**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| Petition for Approval of Name Change from AmeriVision Communications, Inc., to AmeriVision Communications, Inc. d/b/a LifeLine Communications | ) | DOCKET NO.: 020178-TI |
| | ) | FILED: March 1, 2002 |

**PETITION**

AmeriVision Communications, Inc. ("AmeriVision") hereby petitions the Florida Public Service Commission to approve to the extent necessary a name change from AmeriVision Communications, Inc., to AmeriVision Communications, Inc. d/b/a LifeLine Communications. The name change is requested to reflect AmeriVision's use of the name LifeLine Communications as its fictitious name and the registration of its name with the Secretary of State.

## I. Introduction

AmeriVision believes that the Commission is obligated to recognize the change in its business name consistent with the Company's business name as registered with and approved by the Secretary of State. In short, AmeriVision believes that the Commission's duties in this regard are ministerial rather than substantive. Nevertheless, AmeriVision recognizes that the Commission does have a legitimate interest in promoting both consumer welfare and fair competition in regulating competitive carriers. AmeriVision further understands that the Commission wishes to consider these interests in addressing the approval of this petition. Without acquiescing in the proposition that the Commission's duty here is more than ministerial, AmeriVision welcomes the opportunity to address in this petition the Commission's concerns.

## II. Discussion

The Commission's major concern is that allowing AmeriVision to use "LifeLine Communications" as either a fictitious name or a service mark may lead to confusion among Florida consumers who are the target of the Federal Lifeline Assistance program. Because of this the Commission is apparently concerned that recognizing the fictitious name might not be in the public interest.

There has been no demonstration that AmeriVision's lawful use of its fictitious name and service mark would be contrary to the public interest, nor can there be. Moreover, AmeriVision believes that the public interest is best served by allowing commercial free speech in the market place. And still further, AmeriVision enjoys the constitutional right to commercial free speech, which right may not be abridged through prior restraint except under very narrow circumstances. These points are briefly addressed below.

### A. AmeriVision's Use of LifeLine Communications as a fictitious name and a service mark is in the public interest

Commission recognition of the Company's business name as "AmeriVision Communications, Inc. d/b/a LifeLine Communications" is in the public interest for at least nine basic reasons:

**Reason #1. It really is the Company's name.** "AmeriVision Communications, Inc. d/b/a LifeLine Communications" has been the Company's business name under the laws of Florida since 1999. It is in the public's interest to allow a company to use its name.

**Reason #2. AmeriVision has a stellar record.** AmeriVision has been successfully providing interexchange telecommunications services in Florida for twelve years. Its record of regulatory compliance is exemplary. For example, last year there were only four complaints filed with the Commission. AmeriVision enjoys a similar record throughout the nation. It has proved that it provides service in a manner that promotes customer satisfaction, not confusion. To the best of AmeriVision's knowledge, there has never been a consumer complaint related to the use of its fictitious name or service mark.

**Reason #3. AmeriVision's markets to church and faith-based organizations.** AmeriVision markets to churches and faith-based organizations under the fictitious name and service mark "LifeLine Communications." This market demands the highest standards of performance and ethics. Moreover, in this context the service mark "LifeLine" connotes spiritual support, not financial subsidy.

**Reason #4. AmeriVision has used its service mark LifeLine Communications alongside the federal program for fourteen years without customer confusion.** There is no basis in fact to conclude that continued use will undermine any legitimate policy objective of the Federal Lifeline Assistance Program in the State of Florida.

**Reason #5. Commerce appears to favor more rather than fewer uses of the mark "Lifeline."** "Lifeline" appears in approximately 110 current marks on the Principal Register. Most, of the entities who own these marks do business in Florida. The term "Lifeline" appears in over 100 other marks that have lapsed.

**Reason #6. Federal Statutes favors use of protected service marks.** AmeriVision's service mark is fully secured by the Lanham Act. Its first use in commerce is documented as June 28, 1988. AmeriVision registered the service mark Lifeline with the U.S. P.T.O. on January 26, 1993 (Registration No. 1748831). It is, therefore, entitled to all of the protection available under the Lanham Act, 15 U.S.C.§§ 1051-1127. It has acquired the right to use the mark nationwide, including in Florida, limited only by the prior use of others, if any. Service marks are secured by statutory and common law because their use promotes the economy which is in the public interest.

**Reason #7. State statute favors use of protected marks.** Chapter 495, Florida Statutes, which codifies the state common law, provides protections similar to that of the Lanham Act. State statute thus secures marks because their use is in the public interest.

**Reason #8. The common law favor use of protected marks.** Common law rights in marks have always been recognized in Florida. Crown Central Petroleum Corp. v. Standard Oil Co., 135 So.2d 26 (1st DCA 1961). Over one hundred years ago the Supreme Court Florida recognized a company's right to use protectable marks. In El Modelo Cigar Mfg. Co. v. Gato, 7 So. 23 (1890), the Court stated that "Every manufacturer has the unquestionable right to distinguish the goods that he manufactures and sells by a particular label, symbol or trademark ...." The same is true of marks that apply to services.

**Reason #9. Thirty-two other companies use "Lifeline" in their fictitious name without impairing the Federal Lifeline Assistance Program.** More than thirty

other corporations registered to do business in Florida use "Lifeline" in their fictitious names. There is no apparent reason to believe that the likelihood of confusion with the Federal Lifeline Assistance Program is materially greater with AmeriVision's use of its fictitious name than the use by at least some of the other corporations of fictitious names including "Lifeline."

## B. As A Matter Of Constitutional Law AmeriVision Is Entitled To The Use Of Its Service Mark LifeLine Communications Without Prior Restraint

The Commission has concerns that AmeriVision's fictitious name and service mark may create customer confusion with respect to the Federal Lifeline Assistance Program. These concerns, however, are apparently based solely on the similarity of the names. To the best of AmeriVision's knowledge, the Commission has taken no steps to validate those concerns. For example, the Commission did not investigate the facts and it did not research the law or even analyze the situation. Rather the Commission simply issued a proposed agency action the purpose of which was to deny AmeriVision continued use of its fictitious name and service mark until AmeriVision could persuade the Commission that the exercise of its constitutional right to commercial free speech would not confuse customers about a federal subsidy program. The Commission's actions in this regard do not pass constitutional muster.

In Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980), the U.S. Supreme Court stated that the First Amendment, as applied to the states through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation.[1] 447 U.S. at 561.

[1] The Court further stated that:

> Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in

Earlier in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), the Court had stated that:

> Our question is whether speech which does "no more than propose a commercial transaction," (citation omitted), is so removed from any "exposition of ideas," (citation omitted), and from " 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,'" (citation omitted), that it lacks all protection. Our answer is that it is not.

425 U.S. at 762.

In Central Hudson, the Court developed a four-part analysis in commercial speech cases.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we must ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

447 U.S. at 566-67.

First, without a question, AmeriVision's use of its service mark (or fictitious name) LifeLine Communications is not involved with any activity that is unlawful. Neither is its use demonstrably misleading or confusing. Although the Commission concluded in

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> the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the" highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and ... the best means to that end is to open the channels of communication rather then to close them." (citations omitted) 447 U.S. at 562.

Order No. PSC-PSC-00-0827-PAA-TI, that the use was unduly confusing with the Federal Lifeline Assistance Program, its conclusion was based entirely on a supposition. It considered no evidence of consumer confusion. Such evidence does not exist.

The State of Florida does have a substantial interest in promulgating regulations that protect consumers from activities of telecommunications service providers with the potential to harm them. For example, section 364.01 (3), Florida Statutes, provides that "The Legislature further finds that the transition from monopoly provision of local exchange services to the competitive provision thereof will require appropriate regulatory oversight to protect consumers and provide for the development of fair and effective competition ...." Moreover, section 364.27, Florida Statutes, empowers the Commission to investigate rules of practice in relation to interstate telecommunications services that violate federal statutes. Section 201 of the Communications Act of 1934 provides that all charges, practices, classifications, and regulations of interstate service be just and reasonable.

However, a prior restraint in this instance will not directly advance the state's interests. In Beckwith v. Department of Business and Professional Regulation, Board of hearing Aid Specialists, 667 So.2d 450 (1st DCA 1996), the Court stated that:

> But the First Amendment right to engage in commercial speech may not be so significantly limited on mere speculation that such behavior might *possibly* occur. As the United States Supreme Court has explained, Central Hudson's second prong "'is not satisfied by mere speculation and conjecture; rather a governmental restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate

> them to a material degree.'" *Rubin* [v. Coors Brewing Co.], 514 U.S. 476 [,___] (1995) (quoting *Edenfield* [v. Fane], 507 U.S. at 770-771 [(1993)].

As already noted, there is no evidence in the record of Docket No. 000153-TI or Docket No. 010591-TI, or otherwise before the Commission, that would support a conclusion that AmeriVision's use of the fictitious name LifeLine Communications has resulted or will result in consumer confusion with the Federal Lifeline Assistance Program. There have been no studies. There is no anecdotal evidence. There have been no consumer complaints. AmeriVision has used this fictitious name and service mark in Florida and extensively elsewhere in the nation for at least fourteen years without confusing or misleading consumers. Furthermore, it is difficult to see what harm would come to the rare consumer who might confuse AmeriVision's use of the fictitious name LifeLine Communications with the Federal Lifeline Assistance Program. Any such confusion would be quickly cleared up with a simple inquiry.[2]

Thus the link between a prior restraint and the public welfare is tenuous and indirect here. There is no credible threat to the public welfare from AmeriVision's use of its fictitious name LifeLine Communications. The Commission makes no showing of harms that are real in AmeriVision's use of its service mark, and can make no such showing. There is no harm to be averted.

Because the Commission cannot assert that a substantial state interest is directly advanced by denying AmeriVision's request for the name change, it is unnecessary to

[2] Indeed, consumers experiencing this "confusion" may benefit. Upon inquiry, they are likely to be readily provided with the information needed to make contact with the Federal Lifeline Assistance Program, which might otherwise elude them.

address whether the suppression of speech caused by the Commission's denial is no more than necessary to further the state's interest.

## C. AmeriVision's Gesture of Good Faith

AmeriVision is troubled that despite its explanations to the contrary, there is still concern that it knowingly disregarded the Commission's wishes and ignored the concerns expressed at agenda conference about customer confusion. To reiterate briefly, no one at AmeriVision was even aware that the use of "LifeLine Communications" was an item at the agenda where it was considered. AmeriVision was completely unaware of discussions of this issue at the agenda. Again, when AmeriVision received the PAA order denying the name change request, the regulatory director in good faith thought it related to the tariff that had been withdrawn months earlier. Despite these representations and its excellent record of regulatory compliance, AmeriVision has found itself being portrayed as arrogantly indifferent to the Commission's concerns about the public interest. AmeriVision is not only chagrined by this, but also troubled that its good working relationship with the Commission has suffered. AmeriVision wishes to repair that relationship.

AmeriVision recognizes the Commission's concern that by allowing this petition (rather than proceeding to hearing in the show cause docket), it might be agreeing to dilatory tactics. This is one reason AmeriVision agreed to quickly file the petition. Moreover, AmeriVision appreciates the good faith on the Commission's part. To further alleviate the Commission's concerns and as a gesture of its own good faith, the Company will include in all marketing and sales materials and efforts an appropriate

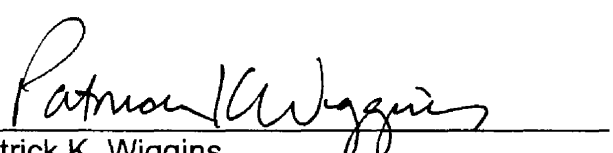
disclosure that telecommunications service is being provided by "AmeriVision Communications, Inc."

So that the Commission will appreciate the sweep of this commitment, this disclosure will be made, for example, in radio broadcasts, television broadcasts, print ads, and telephone scripts. Moreover, because AmeriVision's marketing and sales operations are centrally generated and managed, AmeriVision must *do this nationally to accommodate Florida locally.* Still further, AmeriVision will meet with the Commission staff to discuss these disclosures and will attempt to accommodate changes suggested by staff, if any. It is AmeriVision's intention to continue this approach during the pendency of this case. AmeriVision trusts that the Commission will appreciate AmeriVision's efforts in this regard, as well as the positive intent.

## III. Conclusion

For the reasons stated above, AmeriVision respectfully requests that the Commission approve this petition on an expedited basis.

Respectfully submitted this 1st day of March 2002.



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