

STATE OF FLORIDA

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Public Service Commission

June 3, 2003

VIA ELECTRONIC FILING

Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW - Portals II, TW-A325
Washington, DC 20554

Re: WC Docket No. 03-112, ClickQuick II, LLC, San Marino at Laguna Lakes, LLC, a/k/a/ Bear Lakes Associates, Ltd., and Villa Del Sol, LLC a/k/a VDS Associates, Ltd. against BellSouth Telecommunications, Inc.

Dear Ms. Dortch:

Forwarded herewith are Comments of the Florida Public Service Commission in the above referenced docket with regard to ClickQuick's Petition.

Should you have additional questions, please contact me at (850) 413-6082.

Sincerely,

/ s /

Cynthia B. Miller, Esquire
Office of Federal and Legislative Liaison

CBM:tys

cc: Brad Ramsay, NARUC

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
ClickQuick II, LLC,)	WC Docket No. 03-112
San Marino at Laguna Lakes, LLC)	
a/k/a/ Bear Lakes Associates, Ltd., and)	
Villa Del Sol, LLC a/k/a VDS Associates, Ltd.)	
)	
against)	
)	
BellSouth Telecommunications, Inc.)	

**COMMENTS OF THE FLORIDA PUBLIC SERVICE COMMISSION IN OPPOSITION
TO CLICKQUICK’S PETITION**

The Florida Public Service Commission (FPSC) files these comments in response to ClickQuick’s petition for a declaratory ruling that 47 C.F.R. §68.105(d)(2) preempts the FPSC Rule 25-4.0345(1)(b)(2), Florida Administrative Code, regarding the demarcation point. The FPSC urges the FCC to deny ClickQuick’s petition for the reasons set forth below.

Without doubt, the FPSC’s rule is stricter than the FCC’s minimum point of entry approach to demarcation. The historical reason for the FPSC approach is the view that telecommunications services need to be delivered to the subscriber that ordered the service and not be terminated at a point that is inaccessible by the subscriber. The FPSC has a statutory responsibility to ensure that adequate telecommunications services are provided to subscribers.

(1) The FCC has previously declined to preempt the FPSC rule.

The FCC has been advised of the differing federal and state policies and has had multiple opportunities to preempt Florida’s rule. The FPSC filed comments with the FCC in CS Docket No. 95-184 on April 16, 1996. Florida also filed comments in CC Docket No. 88-57 on January 19, 2001 making the statement that “the FPSC assumes that the FCC has not preempted states’

demarcation rules; therefore, Florida will maintain its current rules requiring the demarcation point at each customer's premises in multi-tenant dwellings." In 1990, BellSouth specifically requested clarification in WT Docket No. 8857 whether the FCC's demarcation point rule preempted Florida's. In 1997, the FCC denied two petitions for reconsideration and saw no need to preempt. To date, the FCC has appropriately chosen not to preempt Florida's rule.

ClickQuick has not demonstrated any information in its petition that has not already been considered by the FCC. Therefore, the FPSC believes the FCC should deny ClickQuick's petition.

(2) The FPSC rule provides an avenue for ClickQuick to seek an exception.

The FPSC notes that ClickQuick can file with the FPSC for an exception of the FPSC rule, under Rule 25-4.0345(1)(b), Florida Administrative Code.¹ The FPSC may grant an exception to the rule "for good cause shown." ClickQuick should seek an exception at the state level first. We also note that nothing in the Florida rule prohibits ClickQuick from providing its own infrastructure.

(3) The FPSC rule is stricter than the FCC rule rather than in direct conflict with the FCC rule.

As stated in Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 381 (1986):

Pre-emption occurs when there is outright or actual conflict between Federal and State law, e.g., Free v. Bland, U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, Florida Lime and Avocado Growers, Inc. v. Paul, 373

¹The FPSC demarcation rule has been effective since December 1982. To date, the FPSC has received no requests for an exception to this rule.

U.S. 132 (1963), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), or where the State law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

In the instant situation, none of these preemption rationales is applicable. Compliance with both federal and state law is physically possible, Congress did not legislate comprehensively in such a manner as to occupy the field, and the state rule does not serve as an obstacle to the accomplishment and execution of the full objectives of Congress.

It is a well-established doctrine of federal law that a state law may impose a stricter standard than a federal law, as long as it is not in conflict with that law. See, e. g. Atherton v. Federal Deposit Insurance Corp., 519 U.S. 213, 213 (1997) (where the court found that a provision of a federal statute setting forth a gross negligence standard for directors or officers of federally insured savings institutions was a floor which did not stand in the way of a stricter state-law standard making directors and officers liable for conduct, such as simple negligence). See also, In re Petition of Verizon New England Inc. d/b/a Verizon Vermont, 173 Vt. 327, 337 (2002).

The FCC has had much experience with state rules being stricter, where the FCC rule serves as a “floor” or minimum set of requirements and the state rule is a “ceiling” or more stringent set of requirements. This has occurred in the area of slamming, for example. We appreciate this regulatory partnership and demonstration of comity.

The FPSC notes that the FCC commendably has been reluctant to preempt state rules. Generally, in the interconnection arena, this has occurred only where a state commission has expressly stated it does not plan to act on a matter. For example, in the FCC's February 4, 2003 Memorandum Opinion and Order, regarding the Petition of Cavalier Telephone, the FCC noted that the Virginia Commission had stated in an Order of Dismissal that it would not arbitrate the interconnection issues.² There, the FCC preempted the jurisdiction of the Virginia Commission over the arbitration of unresolved interconnection issues.

In contrast, the FCC refused to preempt the Florida Public Service Commission in Supra Telecommunications Petition for Preemption. In a November 14, 2002, Order, the FCC stated that when a state commission has acted on a timely basis to arbitrate an interconnection dispute, the law provides for federal court review. The FCC is not an alternative forum for appeal.

The FPSC rule can be considered stricter on the telecommunications provider because that company remains responsible for the maintenance of the wires from the minimum point of entry (MPOE) to the customer's apartment. In addition, the company must pay for the wiring between the MPOE and the customer's apartment, and, in Florida, must repair out-of-service troubles within 24 hours. The FPSC also requires ILECs to install primary services within 3 days. Having a third party between the ILEC and its customers, such as a building owner, might affect the ILEC's ability to comply with these rules.

²Petition of Cavalier Telephone, LLC pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration, WC Docket No. 02-359, Memorandum Opinion and Order, DA 03-357 (rel. February 4, 2003, 18 FCC Rcd 1558).

Conclusion

The FPSC urges the FCC to maintain its current position and thus deny ClickQuick's petition. The FPSC reiterates the following points:

- ◆ The FPSC rule expressly provides that "for good cause shown," an exception can be made for the location of the demarcation point. Therefore, there is no need for preemption of the FPSC rule in this matter. The FPSC believes there is an avenue at this agency for ClickQuick to seek an exception if the filing meets the rule requirement.
- ◆ The FPSC rule is stricter than the FCC rule rather than in direct conflict, and the FPSC rule may be applied without thwarting the FCC rule.
- ◆ The FCC is aware of the FPSC rule and has not preempted the rule.

Respectfully Submitted,

/ s /

Cynthia B. Miller, Esquire
Office of Federal and Legislative Liaison

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
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(850) 413-6082

DATED: June 3, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing comments will be mailed to the persons on the attached list.

/ s /

CYNTHIA B. MILLER, ESQUIRE
Office of Federal and Legislative Liaison
(850) 413-6082

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
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DATED: June 3, 2003

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