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June 26, 2008 – **VIA ELECTRONIC MAIL**

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 080308-TP
Complaint against MCI Communications Services, Inc. d/b/a Verizon Business
Services for failure to pay intrastate access charges pursuant to Embarq's tariffs,
by Embarq Florida, Inc.

Dear Ms. Cole:

Enclosed for filing in the above-referenced matter is Verizon's Motion to Dismiss Embarq's Complaint Seeking Intrastate Access Charges on VoIP Traffic. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at (678) 259-1449.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

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Enclosures

DOCUMENT NUMBER-DATE

05543 JUN 26 8

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint against MCI Communications Services,) Docket No. 080308-TP
Inc. d/b/a Verizon Business Services for failure to pay) Filed: June 26, 2008
intrastate access charges pursuant to Embarq's tariffs,)
by Embarq Florida, Inc.)
-----)

**VERIZON'S MOTION TO DISMISS EMBARQ'S COMPLAINT
SEEKING INTRASTATE ACCESS CHARGES ON VOIP TRAFFIC**

MCI Communications Services, Inc. d/b/a Verizon Business Services ("Verizon") moves the Commission to dismiss the Complaint of Embarq Florida, Inc. ("Embarq") filed on June 6, 2008. Embarq asks the Commission to treat voice-over-Internet-protocol ("VoIP") traffic like traditional telephone traffic and to order Verizon to pay intrastate access charges on it, instead of the interstate access charges Verizon is paying.

Embarq's Complaint must be dismissed because it would require this Commission to assert jurisdiction over VoIP services, in violation of the Florida statutes that "exempt[] from commission jurisdiction" all VoIP services, and therefore any provider of VoIP service to the extent it is providing such service. If the Commission were to assert jurisdiction over Verizon's VoIP services or over Verizon as a VoIP provider, it would be acting in direct contravention of this explicit statutory limitation on the scope of its jurisdiction. Under the express terms of the statute, the Commission has no jurisdiction over VoIP services or entities providing those services, whether in a complaint proceeding or otherwise.¹

¹ Because the Commission has no jurisdiction over VoIP services or VoIP providers, Verizon cannot be compelled to participate in this proceeding. Verizon is responding to Embarq's Complaint only to contest the Commission's jurisdiction over it and does not accede to the Commission's jurisdiction in any way.

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FPSC-COMMISSION CLERK

In addition to the fact that this Commission lacks jurisdiction under the express terms of the governing Florida statute, the regulatory body that does have jurisdiction over these issues -- the FCC -- has several active proceedings to clarify the intercarrier compensation that applies to VoIP traffic. Indeed, this Commission has correctly advised the FCC that VoIP traffic is necessarily interstate in nature, so that the FCC, not state commissions, should address VoIP issues in order to avoid a patchwork of varying state decisions. And the FCC has stated its intention to act on this and other intercarrier compensation issues in the near term.

Accordingly, the Complaint must be dismissed.

I. The Commission Has No Jurisdiction to Hear Embarq's Complaint.

A. The Florida Legislature Expressly Precluded the Commission From Exercising Jurisdiction Over VoIP.

The subject matter of Embarq's Complaint is, obviously, VoIP. Embarq argues that Verizon is "wrongfully designating" VoIP traffic that Embarq originates or terminates as jurisdictionally interstate. (Complaint at 13, 4-5, 8.) Embarq asks the Commission to take jurisdiction over these VoIP calls and treat them like traditional intrastate interexchange calls for purposes of applying intrastate access tariffs and Florida law requiring intrastate access charges "for the origination and termination of interexchange telecommunications service." (Complaint at 6, 8-11, quoting § 364.02(14), Fla. Stat.) Proceeding on Embarq's Complaint would require the Commission to examine VoIP traffic, to determine whether some VoIP traffic can be classified as jurisdictionally intrastate, to determine what intercarrier compensation rates apply to VoIP calls, and to compel a provider of VoIP services to pay a particular compensation rate.

The Commission cannot hear Embarq's VoIP-related claims unless it has subject matter jurisdiction over VoIP services and over the provider of those services to the extent it is providing VoIP services. Subject matter jurisdiction is "an agency's power to hear and determine the causes of a general class of cases to which a particular case belongs."² "Jurisdiction of the subject matter does not mean jurisdiction of the particular case but of the class of cases to which the particular controversy belongs."³

Subject matter jurisdiction must be conferred by Florida statute.⁴ Any doubt as to the Commission's jurisdiction in a particular instance must be resolved against an exercise of jurisdiction.⁵ The Commission understands that it cannot regulate beyond its "specific mandate": "Despite good intentions, we should avoid even the appearance that we are replacing the Legislature's judgment with our own."⁶

Chapter 364 specifically addresses the Commission's jurisdiction over the class of cases to which this one belongs—that is, VoIP-related cases. It confirms that no such jurisdiction exists except where it is explicitly delineated elsewhere in Chapter 364 or authorized by federal law.

² See Am. Jur. 2d, Admin. Law, § VII, "Adjudications," § B, "Jurisdiction," § 281.

³ *Complaint and Petition of John Charles Heekin Against Florida Power & Light Co.*, Order No. PSC-99-1054-FOF-EI, 99 FPSC 5:324, at 7 (May 24, 1999).

⁴ See, e.g., *Petition for Declaratory Statement that Nextel Partners, Commercial Mobile Radio Service Provider in Florida, Is Not Subject to Jurisdiction of Florida Public Service Commission for Purposes of Designation as "Eligible Telecommunications Carrier"* ("Nextel Declaratory Statement"), Docket Nos. 030346-TP & 030413-TP, Declaratory Statement, Order No. PSC-03-1063-DS-TP, at 4-8, citing *City of Cape Coral v. GAC Utils., Inc. of Florida*, 281 So. 2d 493, 495-96 (Fla. 1973); *Lee County Elec. Co-op, Inc. v. Jacobs*, 820 So. 2d 297 (Fla. 2002); *Dept. of Transp. v. Mayo*, 354 So. 2d 359 (Fla. 1977); *Schiffman v. Dept. of Prof. Regulation, Board of Pharmacy*, 581 So. 2d 1375, 1379 (Fla. 1st DCA 1991); *Lewis Oil Co. v. Alachua County*, 496 So. 2d 184, 189 (Fla. 1st DCA 1986).

⁵ *Nextel Declaratory Statement*, at 8, citing *Lee County; Mayo; Complaint Against Fla. Power & Light Co. Regarding Placement of Power Poles and Transmission Lines*, Order No. PSC-02-0788-PAA-EI (June 10, 2002); *Complaint and Petition by Lee County Elec. Coop., Inc. for an Investigation of the Rate Structure of Seminole Electric Coop., Inc.*, Order No. PSC-01-0217-FOF-EC (Jan. 23, 2001).

⁶ *Nextel Declaratory Statement*, at 8.

Section 364.011 states:

Exemption from commission jurisdiction. The following services are **exempt from oversight by the Commission**, except to the extent delineated in this chapter or specifically authorized by federal law:

- (1) intrastate interexchange telecommunications services.
- (2) broadband services, regardless of the provider, platform, or protocol.
- (3) **VoIP**
- (4) Wireless telecommunications, including commercial mobile radio service providers.

(Emphasis added.)

Under the plain terms of the statute, therefore, VoIP services, and the entities that provide those services, are expressly “exempt[] from commission jurisdiction.” This broad statutory “exemption from commission jurisdiction” is categorical, and applies to any exercise of jurisdiction -- whether through a rulemaking proceeding, a complaint proceeding, or otherwise. And, as addressed below, the only exceptions to this broad exemption have no bearing on Embarq’s complaint here. Accordingly, this provision alone makes clear that the Commission cannot assert jurisdiction over Verizon’s VoIP services or over Verizon as a VoIP provider in any kind of proceeding.

In addition to this broad “exemption” from any aspect of the Commission’s jurisdiction, a number of other sections in chapter 364 reiterate the Commission’s lack of authority over VoIP services.

Section 364.013 provides:

Emerging and advanced services. Broadband service and the provision of **voice-over-Internet-protocol (VoIP) shall be free of state regulation**, except as delineated in this chapter or as specifically authorized by federal law, regardless of the provider, platform, or protocol.

(Emphasis added.)

Section 364.01 (“Powers of commission, legislative intent”) includes “**VoIP**” in the “[c]ommunications activities that are **not regulated by the Florida Public Service Commission**” and recites the legislative finding “that **the provision of voice-over-Internet-protocol (VoIP) free of unnecessary regulation, regardless of the provider, is in the public interest.**” (§ 364.01(3), Fla. Stat.)

Section 364.02(13) specifies that the term “**service**” in Chapter 364 “**does not include** broadband service or **voice-over-Internet protocol service for purposes of regulation by the commission.**” It also clarifies that a local exchange carrier cannot have any duties with respect to VoIP under state law; any such duties are “only those that the company is obligated to extend or provide under applicable **federal** law and regulation.” (Emphases added.)

These statutes repeatedly emphasize that the Commission has no jurisdiction over VoIP services or over providers of VoIP services, and the Commission reads them to mean just what they say—that VoIP services and VoIP providers are “exempt[]” from Commission jurisdiction.⁷ In fact, the Commission has not sought to compel companies

⁷ See, e.g., Report on the Status of Competition in the Telecommunications Industry, Fla. Pub. Serv. Comm., Div. of Competitive Markets and Enforcement (May 31, 2006) (“Local Competition Report”), at 2 (listing VoIP among the services that “are not subject to FPSC jurisdiction”); 5, *citing* § 364.011, Fla. Stat. (“The Commission does not regulate wireless telecommunications, broadband services, or Voice over Internet Protocol (VoIP) services.”); 37 (listing VoIP among the “communications market segments that are not subject to FPSC jurisdiction”); 43 (“VoIP is an unregulated service in Florida.”), and 72 (“VoIP is expressly excluded from the statutory definition of service” in the Florida Statutes); *Petition of Alltel Communications, Inc. for Designation as Eligible Telecommunications Carrier*, Order No. PSC-07-0288-PAA-TP, 07 FPSC 4:114, at 6-9 (April 3, 2007) (“Section 364.011, Florida Statutes, is quite clear that unless authorized by federal law, this Commission retains no jurisdiction over CMRS providers.” Commercial mobile radio services are listed along with VoIP services in section 364.011 as exempt from Commission jurisdiction.

even to answer questions about their VoIP activities, let alone exercise any oversight of these activities.⁸

As section 364.011 states, the only possible exceptions to the Commission's lack of jurisdiction are a specific authorization of jurisdiction in federal law or an explicit confirmation of jurisdiction elsewhere in chapter 364.

Embarq states, without any explanation, that the Commission has jurisdiction over all of its VoIP-related claims "pursuant to section 152 of the federal Communications Act, as amended, and chs. 350 and 364, Florida Statutes." (Complaint at 2.) None of these statutes delineates any exception to the jurisdictional bar that applies to Embarq's Complaint, so that Complaint must be dismissed.⁹

B. Section 152 of the Communications Act Does Not and Cannot Authorize Commission Jurisdiction over VoIP Services.

Section 152, the federal statute Embarq cites as a basis for jurisdiction over its Complaint (at 2), addresses the FCC's jurisdiction, not state commission jurisdiction. It does not and cannot "specifically authorize" this Commission to exercise jurisdiction over VoIP services (or anything else). As this Commission has recognized, a federal statute cannot confer jurisdiction directly on the Commission; the Florida Legislature must implement a federal jurisdictional grant through a state statute.¹⁰ Chapter 152

⁸ Local Competition Report, at 2 ("CLECs elected not to respond to the request [for information about their VoIP offerings], citing the lack of FPSC jurisdiction over VoIP services. No ILECs or ILEC affiliates provided VoIP data."); 45 ("several certificated VoIP providers in Florida have refused to divulge the requested information based on the FPSC's lack of jurisdiction over VoIP-based service.")

⁹ For purposes of Verizon's request to dismiss Embarq's Complaint, Embarq's factual allegations are accepted as facially correct. See, e.g., *Petition for Expedited Enforcement of Interconnection Agreement with Verizon Florida Inc. by Teleport Comm. Group, Inc. and TCG South Florida*, Order Granting Motion to Dismiss, Order No. PSC-02-1705-FOF-TP, at 8-12, 02 FPSC 12:58 (Dec. 6, 2002).

¹⁰ See, e.g., *Petition of Alltel Comm., Inc. for Designation as Eligible Telecomm. Carrier*, Notice of Proposed Agency Action Order, PSC-07-0288-PAA-TP, at 7-9 (April 3, 2007); *Complaint Against BellSouth Telecomm., Inc. for Alleged Overbilling and Discontinuance of Service*, Order No. PSC-04-0423-FOF-TP, at 20-21 (April 26, 2004).

does not authorize state commission jurisdiction over anything, so there was nothing to implement through state legislation.

C. Chapter 350 of the Florida Statutes Does Not and Cannot Except VoIP Services from the Jurisdictional Bar in Chapter 364.

Embarq cites chapter 350 of the Florida Statutes as a basis for jurisdiction over its Complaint, without naming any particular section of that chapter. Chapter 350 (“Railroads and Other Regulated “Utilities”) deals primarily with the constitution and administration of the Public Service Commission. It does not address VoIP at all, let alone create any exceptions to Chapter 364’s exemption of VoIP from Commission jurisdiction—nor could it. This is because section 364.011 specifies that any such exception must be “delineated in this chapter”—that is, Chapter 364, *not* chapter 350 or any other chapter. Nothing in chapter 350 does or can provide the Commission jurisdiction over VoIP services or entities providing those services.

D. Nothing in Chapter 364 Excepts VoIP from the Broad Jurisdictional Exemption in Section 364.011.

Embarq lists chapter 364 as a source of jurisdiction over its Complaint, but it does not identify what in chapter 364 it believes confirms the Commission’s jurisdiction over VoIP.

In fact, the only exception to section 364.11’s jurisdictional exemption for VoIP appears in section 364.02(13), which contains the definition of “service.” The entire section states:

“Service” is to be construed in its broadest and most inclusive sense. The term “service” does not include broadband service or voice-over-Internet protocol service for purposes of regulation by the commission. Nothing herein shall affect the rights and obligations of any entity related to the payment of switched network access rates or other intercarrier

compensation, if any, related to voice-over-Internet protocol service. Notwithstanding s. 364.013, and the exemption of services pursuant to this subsection, the commission may arbitrate, enforce, or approve interconnection agreements, and resolve disputes as provided by 47 U.S.C. ss 251 and 252, or any other applicable federal law or regulation. With respect to the services exempted in this subsection, regardless of the technology, the duties of a local exchange telecommunications company are only those that the company is obligated to extend or provide under applicable federal law and regulations.

In this section, the Legislature confirms, once again, the Commission's general lack of oversight over VoIP, but recognizes that the jurisdictional bar does not affect the Commission's ability to address interconnection issues as expressly provided in sections 251 and 252. Embarq does not allege that its dispute with Verizon is a request to arbitrate, enforce, or resolve a dispute under an interconnection agreement entered into under sections 251 and 252 or other federal laws or regulations governing those interconnection agreements.¹¹ Therefore, section 364.02(13)'s language recognizing the Commission's authority to arbitrate, enforce, and approve interconnection agreements in accordance with federal law provides no basis for the Commission to assert jurisdiction over VoIP services or providers.

Although Embarq does not designate section 364.02(13) (or any other specific provision of chapter 364) as a basis for Commission jurisdiction over its Complaint, it focuses on the portion of that section stating that "[n]othing herein shall affect the rights and obligations of any entity related to the payment of switched network access rates or other intercarrier compensation, if any, related to voice-over-Internet protocol service." (Complaint at 11, quoting § 364.02(13), Fla. Stat.)

¹¹ Section 251 interconnection agreements are entered into by two *local* exchange carriers but, as Embarq acknowledges, the company against which it brought the complaint, MCI Communications Services, is an *interexchange* carrier, not a CLEC. Complaint at ¶ 4.

To the extent that Embarq is suggesting that this language creates an exception that would give the Commission jurisdiction to hear its Complaint, it is wrong. Sections 364.011 and 364.013 clarify that the Commission has no jurisdiction over VoIP and no authority to regulate it in the absence of a specific federal or state directive. Section 364.02(13)'s reference to potential rights and obligations "related to the payment of switched network access rates or other intercarrier compensation, if any, related to voice-over-Internet protocol service," does not give the Commission permission to do anything—in contrast to the following sentence stating that "the commission may" exercise jurisdiction in the context of interconnection agreements as provided in sections 251 and 252, *and* which plainly states that this authority is an exception to the broad "exemption" from Commission jurisdiction that would otherwise apply. Likewise, the reference to "intercarrier compensation, if any" recognizes that the entities may—or may not—have compensation arrangements prescribing some form of compensation (but not necessarily intrastate access charges) for VoIP calls, but nothing in that language gives the Commission the jurisdiction to impose or enforce any such arrangements on VoIP services or VoIP providers or to find that they exist apart from federal law. Indeed, to further emphasize the Legislature's understanding that VoIP is not an intrastate matter, the last line of section 364.02(13) provides that even the LEC's duties with respect to VoIP are, as a matter of law, "*only* those that the company is obligated to extend or provide under applicable federal law and regulations" (emphasis added).

In short, Embarq's Complaint does not fit within the lone, narrow exception to the Legislature's broad "exemption" of VoIP services and providers from the Commission's jurisdiction, so the Commission must dismiss it.

II. The Regulatory Body That Does Have Jurisdiction Is Already Considering The Issue.

In addition to the fact that this Commission has no complaint or other jurisdiction over VoIP services and providers, the regulatory body that does have jurisdiction is already actively considering the issues raised by Embarq here.

Specifically, the question of what kind of regulatory treatment is appropriate for VoIP services—including the precise question of whether local telephone companies can, in the absence of an agreement, impose *intrastate* access charges on Internet-protocol-enabled traffic—is now before the FCC in a number of proceedings. These include the IP-Enabled Services docket¹² (*see IP-Enabled Services* ¶¶ 40-41 (seeking comment on whether "one or more classes of IP-enabled service should be deemed subject to exclusive federal jurisdiction with regard to traditional common carrier regulation" and whether the FCC's "end-to-end [jurisdictional] analysis is...inappropriate for...IP-enabled services"); *id* ¶¶ 61-62 (seeking comment on "the extent to which access charges should apply to VoIP...services" and "under what authority could the Commission require payment for these [access] services")); and the *Unified Inter-carrier Compensation* docket (seeking comment on whether intrastate access charges should

¹² Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863 (2004) ("*IP-Enabled Services*").

be preempted “if it is impossible or impractical to separate the interstate and intrastate components” for “calls that originate or terminate with...types of VoIP service”).¹³

Indeed, Embarq itself has squarely presented to the FCC the issue of whether access charges apply to VoIP traffic. At the FCC, Embarq has complained that some entities are relying on the FCC’s so-called “ESP Exemption” (which excuses enhanced service providers from paying access charges) to dispute Embarq’s interstate and intrastate access billings for IP-originated traffic.¹⁴ Embarq has, therefore, asked the FCC to forbear from applying the ESP Exemption. Embarq’s forbearance petition demonstrates its understanding that the FCC is the appropriate forum to settle issues about application of access charges to VoIP traffic.

This Commission agrees. Even before the Florida Legislature adopted the broad jurisdictional exemption for VoIP in section 364.011 (but after it exempted VoIP from the definition of “service” and adopted section 364.01(3)’s directive to keep VoIP “free of unnecessary regulation”), the Commission advised the FCC that IP-enabled services are “necessarily interstate in nature,”¹⁵ and that the Communications Act “reserves to the FCC *exclusive jurisdiction over the regulation of interstate communications.*” (FPSC Reply Comments, at 3 (emphasis in original).) Therefore, “[t]he FPSC is firmly of the view that a national policy regarding the proper treatment of IP-enabled services would provide far greater regulatory certainty than would a patchwork of fifty different state policies.” (*Id.* at 5 (footnotes omitted).) The Commission cautioned against “allow[ing]

¹³ Further Notice of Proposed Rulemaking, Developing a Unified Intercarrier Compensation Regime, 20 FCC Rcd 4685, ¶ 80 (2005) (“*Unified Intercarrier Compensation*”).

¹⁴ *Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption*, FCC WC Docket Nos. 07-256 & 08-8 (filed Jan. 11, 2008).

¹⁵ *IP-Enabled Services*, WC Docket No. 04-36, Reply Comments of the Florida Public Service Commission, at 3 (filed July 14, 2004).

states to fill a regulatory vacuum with a patchwork of differing classifications on VoIP providers with regard to paying access charges.” (*Id.* at 19.) Indeed, it criticized states that had attempted to take jurisdiction over VoIP services: “Unfortunately, as some states are seeking to assert jurisdiction over VoIP, a patchwork of disparate state regulatory treatment of VoIP has already begun.” (*Id.* at 5 n. 11.)

There is no reason for the Commission to repudiate its conclusion that “the regulatory treatment of such services belongs at the federal level.” (FPSC Reply Comments at 4.) Indeed, it would be a particularly bad time to take on a case that—given the keen industry interest in VoIP issues—would generate as much controversy and complexity as any proceeding the Commission has ever undertaken. Although the FCC has taken longer than anticipated to reform the existing intercarrier compensation rules, recent announcements indicate that it intends to tackle this complicated task in the next six months.¹⁶

Taking on the issues raised by Embarq’s Complaint would also be contrary to the legislative directive to coordinate with the FCC “to achieve greater efficiency in regulation.” (§ 364.012(1), Fla. Stat.) It is not efficient for the Commission to devote resources to a proceeding that may be curtailed by FCC action and that risks inconsistency with pending FCC rulings. Of course, that is especially true here, where the Commission lacks jurisdiction in any event.

Ideally, Verizon and Embarq should be able to agree on compensation for the VoIP traffic at issue. Indeed, unlike a number of other carriers, Verizon has not refused to pay any access charges on VoIP traffic, and is paying interstate access rates to

¹⁶ *In Re: Core Communications, Inc.*, D.C. Cir. Civ. No. 07-1446, Transcript of May 5, 2008 Oral Argument, at 22 (Palmore comments) (FCC Chairman “intends to achieve broad-based comprehensive intercarrier compensation reform within six months”).

Embarq on the VoIP traffic at issue. In its FCC Petition for Forbearance from the ESP exemption, Embarq itself has emphasized that interstate access charges are a just and reasonable measure of compensation. (Embarq Forbearance Petition at 19.) If Embarq now has a different view of the compensation arrangement that should apply in this context, it can address its arguments to a forum that has jurisdiction.

Even apart from the fact that this Commission has no jurisdiction to hear Embarq's Complaint, it should decline to do so because the same issues are before the FCC, and this Commission has expressly recognized that the FCC is the appropriate regulatory forum to address those issues.

Respectfully submitted on June 26, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail and U.S. mail on June 26, 2008 to:

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