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September 6, 2000

Ms. Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 990362-TI
Initiation of Show Cause Proceeding Against GTE Communications Corporation
for Apparent Violation of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider
Selection

Dear Ms. Bayo:

Please find enclosed for filing an original and fifteen copies of Verizon Select
Services Inc.'s Answer to the Office of Public Counsel's Petition Requesting Section
120.57 Hearing and Protest of Proposed Agency Action in the above matter. Service
has been made as indicated on the Certificate of Service. If there are any questions
regarding this matter, please contact me at 813-483-2617.

Sincerely,

Kimberly Caswell

KC:tas
Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of Show Cause Proceeding)	Docket No. 990362-TI
Against GTE Communications Corporation)	Filed: September 6, 2000
for Apparent Violation of Rule 25-4.118, F.A.C.,)		
Local, Local Toll, or Toll Provider Selection)	
_____)	

**VERIZON SELECT SERVICES INC.'S ANSWER TO THE OFFICE OF PUBLIC
COUNSEL'S PETITION REQUESTING SECTION 120.57 HEARING AND
PROTEST OF PROPOSED AGENCY ACTION**

Pursuant to Commission Rule 28-106.203, Verizon Select Services Inc. ("VSSI"), formerly known as GTE Communications Corporation, answers the Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action ("Petition"), filed by the Office of Public Counsel ("OPC") on August 16, 2000. VSSI asks the Commission to deny OPC's Petition and to issue an order consummating its Proposed Agency Action Order ("Order") approving VSSI's settlement offer in this case. (Order PSC-00-1348-PAA-TI, July 26, 2000.)

That settlement was intended to resolve the Commission's investigation of unauthorized primary interexchange carrier ("PIC") complaints lodged against VSSI. In it, VSSI committed to: (1) making a \$209,000 contribution to the State General Revenue Fund, with no admission of liability or wrongdoing; (2) suspending indefinitely all face-to-face marketing to multicultural markets in Florida; (3) formally acknowledging that its previously established "warm transfer" process will be used to accommodate customer complaints of unauthorized PIC changes; (4) promptly addressing and resolving all customer inquiries and complaints and continuing to cooperate closely with the Commission and its Staff. (Letter from D. B. May to Blanca Bayo, Dir. of Records &

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FPSC-RECORDS/REPORTING

Reporting, Dec. 16, 1999 (“Dec. 16 Letter”), at 3-4, included in Staff’s June 29, 2000 Recommendation in this docket (“June 29 Staff Rec.”.)

In accepting the terms of the settlement offer, the Commission found it to be “consistent with other settlement offers we have accepted for apparent slamming violations, and...fair and reasonable.” (Order at 3.) It further considered the non-monetary aspects of the offer “to be positive steps for assuring future compliance” with the Commission’s rules. (*Id.*)

OPC offers no rationale to undermine these sound conclusions on the Commission’s part. In fact, VSSI is at a loss to understand why OPC has attempted to block this settlement, as Commission-approved settlements are the routine and customary way the Commission resolves slamming investigations. Indeed, VSSI does not recall any slamming show cause docket having gone to hearing.

OPC contends that the settlement amount in this case is “insufficient.” (Petition at 2.) But there is nothing differentiating VSSI’s settlement offer from any other that the Commission has approved without incident. (*See* case citations below.) In fact, there are a number of factors recommending against unduly harsh penalties in this case.

VSSI is a “first offender,” never having been before the Commission in any show cause docket. The Commission typically considers first offender status in assessing the reasonableness of a settlement proposal; it will require relatively bigger monetary contributions where a company is a repeat offender.

In addition, VSSI took several actions to “mitigate or undo the effects of the unauthorized change[s]” that are the subject of this docket. Under Commission Rule 25-4.118(13)(b), the agency must consider these actions in determining the appropriate

remedies for unauthorized carrier change infractions. In this regard, VSSI promptly responded to the slamming complaints at issue. In most cases, VSSI gave customers 100% credit for the VSSI bills that had been issued. In a small number of cases, VSSI re-rated the customer's bill to reflect the difference between VSSI's rates and the rates of the prior carrier. Last year, VSSI provided Commission Staff copies of refund letters reflecting credits and payments totaling approximately \$20,000. VSSI cooperated fully with the Staff in all aspects of its investigation. (Dec. 16 Letter, June 29, 2000 Staff Rec. at 8.) OPC does not appear to dispute any of these points.

Further, as VSSI's settlement proposal noted and OPC acknowledges, one of VSSI's marketing agents, Snyder Communications, Inc., was "the largest single source of slamming" for VSSI. (OPC Petition; Dec. 16 Letter, Staff. Rec. at 7.) As VSSI explained, when it determined Snyder to be the cause of an increase in slamming complaints, it required Snyder to implement enhanced slamming protections. After it became apparent that these stepped-up quality control efforts were not working, VSSI shut down Snyder's face-to-face marketing operation on behalf of VSSI. This operation had been the primary cause of unauthorized PIC changes in Florida. (Dec. 16 Letter, Staff Rec. at 7.)

In view of VSSI's first offender status, its resolution of customer complaints, and its voluntary efforts to remedy apparent problems and assure future compliance with the Commission's Rules, VSSI considers the \$209,000 settlement figure to be very reasonable. In fact, VSSI had initially offered a much lower amount, but Staff indicated that VSSI would need to pay \$1000 per complaint to resolve this matter. VSSI offered exactly that amount, which the Commission deemed fair and reasonable.

OPC tries to cast doubt on the Commission's decision to accept the settlement by focussing on allegations that Snyder employees forged customer signatures on letters of authorization ("LOAs") for PIC changes. VSSI agrees that forgery is a very serious matter and in no way encourages, tolerates, or condones it. But, as noted below, alleged forgery has been a component of a number of the slamming show cause cases that have come before the Commission. Once again, all of these cases have settled without hearing, so OPC cannot rely on the forgery element to single out VSSI's case for a hearing.

OPC's recitation of FCC penalties for unauthorized PIC changes is, moreover, irrelevant to this case. This Commission is not a division of the FCC. Its decisions are necessarily founded on Florida law, regulations, and precedent, which differ from the federal law, regulations, and precedent governing the FCC's actions in slamming cases. The relevant comparison for this Commission's purposes is between the instant case and its own past decisions approving settlement offers—not between FCC decisions and this Commission's decisions. For instance, although the FCC recently approved a \$3.5 million slamming settlement with MCI, this Commission approved a settlement offer of \$240,000 from MCI in its third slamming show cause case before the Commission. (Order No. PSC-98-0751-AS-TI, June 1, 1998; the previous settlements were approved by Order No. 24550, May 20, 1991 (\$25,000 settlement) and Order No. PSC-96-0336-AS-TI, March 8, 1996 (\$50,000 settlement).)

In addition, while VSSI does not know all the details of the FCC cases (nor are they relevant for purposes of this docket), it appears there were obvious aggravating factors in some, if not all, of them. For example, OPC leads its FCC discussion with the

Brittan Communications International case, in which the FCC imposed a \$1 million forfeiture for unauthorized PIC changes, some of them involving apparently forged LOAs. Review of the Brittan situation reveals that a key factor prompting the large fine was Brittan's failure to thoroughly respond to customers' complaints. (FCC Report No. CC 98-38, Oct. 29, 1998, www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1998/nrcc8079.txt.) That is not the case here, where VSSI responded to all complaints, voluntarily changed customers back to their preferred carriers, issued credits for the VSSI charges, and fully cooperated with the Commission's investigation.

If the Commission undertakes the more relevant exercise of comparing VSSI's settlement here with its own orders in other slamming cases—as the Staff did in recommending the Commission approve the VSSI settlement (June Staff Rec. at 4)—it will find the VSSI contribution to be consistent with other approved settlements. The Commission routinely approves slamming settlements in cases involving all manner of allegations about misconduct leading to the apparent slamming infractions—including forgery, deceptive marketing practices, lack of cooperation with the Commission, and the like. (See, e.g., Orders approving settlements with: American Nortel Communications, Inc., Order No. PSC-99-1875-AS-TI (Sept. 21, 1999) (\$30,000 contribution to settle unspecified number of apparent slamming infractions (settlement letter mentions over 50 complaints); case involved sweepstakes marketing;) USA Tele Corp., Order No. PSC-99-1385-AS-TP (July 19, 1999) (\$12,000 contribution to settle 15 apparent slamming infractions; case involved “questionable marketing practices”); Excel Telecommunications, Inc., Order No. PSC-99-0368-AS-TI (Feb. 22, 1999) (\$68,000 contribution to settle 37 apparent slamming infractions for then-second-time offender;

case involved forgery allegations); Minimum Rate Pricing, Inc., Order No. PSC-99-0261-AS-TI, (Feb. 10, 1999) (\$100,000 contribution to settle 194 apparent slamming infractions; the Commission had received 423 slamming complaints against MRC in less than two months; case involved allegations of misleading solicitations and MRC's practice of "recapturing" subscribers who did not notify MRC of their decision to switch to another provider); Least Cost Routing d/b/a Long Distance Charges, Order No. PSC-99-0072-AS-TI (Jan. 8, 1999) (\$70,000 contribution to settle "at least" 68 apparent slamming infractions); Preferred Carrier Services, Order No. PSC-98-1627-AS-TI (Dec. 7, 1998) (\$50,000 contribution to settle 53 apparent slamming infractions; case involved sweepstakes marketing allegations; PCS was "first time offender"); LCI International Telecom Corp., Order No. PSC-98-1318-AS-TI (Oct. 9, 1998) (\$110,000 contribution to settle unspecified number of apparent slamming infractions; case involved forgery allegations); Home Owners Long Distance, Order No. PSC-98-1319-AS-TI (Oct. 9, 1998) (\$90,000 contribution to settle 101 apparent slamming infractions; HOLD had used sweepstakes marketing); Intercontinental Communications Group, Order No. PSC-98-0930-AS-TI (July 8, 1998)(\$50,000 contribution to settle 24 apparent slamming infractions; case involved use of sweepstakes marketing and forgery allegations); Sprint Communications Company, Order No. PSC-98-0879-AS-TI (July 2, 1998) (\$150,000 contribution to address 106 apparent slamming infractions in second slamming settlement with Sprint (first case addressing 62 apparent slamming infractions settled for \$40,000, Order No. 24037 (Jan. 28, 1991)); case involved forgery allegations); UniDial Incorporated, Order No. PSC-98-0800-AS-TI (July 9, 1998) (\$125,000 contribution to settle 64 apparent slamming infractions; lack of "proper authorization" on

LOAs); MCI, Order No. PSC-98-0751-AS-TI (June 1, 1998) (\$240,000 contribution to address 106 apparent slamming infractions in third slamming settlement with MCI).

As is apparent from this list, a number of these cases were resolved for per-complaint payments that are about the same or lower than VSSI's \$1000 per-complaint contribution. The specific facts of each of these cases, of course, vary. But review of the conduct, the contributions, and other settlement terms in each case leads to the same conclusion the Commission has already made—that VSSI's settlement in this case is fair, reasonable, and consistent with past settlements in other cases. (Order at 3.)

In order to affirm this conclusion, VSSI does not believe it is necessary for the Commission to accept or reject either of the parties' positions on any facts that may be in dispute at this point. It need only review the undisputed aspects of VSSI's conduct and compare VSSI's settlement with other settlements approved in the past. Indeed, even if the Commission takes all of OPC's factual allegations as true (and they are not),¹ there is still nothing so distinctive about this case that should prompt the Commission to go to hearing on it. The OPC's proposed remedy of up to \$25,000 for each of the 209 apparent slamming infractions in this case would be, to say the least, a sharp and unjustified departure from this Commission's past practice and precedent.

¹ For instance, it is not true, as OPC claims, that VSSI is still using Snyder for telemarketing in Florida. The Briceno complaint that OPC mentions to support this allegation was lodged some sixteen months after the apparent slam, and stemmed from Snyder's actions before its telemarketing operations here ended. In addition, OPC implies that VSSI did nothing about Snyder's apparent misconduct in the six months between discovering it and shutting down Snyder's face-to-face marketing operations in Florida. This implication is unwarranted. As VSSI pointed out above, in its settlement letter, and in discussions with Staff and OPC, VSSI tried, very reasonably, to implement various anti-slammings protections before shutting down Snyder's contact sales in Florida and elsewhere. Among other things, Snyder assured VSSI that it had: (1) begun using positive option letters; (2) started penalizing its employees for rejected sales; (3) terminated the Branch Manager and almost 100 sales representatives in Florida; (4) closed sales offices in Sarasota and West Palm Beach.

Another important consideration for the Commission in deciding whether to grant OPC's Petition is that a hearing will require full litigation, up to appeal if necessary, of complex legal issues that the Commission has not been called upon to resolve in any previous slamming show cause case. Because the Commission routinely settles such cases, it has been able to avoid potentially difficult problems of proof. As OPC's Petition recognizes, the Commission must find that VSSI willfully violated Commission rules before it can assess any fine. (Fla. Stat. ch. 364.283.) This standard requires "that the act be intentional and accompanied by the 'actor's intent and purpose that the prohibited conduct take place.'" *Metropolitan Dade County v. State of Fla. Dep't of Environmental Protection and Sekoff Investments*, 714 So. 2d 512, 517 (1998), quoting *Thunderbird Drive-In Theatre, Inc. v. Reed*, 571 So. 2d 1341 at 1344 (Fla. 4th DCA 1990). In practical terms, then, the Commission will need to review each of the 209 complaints at issue to determine if VSSI acted with the intent to slam the particular customer in violation of the Commission's Rules.

This time-consuming and labor-intensive analysis will be complicated by the fact that most of the complaints arose through the acts of VSSI's marketing agent, not VSSI itself. Although VSSI has clearly accepted responsibility for remedying the misconduct of sales agents (for example, switching back complaining customers to their preferred carriers and issuing appropriate credits), that is not the same as being vicariously liable for its agents' actions. VSSI never raised this point in settlement negotiations with Staff, and would not have done so at all in this docket, but VSSI will be compelled to do so if it is forced to litigate this case. In this regard, to penalize VSSI for slamming, the Commission will need to find that it ratified the unauthorized PIC changes by

“accept[ing] the fruits of the agent’s efforts,” and refusing to “restore all the fruits of the transaction.” See, e.g., *Frederick v. Squillante*, 144 So. 2d 848, 849 (Fla. 2d DCA 1962), quoting *Branford v. Howell*, 102 So. 649, 650 (1924).

While VSSI believes it would prevail on the legal issues if a hearing is ordered, it is unnecessary to argue these issues now, and the Commission need not take any stance on them at this point. VSSI’s only purpose in raising them is to emphasize that, depending on the outcome of any litigation of the legal issues in this case, the Commission’s efforts to obtain reasonable settlements in the future may be substantially undermined. Time-consuming and expensive hearings may become the norm, rather than the extraordinary exception.


VSSI believes the Commission’s primary motivation in this case, as it is in all investigations of PIC change infractions, is to deter future slamming. To this end, the Commission’s Order approving the settlement observed that the non-monetary aspects of the settlement should help assure future compliance with the Commission’s rules. Indeed, that effect had already occurred by the time the settlement came before the Commission. As Staff notes in its June Recommendation, only 36 slamming complaints had been received for VSSI in the months between September 30, 1999 and preparation of Staff’s Recommendation almost nine months later. (At that point, only one complaint had been closed as slamming. Further, it is likely that some of these complaints pertained to Snyder’s activities before its contact sales were stopped.) While VSSI has a no-tolerance policy for slamming, it believes the drop in slamming complaints shows that its wholly voluntary actions to curb slamming have been largely successful, and that there is no systemic problem with forgery or other impermissible

conduct. If the Commission's primary goal is deterrence, then a hearing would be a waste of resources for the Commission and the Company. These resources can be better directed toward service-related endeavors than litigation. Moreover, given that deterrence has already been achieved, the bigger fines OPC seeks will accomplish no worthwhile goal.

Finally, as the Commission's Order recognizes, the Florida Attorney General's Office is pursuing its own investigation of the marketing of VSSI's services in Florida. VSSI is cooperating fully with that investigation. The Attorney General's Office has the ability to pursue claims not just against VSSI, but also against entities, such as Snyder, that are not parties to this proceeding. In light of the Attorney General's investigation, granting OPC's hearing request would entail an inequitable, unnecessary and duplicative commitment of the State's regulatory resources.

For all the reasons discussed in this Answer, VSSI asks the Commission to deny OPC's Petition, as is the Commission's prerogative under its Rule 28-106.201(3), and to issue an order consummating its Order approving VSSI' settlement proposal.

Respectfully submitted on September 6, 2000.

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Select Services Inc.'s Answer to the Office of Public Counsel's Petition Requesting Section 120.57 Hearing and Protest of Proposed Agency Action in Docket No. 990362-TI were sent via overnight delivery(*) on September 5, 2000 or U.S. mail(**) on September 7, 2000 to:

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