹⁰ Because the Order did not explain why Verizon's factual and legal arguments were rejected, Verizon has no way of knowing which points of fact or law the Hearing Officer may have overlooked. Likewise, commissioners who were not involved in the Hearing Officer's decision have no way to determine whether the ruling was correct without reviewing the parties' arguments concerning the motion. Verizon therefore presents those arguments in Section V below. Moreover, there have been a number of recent developments that make even more clear that the retention marketing issues should be added to the case and that discovery on these issues should be allowed. Those developments include the following:

First, as just noted, both Bright House and Comcast have objected to Verizon's discovery questions concerning the retention marketing programs of their cable affiliates, citing the Second Order Modifying Procedure as authority. Unless the Commission reconsiders or at least clarifies the Order, it may be used to choke off discovery about those programs and thus prevent the Commission from hearing crucial marketplace evidence that Verizon could otherwise develop during the discovery process.

¹⁰ See *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962); *Pingree v. Quaintance*, 394 So.2d 161 (Fla. 1st DCA 1981).

Second, Bright House has filed testimony denying that it engages in the “type of activity that Verizon uses in its retention marketing program.”¹¹ Bright House also has submitted testimony contending that Verizon’s retention marketing program is anticompetitive.¹² Verizon should be allowed to develop evidence to rebut Bright House’s denial that it engages in retention marketing that is similar to Verizon’s program. It also should be allowed to explore why Bright House contends (assuming it does) that its own retention marketing is beneficial while Verizon’s is not.

Third, a recent article has reported on Comcast’s new “win-at-any-cost retention program.” See Brian Santo, *Cable Show: Comcast To Try Win-at-Any-Cost Retention Program*, CedMagazine.com (May 20, 2008), available at <http://www.cedmagazine.com/Cable-Show-Comcast-win-at-any-cost.aspx> (attached as Exhibit A). The article confirms that (a) the cable incumbents engage in retention marketing that is substantively identical to Verizon’s retention marketing program; and (b) that the cable incumbents have relied on their own refusal to accept disconnect orders from Verizon acting on behalf of a prospective customer to obtain a competitive advantage. According to the article, “Comcast is preparing to institute what seems to be the single-most-aggressive customer retention program in the industry.” The article reports that Mike Doyle, president of Comcast’s eastern region, stated that “in a high percentage of instances, Comcast agents will not only be able to save a customer, they will be able to upgrade them by offering a bundle. . . . Many customers that ask to unsubscribe are calling to cancel a single service (frequently video) and are unaware of the cost savings inherent in bundles. That makes it easy to upgrade those customers.” Doyle was quoted as saying “[t]hey just don’t know the deals they can get.” Doyle also stated that

¹¹ Direct Testimony of Timothy M. Freundberg at p. 7.

¹² Direct Testimony of Coleman D. Bazelon, pp. 4-9.

Comcast's retention marketing "will be a retain-at-any-cost situation. Further, agent compensation will be based on retention rates and the extent of the incentives the agent offers a customer to remain with Comcast."

Doyle also touted the cable incumbents' supposed ability to manipulate regulations before commissions like this one to obtain a competitive advantage. He stated that Comcast "doesn't anticipate problems" with regulatory complaints of the kind that Comcast has pursued against Verizon. "When Verizon phone customers disconnect, they tell the new service provider, and the new service provide negotiates the disconnect with Verizon." He further stated that "since Comcast callers call Comcast directly to disconnect, the MSO will not have the same problem that Verizon had."

Comcast's statements make a number of things clear, despite its claims in this case. First, customers benefit from retention marketing, which informs them about available services and pricing plans at a time when that information is of particular benefit. Second, the complaints of Bright House and Comcast are designed to impose an artificial regulatory constraint on Verizon that will bar Verizon from engaging in precisely the same type of retention marketing that the cable incumbents freely employ. Third, competition to retain customers has everything to do with intense competition among communication service bundles, in which the cable incumbents enjoy significant market advantages.

These developments confirm that the issues relating to the parties' retention marketing practices should be added and that discovery should be permitted concerning those practices. Without that discovery and the evidence it would produce on these crucial issues, the Commission would be denied any chance of rendering a balanced

decision reflective of the real-world competitive environment in which Verizon, Comcast and Bright House operate. The Commission therefore should reconsider the Order and add the issues or at the least clarify the Order to ensure that it does not foreclose discovery on the cable companies' retention marketing programs.

III. THE PARTIES' RETENTION MARKETING PRACTICES

The retention marketing program that is the subject of the complaints in this case was developed as one aspect of Verizon's efforts to compete effectively against rival providers of bundles of voice and other services, particularly cable providers. Retention marketing is triggered after an order to disconnect a customer's retail service is received by Verizon's retail operations, which often occurs several days before the disconnect is scheduled to happen. Verizon attempts to reach out to those customers who have not already spoken with a Verizon retail representative, sending an overnight letter alerting customers to Verizon's competitive offers and asking them to call if they want to learn more. Thus the customer herself chooses whether to follow up to learn more from Verizon before her service is disconnected. If the customer calls Verizon in response to the retention marketing letter, the Verizon representative asks her why she is disconnecting and informs her about available service packages and promotional offers, in an attempt to persuade the customer to stay. With this new information, some customers decide that they are better off keeping their Verizon services. These retention marketing efforts have had some success because Verizon provides consumers with accurate information about Verizon's service offerings that they may not have had at the time that they initially decided to switch providers and because the

program provides consumers substantial benefits in the form of financial incentives to remain with Verizon.

The cable companies likewise engage in retention marketing when Verizon has attracted one of their customers, but in a more aggressive way that does not give the customer the choice of whether to listen to a retention marketing pitch. Unlike Verizon, which must allow a competitive service provider to cancel Verizon's telephone service on a customer's behalf, cable operators typically require customers personally to call them directly to cancel their cable or broadband service.¹³ Thus instead of giving the customer the choice of whether to listen to retention information, the cable companies force them to, merely in order to cancel service. This more aggressive retention marketing program gives the cable operator a guaranteed final opportunity to persuade the customer not to switch her services (including voice service), and to offer incentives for the customer to remain with the cable operator. The Bright House and Comcast cable companies acknowledged in the FCC retention marketing case that they "typically require customers to contact them directly to cancel video or broadband Internet access service." They further admitted that "[w]hen customers call [them] directly to cancel video or broadband Internet access service, [they] offer such customers incentives to remain customers in some instances."¹⁴ A significant percentage of Verizon winbacks that involve a number port are canceled before the migration is completed, which suggests that the cable companies' retention marketing efforts are successful and

¹³ Verizon has filed a petition at the FCC challenging the cable companies' refusal to accept cancellation orders from competing video providers on behalf of customers who have chosen to switch their service provider.

¹⁴ *In re: Bright House Networks, LLC v. Verizon California, Inc.*, Letter from Matthew A. Brill, File No. EB-08-MD-002 (March 6, 2008).

extensive. Verizon will seek to develop further information about these practices from Bright House and Comcast during discovery in this case.

IV. PROPOSED ISSUES

Verizon has proposed the inclusion of the following issues concerning the parties' retention marketing practices:

1. What are the retention marketing practices of Verizon Florida LLC ("Verizon") for voice customers, broadband customers and cable customers?
2. What are the retention marketing practices of Bright House Networks Information Services (Florida), LLC and Bright House Networks, LLC (collectively, "Bright House") for voice customers, broadband customers and cable customers?
3. What are the retention marketing practices of Comcast Phone of Florida, LLC and Comcast Corporation (collectively, "Comcast") for voice customers, broadband customers and cable customers?

For the reasons discussed below (in addition to the new developments that already have been addressed), Verizon respectfully submits that these issues are not only highly relevant, but essential to a fair evaluation of claims raised by the cable companies themselves. They should be added to the issues list.

V. THE COMMISSION SHOULD RECONSIDER THE ORDER AND ADD THE PROPOSED ISSUES

The issues Verizon has requested concerning the parties' retention marketing practices are relevant to the claims in this case for at least three reasons: (i) retention marketing cannot be *competitive* when engaged in by cable companies, but *anticompetitive* when engaged in by Verizon; (ii) Verizon's program must be viewed in light of the competition it faces, which includes the extensive retention marketing

programs employed by Bright House and Comcast, and the marketplace norms reflected in those practices; and (iii) the Commission should not grant requested relief (here, termination of Verizon's program) that would lock into place an artificial and anticompetitive regulatory bias in favor of cable company marketing practices, in this case by prohibiting Verizon's retention marketing program while leaving the complainants' cable companies free to continue their own retention marketing.

A. Retention Marketing Cannot Be *Competitive* When Engaged in By Cable Companies and *Anticompetitive* When Engaged in by Verizon

Bright House and Comcast seek to continue their own aggressive retention marketing efforts at the same time they are asking the Commission to direct Verizon to stop its less aggressive retention marketing program. Presumably the Bright House and Comcast cable companies would not engage in conduct they believe to be "anticompetitive" and they certainly have given no indication that they have any intention of stopping their own practices. The cable companies' own conduct thus belies the validity of the claims here that Verizon has somehow engaged in "anticompetitive" conduct. Even in the unlikely event that Bright House and Comcast were to criticize their cable companies' own marketing practices, they would be admitting that they come before the Commission with unclean hands, and accordingly that they are not entitled to relief. Therefore, whatever position Bright House or Comcast take concerning their cable companies' retention marketing practices, those practices bear directly on their claims that Verizon's less aggressive practices are "anticompetitive," and indeed compel the conclusion that their claims have no merit.

B. Verizon's Retention Marketing Program Must Be Viewed in Light of the Competition it Faces

Bright House and Comcast ask the Commission to stop Verizon's retention marketing program without considering the relevant marketplace context, which includes their own retention marketing. For the Commission to assess whether Verizon's program is anticompetitive, it must take into account the robust competition that is taking place in the Tampa Bay area between Verizon and its cable competitors. In this intermodal competition, Verizon is entering the cable business, the cable companies are entering the voice business and both Verizon and the cable companies are continuing to compete for broadband customers. Both Verizon and the cable companies are pursuing double and triple play customers who want to receive multiple, bundled services at discounted prices. And they both actively market their services in a number of ways, including through retention marketing. The Commission should not accept Bright House's and Comcast's invitation to turn a blind eye to their cable companies' retention marketing practices because doing so would leave the Commission with an inaccurate picture of Tampa Bay's competitive landscape and prevent it from fairly judging Verizon's program in the context from which it arises.

Obtaining and reviewing information about unregulated services when relevant to the task at hand is nothing new for the Commission. The Commission's annual reports to the legislature have included data on unregulated services such as Voice over Internet Protocol ("VoIP"), broadband and wireless services, which has enabled the Commission to provide a more complete picture of the Florida telecommunications

industry.¹⁵ Likewise, when determining whether good cause has been shown to relieve a local exchange telecommunications company of its carrier-of-last-resort obligation, the Commission has considered evidence that VoIP service was available at the property from other providers, including the cable company.¹⁶ As it has done in these other contexts, the Commission should take into account information about the cable companies' services, even though they are unregulated.

Consideration of the cable companies' retention marketing for unregulated services is particularly appropriate here because of its effect on voice service. In a market like the Tampa Bay area where both traditional telephone and traditional cable providers offer similar service bundles including voice, broadband and video services, retention marketing for any of these services affects all of them. As the FCC Enforcement Bureau recently stated:

A cable operator has [an] opportunity to retain its customer if it requires the customer to call personally to cancel service, to stay home to wait for a technician to arrive to disconnect service, or if it requires that the customer personally return equipment to the cable provider's offices. Yet these practices affect not just the customer's choice of provider for a single service. In a market of bundles they affect the customer's choice of provider for *all* services.¹⁷

Thus, the cable companies' retention marketing for broadband and cable customers also targets voice customers for reacquisition. For example, when Verizon wins a triple play (voice, broadband and cable) customer, and Bright House then persuades the

¹⁵ See Commission's Report on the Status of Competition in the Telecommunications Industry as of May 31, 2006 and Report on the Status of Competition in the Telecommunications Industry as of May 31, 2005.

¹⁶ See *In re: Petition for relief from carrier-of-last-resort (COLR) obligations pursuant to Florida Statutes 364.025(6)(d) for two private subdivisions in Nocatee development, by BellSouth Telecommunications, Inc.*, Order Granting Petition for Relief From Carrier-of-Last-Resort Obligation, Docket No. 060822-TL, Order No. PSC-07-0862-FOF-TL, p. 4 (Oct. 26, 2007).

¹⁷ *In re: Bright House Networks, LLC v. Verizon California, Inc.*, Recommended Decision, File No. EB-08-MD-002 ¶ 30 (April 11, 2008) ("Recommended Decision") (emphasis in original).

customer not to switch after the customer calls to cancel his or her cable service, Bright House keeps all the services in the bundle, including the voice service. The direct effect of the cable companies' retention marketing practices on voice customers leaves no doubt as to their relevance here.

C. The Commission Should Not Grant Requested Relief that Would Lock in an Unfair Advantage for Cable Competitors

Bright House and Comcast seek an unfair advantage in the marketplace by getting this Commission to prohibit Verizon's retention marketing while the cable companies engage in more aggressive retention marketing with no restrictions. The FCC Enforcement Bureau emphasized the need to avoid such asymmetric regulation in the Recommended Decision when it stated that "[r]egulatory parity, whether by increased regulation or deregulation, is important to ensure a level playing field, despite possible historic differences in regulation of the various services in the bundle."¹⁸ The Bureau further stated that it is "very clear" that retention marketing, "whether engaged in by the incumbent telephony provider or by the cable provider, should be treated consistently."¹⁹ Although this Commission cannot level the playing field between cable companies and Verizon through regulation that applies to both, it can and should consider that effects of its actions in the broader marketplace when it regulates Verizon. The Commission therefore should review the retention marketing programs of the Bright House and Comcast cable companies so it can assess the impact of the requested relief on Verizon's ability to compete on a level playing field with the cable companies.

¹⁸ *Id.*

¹⁹ *Id.* ¶ 31.

VI. AT A MINIMUM, THE ORDER SHOULD BE CLARIFIED

Even if the Commission were to decide not to add the issues Verizon has requested, it should not foreclose discovery on the Bright House and Comcast cable companies' retention marketing programs. As a general matter, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action" and "[i]t is not ground for objection . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."²⁰ For the reasons discussed above, the cable companies' retention marketing is highly relevant to the issue of whether Verizon's retention marketing program for voice customers is anticompetitive, as complainants allege, which is one of the issues already identified in this case. At a minimum therefore, the Order should be clarified so that it does not prohibit such discovery.

For the foregoing reasons, Verizon respectfully requests that its motion for reconsideration or clarification be granted.

Respectfully submitted on June 9, 2008.

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²⁰ Fla. R. Civ. P. 1.280(b)(1).

EXHIBIT A

Cable Show: Comcast to try win-at-any-cost retention program

By Brian Santo

CedMagazine.com - May 20, 2008

Comcast is preparing to institute what seems to be the single-most aggressive customer retention program in the industry, starting June 1.

The company has been building a new call center in Newark, Del., capable of housing 700 call center agents. Comcast will have up to 200 agents devoted specifically to retaining customers "no matter what it takes," said Mike Doyle, president of Comcast's eastern division. Doyle was speaking in New Orleans on a Cable Show panel.

As competition increases, the more important retention becomes, Doyle said. He said that in a high percentage of instances, Comcast agents will not only be able to save a customer, they will be able to upgrade them by offering a bundle.

Many customers that ask to unsubscribe are calling to cancel a single service (frequently video) and are unaware of the cost savings inherent in bundles. That makes it easy to upgrade those customers, Doyle said. "They just don't know the deals they can get."

Doyle doesn't anticipate problems of the sort that Verizon recently got in trouble for. When Verizon phone customers disconnect, they tell the new service provider, and the new service provider negotiates the disconnect with Verizon. Verizon would call those customers to try to retain them, but the telco was accused of violating the privacy of their former calling customers because they were relying on records that arguably should not have been available to them to use for that particular purpose.

Doyle said that since Comcast callers call Comcast directly to disconnect, the MSO will not have the same problem that Verizon had. Further, there is no customer demand for the ability to switch to another video provider and have that video provider negotiate a disconnect with Comcast, similar to the situation Verizon is in.

Despite all that, the new retention program looks to be a high-pressure sales situation. Doyle said it will be a retain-at-any-cost situation. Further, agent compensation will be based on retention rates and the extent of the incentives the agent offers a customer to remain with Comcast, Doyle explained.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail
and U. S. mail on June 9, 2008 to:

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