

Dulaney L. O'Roark III  
Vice President-General Counsel, Southeast Region  
Legal Department



Six Concourse Parkway  
Suite 600  
Atlanta, Georgia 30328

Phone 770-284-5498  
Fax 770-284-5488  
[de.oroark@verizon.com](mailto:de.oroark@verizon.com)

October 18, 2006 – **VIA ELECTRONIC MAIL**

Ms. Blanca S. Bayo, Director  
Division of the Commission Clerk  
and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: Docket No. 060650-TL  
Joint Petition against BellSouth Telecommunications, Inc., Embarq Florida, Inc.  
and Verizon Florida Inc. for billing charges unauthorized by Telecommunications  
Consumer Protection Act and request for refunds, by Citizens of the State of  
Florida and Attorney General

Dear Ms. Bayo:

Enclosed is Verizon Florida Inc.'s Motion to Dismiss Petition for filing in the above  
matter. Service has been made as indicated on the Certificate of Service. If there are  
any questions regarding this filing, please contact me at 770-284-5498.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

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Enclosures

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing were sent via U.S. mail on October 18, 2006 to the parties on the attached list.

s/ Dulaney L. O'Roark III

Staff Counsel  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Embarq Corporation  
Susan S. Masterton  
1313 Blair Stone Road  
P. O. Box 2214  
Tallahassee, FL 32316-2214

Embarq Corporation  
Charles J. Rehwinkel  
315 S. Calhoun Street  
Suite 500  
Tallahassee, FL 32301

BellSouth Telecommunications Inc.  
Jerry Hendrix/James Meza III/  
Manuel A. Gurdian  
c/o Nancy S. Sims  
150 S. Monroe Street, Suite 400  
Tallahassee, FL 32303-1556

BellSouth Telecommunications Inc.  
E. Earl Edenfield, Jr.  
675 W. Peachtree Street  
Suite 4300  
Atlanta, GA 30375-0001

Michael Cooke  
General Counsel  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Harold McLean  
Office of the Public Counsel  
c/o The Florida Legislature  
111 West Madison Street  
Room 812  
Tallahassee, FL 32399-1400

Michael Palecki/Allison Finn  
Office of the Attorney General  
The Capitol - PL01  
Tallahassee, FL 32399-1050



to state a claim. The Commission lacks jurisdiction because neither the TCPA nor any other provision of Chapter 364 authorizes the Commission to regulate the billing of third-party charges that are not from a carrier providing telecommunications service or 900 or 976 service. Moreover, the Commission lacks jurisdiction to regulate Internet services such as those provided by EDN or the charges for those services. The Petition fails to state a claim because even if its allegations were true, they would not entitle Petitioners to relief under the TCPA or any other provision of Chapter 364.

The factual background discussed below is presented solely to provide context for the legal discussion that follows. Because purely legal issues are involved, no additional facts are required for the Commission to decide this motion, for the reasons outlined below.

**B. Factual Background**

1. Verizon's third-party billing business

Billing is a critical function for most businesses, particularly for companies that offer complex services like telecommunications carriers. Billing is something that smaller telecommunications carriers and companies that offer other communications-related services find difficult or costly to do well, however, so many of these companies contract with third-party billing aggregators, also known as clearinghouses, and through those clearinghouses with bill issuers, like Verizon and the other respondents in this proceeding. Clearinghouses assign each of their customers a customer identification code called a "Sub-CIC," which is the term used in the industry for these customers. Clearinghouses collect billing information from Sub-CICs, help ensure its accuracy, and

send it in the proper electronic format to the local exchange carrier (“LEC”) for inclusion on the customer’s telephone bill. Clearinghouses enter into billing services agreements with LECs that provide for inclusion of Sub-CIC charges on telephone bills and that require clearinghouses to take specified actions to protect consumers from erroneous or fraudulent billing.

Verizon provides billing services to a number of third-party providers, including long distance carriers, Verizon affiliates, and clearinghouses. Clearinghouses submit billing records to Verizon for their Sub-CICs, so that each Sub-CIC’s charges appear on its customers’ bills. Verizon processes more than 90,000 clearinghouse bills per month in Florida for more than 260 Sub-CICs. These bills include charges for traditional telecommunications services (1+, collect and calling card services) and charges for miscellaneous services. Among the types of miscellaneous services billed through clearinghouses are Internet access service, e-mail, voice mail, web hosting and directory listing services. In addition, Verizon bills for a number of businesses that provide hospital telephone services, allowing patients to bill their phone service to their home telephone bill while hospitalized, and for an emergency contact service for cruise ship passengers. Clearinghouses submit approximately 26,500 bills per month for these miscellaneous services.

Verizon’s third-party billing services provide important benefits for consumers. Many Sub-CICs offer telephone billing options with no credit check or requirement that the customer present a credit card or other payment instrument in order to purchase service. Being able to pay for services through a telephone bill can be an important option for consumers who do not have a bank account, credit card, or other credit-

based payment mechanism. By using their telephone bill, customers that lack – or simply choose not to use – personal credit instruments may still obtain Internet access, e-mail accounts and private voice mail services, which expands the universe of Internet users beyond those with formal credit accounts.<sup>2</sup> Another advantage of third-party billing service is that consumers benefit from consolidated billing of telecommunications and other communications-related services on a single bill, and including competitive services in a consolidated bill fosters competition by lowering providers' costs and enabling them to offer their services at lower prices to consumers. As a result, consumers clearly benefit from telephone companies offering telephone bill-based billing to other service providers wishing to offer their services in a competitive marketplace.

## 2. Consumer safeguards

Despite the clear consumer benefits provided by clearinghouse billing, there is always the possibility of billing issues coming up between customers and Sub-CICs. As a result, Verizon takes a number of steps to prevent Sub-CICs from submitting, and to excuse consumers from paying, erroneous charges.

First, when a customer complains about charges for unauthorized third-party services on a bill, Verizon's policy is to tell the customer immediately that Verizon will make an adjustment or appropriate credit to the customer's bill, and to recourse the charges to the responsible third-party provider.

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<sup>2</sup> Florida prohibits discontinuance of local telephone services for non-payment of non-regulated services, so these consumers do not put their access to telephone service at risk by choosing to incur such charges on their telephone bills. Fl. Admin. Code. § 25-4.113(4)(e).

Second, Verizon's billing services agreements with clearinghouses require them to submit only Sub-CIC charges that comply with Verizon's policies, which include Verizon's policy that persons placing third-party charges on a telephone bill must be at least 18 years old and authorized to put the charges on the bill. Clearinghouses are required to screen billing files submitted to Verizon to ensure that they are accurate. Moreover, Verizon explicitly retains the right to terminate any Sub-CIC that, among other things, has generated an excessive number of complaints or is the subject of a federal or state agency investigation alleging cramming or other fraudulent activity.

Third, Verizon investigates each new Sub-CIC for which it bills. For example, Verizon checks for any links to Sub-CICs that previously have been terminated or that have been required to take corrective actions. Verizon also researches the products and services offered by the Sub-CIC and reviews the Sub-CIC's sales and marketing procedures to ensure (among other things) that they require customer authorization to bill charges to their telephone number and to confirm that the purchaser is at least 18 years old.

Fourth, Verizon offers a bill blocking service that restricts third parties from putting charges on a customer's phone bill at the customer's request. Verizon provides this optional service at no charge to all customers who call Verizon's customer service lines to complain about cramming. This third-party blocking service is also generally available to any customer who requests it and Verizon notifies customers of this option in annual bill inserts. Customers calling the Commission to complain about cramming can be transferred to Verizon via the Commission's transfer connect process, and Verizon will make an immediate adjustment or appropriate credit to the customer's bill.



Fifth, Verizon measures the type and number of cramming complaints submitted by Verizon customers and maintains data on the number and percentage of cramming complaints received each month, by Sub-CIC as well as by clearinghouse. Verizon requires Sub-CICs exceeding cramming complaint thresholds to produce an action plan for meeting Verizon's requirements. Over the past eighteen months Verizon has required remedial action plans from a number of Sub-CICs due to excessive cramming complaints. Failures to cure have resulted in service providers being terminated. Other service providers' action plans have been effective in reducing the level of complaints about their services received by Verizon.

### 3. Suspension of EDN

The Commission asked Verizon about the billing practices of Email Discount Network, LLC ("EDN") earlier this year. Verizon checked its records and verified that EDN had not exceeded any of the thresholds for disciplinary action in the applicable billing services agreements or Verizon's policies. As a result of the Commission's inquiry, however, Verizon notified each of EDN's clearinghouses that it had been suspended and that Verizon would not accept billing records from EDN until further notice. The suspension became effective May 24, 2006 and it has not been lifted. After Verizon received the Petition, it suspended additional Sub-CICs that have the same billing addresses or principals as EDN.

### **C. Petitioners' Allegations**

Petitioners allege that EDN is a Sub-CIC that “purports to provide Internet services such as email accounts to thousands of Florida consumers.”<sup>3</sup> Petitioners complain about two alleged EDN practices: (i) offering its services on the Internet without disclosing conspicuously that it charges for its services and places the charges on customers’ telephone bills; and (ii) failing to verify information that customers provide over the Internet, resulting in charges to customers who never requested services.<sup>4</sup> EDN is alleged to have submitted billing information generated by these practices to billing aggregators who, in turn, are alleged to have sent them to Verizon and other LECs for inclusion in telephone bills.<sup>5</sup>

The TCPA is the sole legal basis Petitioners assert for relief against Verizon. The TCPA establishes certain requirements for “billing parties” (telecommunications companies that bill end user customers) that include charges on their bills from “originating parties.” The TCPA defines “originating party” as “any person, firm, corporation, or other entity, including a telecommunications company or a billing clearinghouse, that provides any telecommunications service or information service to a customer or bills a customer through a billing party.”<sup>6</sup> The term “information service” is narrowly defined to mean “telephone calls made to 900 or 976 type services,” and “does not include Internet services.”<sup>7</sup> Petitioners allege that EDN does not provide an “information service,” and therefore is not entitled to bill as an “originating party,” as

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<sup>3</sup> Petition, ¶ 5b.

<sup>4</sup> *Id.* ¶ 5c-f.

<sup>5</sup> *Id.* ¶ 5d.

<sup>6</sup> Fl. Stat. § 364.602(4). The term “originating party” does not include any entity exempted from the definition of “telecommunications company” in Florida Statutes, section 364.02(14).

<sup>7</sup> Fl Stat. § 364.602(5).

those terms are defined in the TCPA.<sup>8</sup> Their legal theory therefore appears to be that only “originating parties” charges may be included in telephone bills, but they point to no language in the TCPA that imposes any such restriction. In fact, as discussed below, the TCPA does not place any restrictions on the types of charges that may be included in telephone bills.

Petitioners seek draconian relief. First, they ask the Commission to force Verizon to refund *all* charges for EDN services, whether or not a customer has complained about the service it has received, disputed the amount due or contended it did not authorize the charge or the method of payment. Second, Petitioners request that Verizon be prohibited from billing for charges that are not permitted by the TCPA, meaning apparently any charges that are not from an “originating party.” Third, Petitioners request that Verizon be required to ensure that only authorized charges appear on its telephone bills.

#### **D. Grounds for Dismissal**

The Petition must be dismissed because the Commission does not have jurisdiction to address the claims it raises and because the Petition fails to state a claim for which relief can be granted.

##### **1. The Commission lacks jurisdiction over the Petition**

The legislature did not confer general authority on the Commission to regulate telecommunications companies, but rather provided that the Commission “shall exercise over and in relation to telecommunications companies the powers conferred by [Chapter

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<sup>8</sup> Petition, ¶ 6.

364].”<sup>9</sup> Thus, before the Commission could exercise jurisdiction here, it would need to find specific authorization in Chapter 364 permitting it to act. Chapter 364 provides no such authorization, either with respect to third-party billing for EDN’s services or concerning Internet services in general.

The only provisions in Chapter 364 relating to the placement of third-party charges on a telephone bill are found in the TCPA, the scope of which is carefully delineated. As discussed above, the TCPA only applies to charges from an “originating party,” which is defined to include only parties that provide telecommunications services and services involving “telephone calls made to 900 and 976 type services.” Nothing in the TCPA addresses, much less prohibits, the inclusion of other types of charges in telephone bills. Petitioners do not even attempt to construe the statute in a way that would impose such a limitation, and there is no way to do so.<sup>10</sup> To the extent that charges from companies that are not “originating parties” are included in telephone bills, therefore, the Commission lacks the authority to regulate those charges.

The Commission’s billing rules are consistent with the limits on its statutory authority. The definitions of “billing carrier,” “originating party” and “information service” track the definitions from the TCPA and, consistent with the TCPA, the billing rules themselves regulate only telecommunications services and 900 and 976 services.<sup>11</sup> Nothing in the billing rules purports to regulate charges included in a Verizon bill from a

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<sup>9</sup> Fl. Stat. § 364.01(1).

<sup>10</sup> Not only does Petitioners’ argument lack any textual support in the statute, but its interpretation would lead to undesirable consequences. For example, under Petitioners’ view, carriers would be prohibited from including DSL and other charges for unregulated services provided by a billing carrier’s affiliate, thus denying consumers the benefit of receiving a single bill for services provided by affiliated companies.

<sup>11</sup> Fl. Admin. Code §§ 25-4.003, 25.4.110.

third party that is not an “originating party”. Unlike Petitioners, the Commission has interpreted the TCPA correctly.<sup>12</sup>

Chapter 364 also has no provisions that would permit the Commission to regulate Internet services or the charges for Internet services. To the contrary, Chapter 364 expressly precludes the Commission from exercising jurisdiction over broadband services and VoIP.<sup>13</sup> And the TCPA expressly excludes Internet services from its definition of “information service,” making clearer still that the Commission does not have authority to regulate Internet charges on telephone bills. The Commission, consistent with its lack of authority, has not established rules regulating Internet services or billing for Internet services.

The Petition alleges that EDN is not an originating party because it provides an Internet service.<sup>14</sup> By this allegation Petitioners have pleaded themselves out of court. Because EDN is not an originating party, the TCPA does not provide the Commission with any basis for regulating EDN’s charges that appear on Verizon’s bills. And because EDN provides Internet services, the Commission lacks jurisdiction to regulate it or how it charges for its services. Because the Commission lacks jurisdiction, the complaint must be dismissed.

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<sup>12</sup> Petitioners' interpretation is unsound for the additional reason that it would raise serious First Amendment issues. The Supreme Court has held that information included on or with bills to customers is a form of protected speech, and regulation of that speech (including commercial speech) must pass constitutional muster. See *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986)(holding it would violate utility's First Amendment rights for the state PUC to force utility to include bill inserts from consumer organizations); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980); (upholding utility's right to include bill inserts expressing its views); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)(holding PSC's ban on certain promotional advertising to violate utility's First Amendment commercial speech rights). Among other things, this means that any statutes must be narrowly construed to avoid raising constitutional issues and that any regulation that is authorized must be shown both to further some important governmental interest and be appropriately tailored to directly address that interest.

<sup>13</sup> Fl. Stat. § 364.011.

<sup>14</sup> Petition, ¶ 6.

2. The Petition fails to state a claim for which relief can be granted

Even if the Commission had jurisdiction (which it does not, as explained above), and even if Petitioners' allegations were true, the Petition still would not state a claim for which relief could be granted.

Petitioners' request that Verizon should refund all charges for EDN services fails to state a claim for two reasons. First, as already discussed, Petitioners' theory that Verizon is not allowed to include charges from companies other than "originating parties" is unfounded. Second, Petitioners request a *blanket* refund without alleging that all (or even many) EDN customers have been harmed. Petitioners would require refunds to customers who have no complaints about the service they received, the amount they paid or the manner in which they were billed. Verizon stands ready to provide refunds or credits to customers who complain that they did not intend to obtain EDN service, but Verizon should not be required to provide refunds to satisfied customers.

Petitioners next request that Verizon be required to stop putting charges on its telephone bills that are not permitted by the TCPA. Again, Petitioners' legal theory that the TCPA somehow prohibits charges from companies that are not "originating parties" cannot withstand analysis for the reasons already discussed. This claim, too, must be rejected as a matter of law.

Finally, Petitioners ask that Verizon "ensure" that incorrect third-party charges do not appear on its bills. Petitioners offer no legal basis for their claim. The TCPA does not impose a legal obligation on Verizon to screen charges to ensure their validity. To the contrary, the TCPA requires the *originating party* to provide the billing party

(Verizon) with all required information.<sup>15</sup> The approach mandated by the statute, in contrast to the claim asserted by the Petitioners, makes good sense. It requires a party to the transaction, or at least the clearinghouse that has a direct relationship with that party, to take responsibility for providing the correct information to the billing LEC. In fact, as described above, Verizon does take a number of steps to prevent erroneous charges from third parties from appearing on its bills, steps that Verizon takes as a matter of good business practice. Because Petitioners' request that Verizon be forced to modify its billing practices has no legal basis, that request, like the rest of its claims, should be rejected as a matter of law.

WHEREFORE, Verizon respectfully requests that its motion be granted.

Respectfully submitted on October 18, 2006.

By: s/ Dulaney L. O'Roark III  
Dulaney L. O'Roark III  
General Counsel, Southeast Region  
6 Concourse Parkway, Suite 600  
Atlanta, Georgia 30328  
Phone: (770) 284-5498  
Fax: (770) 284-5488  
Email: [de.oroark@verizon.com](mailto:de.oroark@verizon.com)

Attorney for Verizon Florida Inc.

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<sup>15</sup> Fl. Stat. § 364.604(1).