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Sent: Tuesday, March 14, 2006 3:59 PM
To: Filings@psc.state.fl.us
Cc: Leigh.a.hyer@verizon.com; David Christian; Adam Teitzman; Dale Buys; John Mann; Cox, Will
Subject: E-Filings - Docket No. 060042
Attachments: Franklin Templeton Amended Reply to Verizon's Affirmative Defenses and Answer.pdf

<<Franklin Templeton Amended Reply to Verizon's Affirmative Defenses and Answer.pdf>>

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TITLE:

Cover Letter to Mrs. Blanca S. Bayo, Florida Public Service Commission

Franklin Templeton Companies, LLC Amended Reply to Verizon's Affirmative Defenses and Answer and Affirmative Defenses to Verizon's Counterclaim

FILED ON BEHALF OF:

Franklin Templeton Companies, LLC

ATTACHMENT (10 pages)

Cover Letter to Mrs. Blanca S. Bayo, Florida Public Service Commission (2 pages)

Franklin Templeton Companies, LLC Reply to Verizon's Affirmative Defenses and Answer and Affirmative Defenses to Verizon's Counterclaim (7 pages)

Certificate of Service (1 page)

Sandra L. McMonagle
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March 14, 2006

VIA ELECTRONIC MAIL

Mrs. Blanca S. Bayo
Director, Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Re: ***Complaint of Franklin Templeton Companies, LLC Against Verizon Florida Inc. - Docket No. 060042***

Dear Mrs. Bayo:

Please find attached Franklin Templeton's Amended Reply to Verizon's Affirmative Defenses and Franklin Templeton's Answer and Affirmative Defenses to Verizon's Counterclaim. Four minor changes have been made, as follows:

Paragraph 8: Paragraph 8 is revised and clarified as follows (The changes are underlined and in bold): "Franklin Templeton states that while certain carriers (interexchange carriers) were authorized to serve Franklin Templeton, **Franklin Templeton never authorized Verizon or these carriers themselves to place the carriers on the SONET ring. Moreover, Franklin Templeton was never even advised that these carriers were being placed on the SONET ring in the first place.**"

Paragraph 11: The last sentence was amended to make it clear that Verizon's actions were unauthorized. The change is underlined and in bold. "Franklin Templeton states that any interstate traffic on the SONET ring causing the services to be subject to interstate tariffs was a direct consequence of Verizon's **unauthorized** actions to place interstate interexchange carriers on the SONET ring."

Paragraph 16: The last sentence has been amended to clarify the time sequencing as follows (The changes are underlined and in bold): "In July 2004, **fifteen months after the request for explanation of the early termination charge and twenty-five months after the closing of the Ninth Street office and the termination of its corresponding Burlington node**, Franklin Templeton received the first explanation for the calculation of this charge."

Paragraph 20: The second to last sentence has been amended to clarify the time sequencing as follows (The changes are underlined and in bold): "Verizon failed to provide any meaningful explanation of the early termination charge and its calculation **until nearly fifteen months after the request for explanation of the charge and twenty-five months after the termination of the Burlington node**."

If you have any questions, please feel free to contact me.

Very truly yours,

ABEL BAND, CHARTERED

William P. Cox
Attorneys for Franklin Templeton Companies, LLC

WPC:slm
Attachments
cc: Certificate of Service

ORIGINAL

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by
Franklin Templeton Companies, LLC
against Verizon Florida, Inc.
for allegedly breaching telecommunications service agreement and violating Section 364.051(5)(b), Florida Statutes, and Rule 25-4.110, Florida Administrative Code.

Docket No. 060042

Filed: March 13, 2006

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AMENDED REPLY TO VERIZON'S AFFIRMATIVE DEFENSES AND ANSWER AND AFFIRMATIVE DEFENSES TO VERIZON'S COUNTERCLAIM

Pursuant to sections 120.569, 364.01, and 364.19, Florida Statutes, rules 25-4.110, 25-22.036 and 28-106.201, Florida Administrative Code, Franklin Templeton Companies, LLC ("Franklin Templeton") files this Amended Reply to the Affirmative Defenses of Verizon Florida Inc. ("Verizon") to Franklin Templeton's Complaint, filed January 18, 2006, ("Complaint") and Franklin Templeton's Answer and Affirmative Defenses to Verizon's Counterclaim, and states as follows:

REPLY TO AFFIRMATIVE DEFENSES

1. Franklin Templeton denies the allegations of each affirmative defense in that they do not allege a factual or legal basis to establish an avoidance of culpability or liability for those claims asserted against Verizon in Franklin Templeton's Complaint. Verizon fails to allege any facts supporting its affirmative defenses, and therefore Verizon's affirmative defenses should be stricken as a matter of law.

2. As to the affirmative defense of a bar to Franklin Templeton's claims for overbilling based on the 60-day time limits set forth in Verizon's tariffs and time limits set forth under applicable law, Franklin Templeton states that Section 95.11(2)(b), Florida Statutes, provides for a five-year statute of limitations on actions on a contract, and Franklin Templeton

has brought its Complaint within that five-year statute of limitations. A tariff time limitation does not constitute a statute of limitations.

3. Moreover, the 60-day time limit is unjust and unreasonable. Verizon Florida Inc. General Services Tariff, A2.4.3.a, stated as follows:

> All charges due by the customer are payable at the Company's business office or at any agency duly authorized by the Company within a period of sixty (60) days from the date of bill. ***If no report of any error, irregularity, or objection to a bill is received by the Company from the customer within said 60-day period, the billing shall be deemed correct.*** (emphasis added) Where overbilling of a subscriber occurs, due either to company or subscriber error, no liability exists which will require the Company to pay any interest, dividend, or other compensation on the amount overbilled.

Verizon's argument to legitimize unauthorized charges through this state tariff provision violates the Federal Communications Commission's Truth-in-Billing principles, guidelines, and rules, 47 C.F.R. § 64.2401 *et seq.*, and other pro-competitive provisions of the Telecommunications Act of 1996, including 47 U.S.C. §§ 201(b) and 258. This practice also violates provisions of Florida Statutes addressing the promotion of telecommunications competition, including FLA. STAT. ch. 364.01, 364.03, 364.27, and 364.604 (2004), and appropriate statutes of limitations for contesting a contractual matter, FLA. STAT. ch. 95.03, 95.11, and 95.031 (2004). Franklin Templeton states that Verizon has removed this 60-day limit from the tariff effective July 21, 2005.

4. Further, Franklin Templeton states that the clear intent of the parties for the ICB telecommunications service agreement at issue, entered into on or about November 12, 2000, Florida ICB FL0002476 ("Agreement"), was that Verizon tariff time limitations that would prevent refunds to Franklin Templeton for overcharges would not apply for services provided pursuant to the Agreement.

5. As to the affirmative defense of failure to state a claim for which relief may be granted, Franklin Templeton's Complaint clearly pleads to actionable claims: one for breach of a telecommunications service agreement subject to the jurisdiction of the Florida Public Service

Commission ("Commission") and the second for violation of a Commission rule and certain provisions of Chapter 364, Florida Statutes, which are under the jurisdiction of the Commission.

6. As to the affirmative defense of the filed rate doctrine, Franklin Templeton states that all services and applicable charges at issue in the Complaint are specified in the Agreement and any applicable tariffs are consistent with the rates and terms of said Agreement. Further, Franklin Templeton states that at no time did Verizon provide any notice to Franklin Templeton that tariff rates would apply to the services in lieu of the rates provided in the Agreement nor did Verizon charge any such rates.

7. As to the affirmative defense of estoppel, there is no legal or factual basis for such an affirmative defense.

8. As to the affirmative defense of unclean hands, Franklin Templeton states that it has not violated the Agreement of the parties or any applicable Florida law but has disputed the amount of the early termination charge for services provided by Verizon to Franklin Templeton as specified in the Agreement. Franklin Templeton's hands are "clean", while Verizon's "unclean" hands are apprarent and uncontroverted based on the unauthorized carriers on Franklin Templeton's private, exclusive SONET ring, improper FDDI circuit charges, double compensation, and excessive early termination charge. Franklin Templeton states that while certain carriers (interexchange carriers) were authorized to serve Franklin Templeton, Franklin Templeton never authorized Verizon or these carriers themselves to place the carriers on the SONET ring. Moreover, Franklin Templeton was never even advised that these carriers were being placed on the SONET ring in the first place.

9. As to the affirmative defense of failure to mitigate damages, if any, Franklin Templeton asserts that it has made good faith efforts to negotiate with Verizon over the past two years over the alleged damages and has not received a good faith response from Verizon to reach an amicable resolution to the dispute.

10. As to the affirmative defense of setoff or recoupment, Franklin Templeton states that any setoff or recoupment for Verizon associated with Franklin Templeton's s termination liability is significantly less that the overcharge by Verizon for services provided pursuant to the Agreement as alleged in Franklin Templeton's Complaint. In addition to the overcharge, Franklin Templeton also states that Verizon failed to provide the proper billing credit to Franklin Templeton for the service outage on or about the time of the termination of Franklin Templeton's Ninth Street office node and also failed to provide proper monitoring of service outages, both as required by the Agreement.

11. As to the affirmative defense of Franklin Templeton's claims are subject to interstate tariffs outside of the Commission's jurisdiction, Franklin Templeton states that the Complaint is based on a Florida ICB telecommunications service agreement specifically subject to the Commission's jurisdiction by its subject matter and by the terms of the Agreement. Franklin Templeton states that Verizon is the party that chose to offer the Florida ICB telecommunications service agreement to Franklin Templeton based on Franklin Templeton's intended intrarstate traffic on the SONET ring. Franklin Templeton states that any interstate traffic on the SONET ring causing the services to be subject to interstate tariffs was a direct consequence of Verizon's unauthorized actions to place interstate interexchange carriers on the SONET ring.

ANSWER TO COUNTERCLAIM

12. Franklin Templeton admits the allegations in Paragraph 1 of the Counterclaim to the extent Paragraph 1 recites a provision of the Agreement regarding termination liability and describes the services provided by Verizon pursuant to the Agreement.

13. Franklin Templeton denies the allegations in Paragraph 1 to the extent that these allegations assert or imply Franklin Templeton terminated the services and the Agreement upon the closing of its Ninth Street location in St. Petersburg. Franklin Templeton states that it

received no notice of cancellation or termination of the Agreement upon said office closing and termination of the corresponding node on the SONET ring. Further, Franklin Templeton received no notice from Verizon that the SONET ring service was switched by Verizon to "diverse route" service upon the termination of the node at Franklin Templeton's Ninth Street office.

14. Franklin Templeton admits the allegations in Paragraph 2 of the Counterclaim that the in-service date for the three-node ring under the Agreement was December 15, 2000, and that it requested the disconnection of the second of the two nodes in March 2002 (twenty months prior to the terms of the end of the term of the Agreement), but it denies all other allegations in Paragraph 2 of the Counterclaim.

15. Franklin Templeton admits the termination charge liability calculation methodology in the Agreement, but denies that it is liable for any such termination charges as calculated and proposed by Verizon, and it denies all other allegations in Paragraph 3 of the Counterclaim.

16. Franklin Templeton denies the allegations in Paragraph 4 of the Counterclaim based on Verizon's miscalculation of the termination liability charge, which was improperly based on the charge for transport for the entire SONET ring. Franklin Templeton further states that the early termination charge first appeared on a Franklin Templeton bill from Verizon one year after the closing of the Ninth Street office and the termination of its corresponding node. At that time, Franklin Templeton requested that Verizon provide an explanation of the calculation of the early termination charge. In July 2004, fifteen months after the request for explanation of the early termination charge and twenty-five months after the closing of the Ninth Street office and the termination of its corresponding Burlington node, Franklin Templeton received the first explanation for the calculation of this charge.

17. Franklin Templeton admits the allegation that the Agreement expired in December 2003 but denies all other allegations in Paragraph 5 of the Counterclaim based on the fact that Verizon continued to charge and accept payments from Franklin Templeton based on the rates specified in the Agreement following its December 2003 expiration of the term of the Agreement.

18. WHEREFORE Franklin Templeton requests that the Commission deny the requested relief and dismiss Verizon's Counterclaim for Breach of Contract.

AFFIRMATIVE DEFENSES TO COUNTERCLAIM

19. Verizon's Counterclaim is barred because it fails to state a claim for which relief can be granted. Franklin Templeton has disputed in good faith the amount of the early termination charge and is therefore not in breach of contract.

20. Verizon's Counterclaim is barred by the twelve-month time limit for underbilling set forth in Verizon's Florida tariff. Verizon waited over a year from Franklin Templeton's closing of its Ninth Street location and termination of the Burlington node to bill Franklin Templeton for the associated early termination charge. Verizon failed to provide any meaningful explanation of the early termination charge and its calculation until fifteen months after the request for explanation of the charge and twenty-five months after the termination of the Burlington node. Moreover, Verizon has yet to provide specific notice of or bill Franklin Templeton for any services that should have been charged a tariff rate different than that specified in the Agreement.

21. Verizon's Counterclaim is barred by estoppel. Verizon is estopped from claiming breach of contract because Franklin Templeton has clearly and effectively disputed Verizon's calculation and billing for the early termination charge with no good faith resolution of the dispute on the part of Verizon.

22. Verizon's Counterclaim is barred by the doctrine of unclean hands. Verizon engaged in numerous acts of improper billing of Franklin Templeton for services provided pursuant to the Agreement as alleged in Franklin Templeton's Complaint, including the delayed billing for the early termination charge and improper calculation thereof.

23. Verizon's Counterclaim is barred by setoff or recoupment. As described in Franklin Templeton's Complaint, Franklin Templeton was overcharged significantly above the amount alleged by Verizon for the early termination charge and breach of contract claim in Verizon's Counterclaim.

24. Verizon's Counterclaim is barred by Verizon's engagement in fraudulent billing of Franklin Templeton. The material misrepresentations in Verizon's bills are evident in the allegations in Franklin Templeton's Complaint, including the unauthorized carriers on Franklin Templeton's private, exclusive SONET ring, improper FDDI circuit charges, double compensation, and an excessive early termination charge. Franklin Templeton again states that while certain carriers (interexchange carriers) were authorized to serve Franklin Templeton, these same carriers were never authorized by Franklin Templeton to be placed by Verizon on the SONET ring. Moreover, Franklin timely paid its bills, including the overcharges, for the term of the Agreement in reliance upon Verizon's material misrepresentations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2006, a true and correct copy of the foregoing **AMENDED REPLY TO VERIZON'S AFFIRMATIVE DEFENSES AND ANSWER AND AFFIRMATIVE DEFENSES TO VERIZON'S COUNTERCLAIM** was served via e-mail and by United States mail, first class postage prepaid, addressed to the following:

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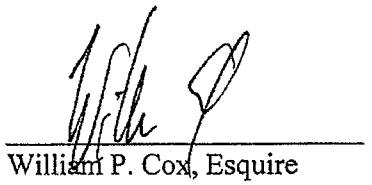

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