

**IN THE SUPREME COURT OF FLORIDA**

**CHARLES J. CRIST JR.,  
Attorney General, State of Florida**

**Appellant,**

**v.**

**LILA A. JABER, CHAIRMAN, and  
J. TERRY DEASON, BRAULIO L.  
946**

**Consolidated Case Nos.:  
SC04-9, SC04-10, SC04-**

**BAEZ, RUDOLPH “RUDY” BRADLEY,  
and CHARLES DAVIDSON, Commissioners,  
as and constituting the FLORIDA PUBLIC  
SERVICE COMMISSION, an agency of the  
STATE OF FLORIDA, et al.,**

**Appellees.**

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**VERIZON FLORIDA INC.’S RESPONSE TO: (1) THE ATTORNEY  
GENERAL’S MOTION FOR DETERMINATION REGARDING  
PUBLIC DISCLOSURE OF BRIEF AND COURT RECORD, AND  
(2) PUBLIC COUNSEL’S JOINDER WITH THE  
ATTORNEY GENERAL’S MOTION**

Pursuant to this Court's September 9, 2004 Order and Rule 9.300, Florida Rules of Appellate Procedure, Appellee Verizon Florida Inc. (Verizon) responds to: (1) the Attorney General’s Motion for Determination Regarding Public Disclosure of Brief and Court Record; and (2) Public Counsel’s Joinder with the Attorney General’s Motion (collectively, the Disclosure Motion).

## **I. INTRODUCTION**

1. The Disclosure Motion should be denied for several reasons. First, it constitutes an improper collateral attack on Florida Public Service Commission (Commission) orders granting requests for confidentiality. Second, Florida law plainly expects that confidential information, exempted from public disclosure by a Commission order, should be maintained as confidential during the course of the appeal. Third, public policy dictates that the parties should not be allowed to re-litigate confidentiality issues on appeal.

## **II. THE DISCLOSURE MOTION IS A COLLATERAL ATTACK ON THE COMMISSION'S CONFIDENTIALITY ORDERS**

2. The Disclosure Motion is unquestionably an impermissible collateral attack on prior Commission confidentiality orders. An examination of the events giving rise to these orders, and the subject matter of the orders themselves, makes this clear.

3. In the proceedings below, Verizon received discovery from other parties and Commission Staff seeking competitively sensitive business information. This information consisted of, for example, cost and revenue data, customer demographics, and other information that, if not protected, would afford Verizon's competitors with an unfair competitive advantage. After receiving such discovery, Verizon filed requests for confidentiality under Section 364.183, Florida Statutes, and

Rule 25-22.006(4), Florida Administrative Code. Neither the Attorney General nor the Office of Public Counsel (collectively, Appellants) objected in the proceedings below to Verizon's requests for confidentiality. The Commission ruled that Verizon had met its burden of proving that the information in question met the definition of confidential proprietary business information, as set forth in Section 364.183(3), Florida Statutes, disclosure of which would cause harm to the ratepayers or the Company's business operations. As a result, the documents in question are exempt from disclosure under Florida's Public Records Act, Chapter 119, Florida Statutes. Section 364.183(2), Florida Statutes. Neither of the Appellants sought reconsideration of the Commission's confidentiality orders, or appealed orders to the Judicial Circuit Court of Florida.

4. It is plain to see that Appellants chose repeatedly not to avail themselves of the proper procedural vehicles for contesting Verizon's confidentiality requests or the Commission's confidentiality orders. Instead, Appellants opted to mount an improper collateral attack on the very issues addressed in Verizon's requests and the Commission's orders. Such blatant disregard for established and recognized procedural rules should not be tolerated.

### **III. THE DISCLOSURE MOTION CONTRADICTS FLORIDA LAW**

5. The Court should deny the Disclosure Motion because Florida law

plainly expects that confidential proprietary business information will not be subject to public disclosure during the course of an appeal. For example, Section 364.183(2), Florida Statutes, provides in pertinent part:

Any record which has been determined to be proprietary confidential business information and is not entered into the official record of the proceeding shall be returned to the person providing the record within 60 days after the final order, unless the final order is appealed. If the final order is appealed, any such record shall be returned within 30 days *after the decision on appeal*. (Emphasis added).

Likewise, Rule 25-22.006(6)(d), Florida Administrative Code, provides:

Confidential information which has not been entered into the official record of the proceeding shall be returned to the utility or person who provided the information no later than 60 days after the final order, unless the final order is appealed. If the final order is appealed, the confidential information which has not been made a part of the record shall be returned no later than 30 days *after the decision on appeal*. (Emphasis added).

The foregoing passages show that the Legislature intended for confidential information to remain protected during pendency of appeal because these passages expressly state that certain confidential information need not be returned until *after* the decision on appeal. Had the Legislature wanted to limit the protection of confidential information solely during the pendency of proceedings before the Commission, the Legislature would have required parties to return confidential information after the issuance of the Commission's decision, not the decision on appeal.

6. Appellants rely on Rule 2.051, Florida Rules of Judicial Administration, for the contrary proposition that all documents, including confidential documents, transmitted from the Commission Clerk to this Court are no longer entitled to protection from public disclosure. Specifically, Appellants argue that the documents deemed confidential by the Commission are no longer exempt from public disclosure because: (1) these documents became records of the judicial branch when they were transmitted to this Court; and (2) Rule 2.051 requires that the public be granted access to records of the judicial branch. However, Appellants' reliance on this Rule 2.051 is misplaced. Subsection (c)(7) of this rule exempts records of the judicial branch from public disclosure if they were made confidential under Florida law, and Subsection (c)(8) exempts records "deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission." The Commission deemed the records at issue to be confidential under Section 364.183, Florida Statutes, and thus these records are exempt from disclosure under subsections (c)(7) and (c)(8). See State v. Buenoano, 707 So. 2d 714, 718 (Fla. 1998) (records deemed exempt from public access under Chapter 119, Florida Statutes, remain exempt from public disclosure even though they were placed in the judicial record); see also In re: Amendments to the Florida Rules of Judicial Administration - Public Access to Judicial Records, 608 So.2d 472 (Fla. 1992) (case cited by Attorney General actually

recognizes the exception set forth in Rule 2.051(c), and thus undermines the Appellants' argument).

In sum, the relief sought by the Attorney General and the Office of Public Counsel contravenes state law.

#### **IV. PUBLIC POLICY MANDATES THAT PARTIES NOT BE ALLOWED TO RE-LITIGATE CONFIDENTIALITY ISSUES ON APPEAL**

7. Florida law clearly establishes that it is in the public interest to exempt proprietary confidential business information from public disclosure. Sections 364.183 and 815.045 and Chapter 688, Florida Statutes. The Disclosure Motion contradicts this fundamental tenet of public policy by seeking the general disclosure of confidential information.

8. Of course, there is a good reason to exempt competitively sensitive information from public disclosure: if Verizon's proprietary and confidential information were made publicly available, Verizon would be placed at an unfair competitive disadvantage relative to its competitors.

9. Moreover, there is no compelling reason to release confidential information here.

10. As an initial matter, the volume of confidential information at issue is a very small portion of the total record.

11. Second, there is simply no credence to the contention that decisions will

somehow be made without all of the relevant facts or in secret unless the Court releases confidential information to the public. Appellants are the public's legally authorized representatives, and these parties have full access to every shred of the confidential information produced in this case. Similarly, the Commission and this Court have access to this information, so there is no danger that any party or the Court will be prevented or hindered from obtaining, considering and/or utilizing relevant information.

12. Third, requiring adherence to the Commission's confidentiality orders will not prevent or limit the ability of any party to make its case. With respect to motions and briefing, this Court's September 9, 2004 Order already establishes a procedure that avoids direct disclosure of the information, but allows the parties to make any point they wish by referencing a confidential appendix. The Attorney General should have little difficulty following this protocol given that his brief "contains scattered highlighted references to allegedly confidential information while the substantial majority of the brief discloses no confidential information." Supreme Court September 9, 2004 Order. With respect to oral argument, this Court should issue a similar order that prevents the disclosure of confidential information, but allows the parties to make their arguments by referencing an exhibit number or a transcript.

13. Fourth, it would be wasteful to allow Appellants to re-litigate confidentiality issues on appeal. The Commission has already undertaken the fact-intensive

examination of whether the information in question meets the statutory definition of confidential proprietary business information, and there is no good reason for this Court to re-undertake the same investigation here. Additionally, allowing the parties to re-litigate the confidentiality issues creates the possibility for inconsistent outcomes in the administrative and judicial realms.

14. Accordingly, it would be poor public policy to allow the parties to re-litigate confidentiality issues on appeal.

## **V. CONCLUSION**

15. For the foregoing reasons, Appellants' general request for the disclosure of confidential information should be denied.

Respectfully submitted on September 17, 2004.

VERIZON FLORIDA INC.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that copies of the foregoing were sent via U. S. mail on September 17, 2004 to:

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