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July 8, 2008

**FILED ELECTRONICALLY**

Ms. Ann Cole  
Office of Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Re: Docket No. 080308  
Embarq's Response to Verizon's Motion to Dismiss

Dear Ms. Cole:

Enclosed please find Embarq Florida, Inc.'s Response to Verizon's Motion to Dismiss in the above referenced docket matter.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions regarding this electronic filing, please do not hesitate to call me at (850) 599-1560.

Sincerely,

/s/ Susan S. Masterton  
Susan S. Masterton

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**CERTIFICATE OF SERVICE  
DOCKET NO. 080308**

**I HEREBY CERTIFY that a true and correct copy of the foregoing was served by regular U.S. Mail and electronic mail on this 8<sup>th</sup> day of July, 2008 to the following:**

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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.	Docket No.: 080308-TP  Filed: July 8, 2008
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**EMBARQ FLORIDA, INC'S RESPONSE TO VERIZON'S MOTION TO DISMISS**

In accordance with Rule 28-106.204, F.A.C., Embarq Florida, Inc. ("Embarq") files this Response in opposition to the Motion to Dismiss and Supplement to the Motion to Dismiss filed by MCI Communications Services, Inc., d/b/a Verizon Business Services ("Verizon") on June 26, 2008 and July 1, 2008, respectively (hereinafter "Verizon's Motion").<sup>1</sup> Embarq's Complaint shows that Verizon has refused to pay intrastate access charges on Verizon's intrastate interexchange traffic terminated to Embarq. Verizon's Motion claims that Embarq's Complaint should be dismissed, ostensibly because the Commission lacks any jurisdiction over traffic Verizon claims it originated using Voice over Internet Protocol ("VoIP") technology. Verizon's Motion is ill-founded and should be denied.

**I. INTRODUCTION**

In its Motion, Verizon seeks dismissal or stay of Embarq's Complaint for intrastate access charges Verizon wrongfully failed to pay for VoIP intrastate interexchange traffic delivered to Embarq for termination. Contrary to Verizon's representations, under Florida law the Commission continues to have jurisdiction over intrastate interexchange companies, such as Verizon, and over VoIP services to ensure

<sup>1</sup> The Supplement to Verizon's Motion to Dismiss filed on July 1, 2008 restarts the 7-day time frame for Embarq's Response, making Embarq's Response due on July 8, 2008. Verizon also filed a Request for Oral Argument on its Motion. Embarq has no objection to that Request.

that intrastate access charges are properly paid to local exchange telecommunications companies, such as Embarq. Verizon is also wrong when it argues that the FCC has declared all VoIP services to be interstate and pre-empted the Florida Commission's jurisdiction to determine that intrastate access charges are due on Verizon's intrastate interexchange traffic delivered to Embarq for termination. The Commission should deny Verizon's Motion to Dismiss because the Commission clearly has jurisdiction over Verizon, as well as Verizon's obligation to pay appropriate intrastate access charges on its intrastate interexchange traffic, including any VoIP traffic.

Verizon has asked, in the alternative, that the Commission stay action on Embarq's Complaint pending the outcome of certain FCC proceedings. These FCC dockets have been pending for several years, without final resolution by the FCC. There is no guarantee that the FCC will act on any of the issues in these proceedings within any predictable time frame or that any action taken by the FCC would be retroactive. Therefore, the Commission should also deny Verizon's request for a stay.

## **II. ARGUMENT**

### **A. Standard for Motion to Dismiss**

The standard applied by the Commission in ruling on a Motion to Dismiss is well-established. A Motion to Dismiss raises, as a question of law, the sufficiency of the ultimate facts alleged in the original petition or complaint to state a cause of action. See, *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1<sup>st</sup> DCA 1993); *Pizzi v. Central Bank and Trust Company*, 250 So. 2d 895, 897 (Fla. 1971). The standard to be applied in ruling on a Motion to Dismiss is whether, assuming all of the allegations in the complaint are true, the complaint states a cause of action upon which relief may be granted. *Id.* In making

this determination, the Commission may not look beyond the four corners of the Complaint. *Id.* Naturally, the Commission also must have subject matter jurisdiction as a basis for considering the issues raised in a complaint. See, Fla. R. Civ. P. 1.140(b).

**B. State law gives the Commission clear jurisdiction to resolve Embarq's Complaint**

In its Motion, Verizon does not assert that Embarq's Complaint fails to state a valid cause of action. Rather, Verizon's Motion rests wholly on its assertion that the Commission lacks any jurisdiction over VoIP services or over Verizon as a provider of VoIP services. (Verizon Motion at page 1) In making this claim Verizon fundamentally misunderstands the basis of the Commission's jurisdiction to consider and resolve Embarq's Complaint.<sup>2</sup> First, section 364.01, F.S., gives the Commission broad regulatory jurisdiction over and in relation to telecommunications companies, in all matters set forth in ch. 364, F.S.<sup>3</sup> Second, even where the Legislature has limited the Commission's jurisdiction over particular entities or activities, as in the statutory sections Verizon cites in its Motion, these provisions expressly reserve the Commission's jurisdiction "to the extent delineated in this chapter." For instance, section 364.011, which sets forth several exemptions from commission jurisdiction, including VoIP, specifically provides:

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<sup>2</sup> Verizon also is wrong to imply that Embarq's Complaint is deficient for failure to cite in par. 6 the specific provisions of ch. 364 that support the Commission's jurisdiction is misplaced. Embarq properly noted the general provisions of state and federal law that give the Commission jurisdiction over the companies and their intrastate activities, and that give the Commission the authority to hear and render rulings on Complaints, i.e., section 152 of the Telecom Act (delineating federal and state jurisdiction over communications services), ch. 350 (setting forth the constitution and authority of the Commission) and ch. 364, (establishing the Commission's jurisdiction over telecommunications companies and services). In addition, Embarq's Complaint fully complies with Rule 28-106.201 and 25-22.036, F.A.C., by identifying the specific statutes that support its claim for relief, including 364.02(13), 364.02(14), 364.08, 364.09, 364.10 and 364.336.

<sup>3</sup> Subsection (1) of section 364.01 states: "The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers conferred by this chapter." Subsection (2) of section 364.01 states: "It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies..." See e.g., *Level 3 Communications, LLC v. Jacobs*, 841 So. 2d 447, 450 (Fla. 2003).

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 companies
- (2) Broadband services, regardless of the provider, platform or protocol
- (3) VoIP
- (4) Wireless telecommunications, including commercial radio service providers. (Emphasis added)

Section 364.013, F.S., reiterates this same reservation of Commission jurisdiction for VoIP services, stating:

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)

While Verizon's Motion repeatedly emphasizes the federal law exceptions in these sections, Verizon wholly ignores the underlined state law exceptions. Verizon ignores them because they belie Verizon's assertion that the Commission lacks jurisdiction over the issues in Embarq's Complaint. In fact, chapter 364, F.S., specifically preserves the obligation to pay intrastate access charges for both intrastate interexchange companies and for VoIP services.

First, in excluding "intrastate interexchange telecommunications companies" from the definition of "telecommunication company" in s. 364.02(14), F.S., the statute expressly carves out from that exclusion the requirement that each intrastate interexchange telecommunications company (such as Verizon) shall "continue to pay intrastate switched network access rates or other intercarrier compensation to the local exchange telecommunications company or competitive local exchange telecommunications company for the origination and termination of interexchange

telecommunications service...” Verizon’s failure to pay Embarq’s tariffed intrastate switched network access rates for Embarq’s termination of Verizon’s intrastate interexchange telecommunications service is exactly the subject of Embarq’s Complaint. The Commission consistently has recognized its jurisdiction to consider and resolve disputes regarding the payment of intrastate switched access. Section 364.02(14), F.S., expressly preserves the Commission’s jurisdiction to resolve these disputes.<sup>4</sup>

Similarly, in section 364.02(13), F.S., while excluding VoIP services from the definition of service for the purposes of regulation by the Commission, the statute expressly provides that the exclusion is not intended to 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 services.” By these express terms, and taken together with the reservation of jurisdiction over intrastate interexchange telecommunications companies in section 364.02(14), F.S., these statutes make unambiguously clear that intrastate interexchange telecommunications companies, such as Verizon, that originate or terminate interexchange traffic to local exchange companies, such as Embarq, are liable for applicable switched network access charges, regardless of

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<sup>4</sup> See, e.g., *In re: Complaint Against AT&T Communications of the Southern States for failure to pay intrastate access charges pursuant to Embarq’s tariffs by Embarq Florida, Inc. f/k/a Sprint-Florida Incorporated*, Order No. PSC-06-0777-FOF-TP, issued September 18, 2006 in Docket No. 060455-TP.

whether these calls allegedly involve any VoIP services.<sup>5</sup> These provisions clearly are encompassed in the statutory references to “except as delineated in this chapter.”<sup>6</sup>

Finally, as discussed above, in considering a Motion to Dismiss the facts alleged by the Petitioner must be taken as true and construed in the light most favorable to the Petitioner. Disputed issues of material fact must be resolved through a formal hearing under section 120.569 and 120.57(1), F.S. While Verizon has alleged that certain traffic it has terminated to Embarq is VoIP traffic subject to interstate, rather than intrastate, access charges, Verizon has not proven the amount of this intrastate interexchange traffic that is actually VoIP traffic, if any. The accuracy of Verizon’s characterization of the traffic as, first, VoIP and second, intrastate is a disputed issue of fact raised in Embarq’s Complaint. (See, e.g., pars. 19 and 33) Even if the Commission were to conclude that it somehow has no jurisdiction over intrastate interexchange VoIP traffic for purposes of ensuring that appropriate switched access charges are paid, notwithstanding the express reservation of such jurisdiction in the statutes, the Commission clearly has jurisdiction to determine whether the disputed traffic is actually VoIP as Verizon claims. And, it unquestionably has jurisdiction over non-VoIP intrastate interexchange traffic and the payment of intrastate access charges on that traffic. Consequently, the Commission

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<sup>5</sup> The rules of statutory construction require that all parts of a statute be taken together and be given meaning. See, e.g., *GTC v. Edgar*, 967 So. 2d 781, 787 (Fla. 2007). Thus, sections 364.011 and 364.013, which recognize the delineation of continued Commission jurisdiction in chapter 364, F.S., and the provisions of section 364.02(13) and (14), which establish the parameters of that continued jurisdiction, must be read in concert to determine the extent of the Commission’s jurisdiction over intrastate interexchange companies and VoIP services. Because the meaning of the relevant statutory provisions is clear on its face, there is no need to look beyond the words of the statute to determine legislative intent. *Id.* at 785.

<sup>6</sup> In another case involving the Commission’s jurisdiction to resolve complaints regarding what was alleged to be VoIP traffic, the Commission rejected similar challenges to the Commission’s jurisdiction. See, *In re: Complaint against KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLC for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint’s tariffs and for alleged violation of Section 364.16(3)(a), F.S., by Sprint-Florida, Incorporated*, Order No. PSC-05-1065-FOF-TP issued November 1, 2005 in Docket No. 041144-TP.



cannot dismiss Embarq's Complaint but must assert its jurisdiction at least for the purpose of determining how much of the intrastate interexchange traffic terminated by Verizon to Embarq may be, in fact, intrastate VoIP traffic.

**C. Federal law does not pre-empt or preclude the Commission's jurisdiction**

Verizon's claim that interexchange VoIP calls are somehow exempt from intrastate access charges, based on the end points of a call, rests on the notion that VoIP is not a "telecommunications service," but instead is an "information service." This characterization stems from the use of Internet protocol technology for the transmission and routing of VoIP calls, rather than the circuit-switched technology commonly used by wireline telecommunications services providers. The mere use of VoIP technology in originating a telephone call, however, does not render it anything new or different, much less outside existing access rules and state jurisdiction.

Historically, the FCC has granted "enhanced service providers" (chiefly Internet service providers) a limited exemption from access charges.<sup>7</sup> However, the FCC has never extended that exemption to carriers. The FCC granted the exemption precisely because ESPs are not carriers and use the PSTN in a different way.<sup>8</sup> By definition ESPs are not carriers and, unlike carriers, they have no right to interconnect. Verizon seeks to evade both Embarq's tariffed access charges and the Commission's authority by trying to obscure the true regulatory treatment of the calls at issue. The traffic at issue here is delivered for termination by Verizon to Embarq in conventional TDM format, whether or

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<sup>7</sup> *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("IP-Enabled Services NPRM").at ¶ 25, citing *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I Memorandum Opinion and Order, 97 FCC Rcd 682, 715 at ¶ 83 (1983); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Services Providers*, CC Docket No. 87-215, Order, 3 FCC Rcd 2631, 2633 at ¶ 17 (1988).

<sup>8</sup> *In the Matter of Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 ¶¶ 343, 345 (1997), pet. for rev. denied, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8<sup>th</sup> Cir. 1998).

not Verizon claims it is originated using VoIP technology. The FCC has never adopted the position that any traffic that includes VoIP in the call path before it is delivered to the PSTN for termination is transformed into “information service,” much less that doing so renders it outside the reach of state commissions.

Verizon misrepresents the FCC’s rulings when it argues that the FCC has declared VoIP to be an interstate service and, therefore, ostensibly has preempted the Florida Commission’s jurisdiction to determine that intrastate access charges apply to intrastate interexchange telecommunications services using VoIP. The FCC never has gone so far as to exempt VoIP-originated voice calls from intrastate access charges, nor has it categorically denied the states jurisdiction over this traffic.<sup>9</sup> On the contrary, Verizon manufactured this rationale to refuse payments it unquestionably owes local exchange carriers for terminating intrastate calls.

When the FCC has addressed the applicability of access charges to VoIP traffic, in three separate instances it has rendered three distinct--and deliberately narrow--rulings. In the AT&T Declaratory Ruling, the FCC considered the applicability of access charges to certain interexchange traffic that originates and terminates on the PSTN (“phone-to-phone VoIP traffic”).<sup>10</sup> The FCC confirmed that access charges are due on these interexchange calls based on the originating and terminating points of the calls. The FCC’s decision shows that, contrary to Verizon’s assertions, the FCC has not determined that VoIP is interstate for all purposes and subject to only interstate compensation schemes.

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<sup>9</sup> The Commission should not take preemption of its state authority lightly. Preemption, in the instances where it does occur, must be clear. It is not to be presumed or extended from orders involving circumstances different from the case at hand.

In the Pulver.com Declaratory Ruling the FCC ruled that VoIP traffic that never touches the PSTN (that is, computer-to-computer VoIP traffic) is not subject to switched access charges, because that traffic never touches the PSTN.<sup>11</sup> This situation is completely different from the facts in the AT&T Declaratory Ruling, where the traffic at issue originated and terminated on the PSTN. The FCC found that it makes sense not to apply access charges to computer-to-computer calls, since there is no access to the local exchange network.

The third decision in which the FCC discusses the jurisdiction of VoIP traffic, the Vonage Declaratory Ruling, involves traffic that either originates or terminates on the PSTN, but not both.<sup>12</sup> The Vonage Declaratory Ruling appears to be the rationale for Verizon's faulty position that intrastate VoIP-originated traffic is somehow jurisdictionally interstate and subject only to interstate compensation mechanisms. Verizon's interpretation of this decision is flatly wrong. In the Vonage Declaratory Ruling the FCC determined that VoIP traffic is interstate for regulatory purposes, but specifically declined to rule on the nature of VoIP traffic (that is, whether it is telecommunications or information services traffic). The FCC also declined to rule on the appropriate intercarrier compensation scheme for VoIP traffic, that is, whether the

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<sup>10</sup> *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC RCD 7457 (2004) ("AT&T Declaratory Ruling").

<sup>11</sup> *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) ("Pulver.com Declaratory Ruling").

<sup>12</sup> *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) ("Vonage Declaratory Ruling"). In subsequent FCC decisions, this type of traffic has come to be known as "interconnected VoIP" service, defined by the FCC as "services that (1) enable real-time, two-way communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive call from and terminate calls to the PSTN." See, *In the Matter of IP-Enabled Services*, WC Docket No. 04-36; E911

traditional jurisdictional application of access charges applies.<sup>13</sup> In addition, in that decision the FCC expressly recognized that VoIP traffic is “jurisdictionally mixed,” meaning that it has ascertainable interstate and intrastate components.<sup>14</sup> The deregulatory scheme for VoIP traffic embodied in the Florida Statutes is entirely consistent with the Vonage Declaratory Ruling in that it removes VoIP from the type of Commission regulation that the FCC preempted, but it recognizes the “jurisdictionally mixed” nature of the traffic and preserves the application of access charges for that portion of the traffic that is jurisdictionally intrastate.<sup>15</sup>

In subsequent decisions to date, the FCC has consistently held that various regulatory requirements applicable to telecommunications providers also must apply to VoIP providers. For instance, the FCC has imposed the same obligation to provide 911 access on VoIP providers as it has on other telecommunications providers (i.e., landline and wireless telecommunications providers).<sup>16</sup> It also has determined that VoIP providers must contribute to the federal universal service fund, based on their interstate VoIP revenues.<sup>17</sup> The VoIP USF Order is particularly significant because in that decision the

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*Requirements for IP-Enabled Service Providers*, WC Docket No. 050196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) (“VoIP 911 Order”) at ¶ 24.

<sup>13</sup> Vonage Declaratory Ruling at ¶ 14, 44

<sup>14</sup> Vonage Declaratory Ruling at ¶ 18.

<sup>15</sup> This approach is also consistent with the Commission’s July 14, 2004 Reply Comments in the FCC’s IP-Enabled Services docket, cited by Verizon at page 11 of Verizon’s Motion and footnote 15. In relation to intercarrier compensation applicable to VoIP, on page 19 of its Reply Comments, the Commission states:

Others argue that voice traffic (whether traditional telephony, wireless, or IP-enabled) that originates or terminates on the PSTN is subject to the existing intercarrier compensation rules. As discussed below, the FPSC support this position in the near term. Our support for this position is based on the notions of regulatory parity (i.e., competitors like wireless and VoIP ought to be treated similarly) and basic notions of fairness (i.e., for better or worse, the rules are on the books and entitle network owners to compensation).

<sup>16</sup> VoIP 911 Order (Supra at footnote 10.)

<sup>17</sup> *In the Matter of Universal Service Contribution Methodology; Federal State-Joint Board on Universal Service; 1998 Biennial Regulatory Review—Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for*

FCC again expressly recognized that VoIP traffic is jurisdictionally mixed (§42). The FCC also specifically noted that an interconnected VoIP provider with the capability to track the jurisdiction of its customer's calls would be subject to state regulation (§56). That is precisely the situation in this case, where Verizon purports to have identified the jurisdiction of its VoIP interexchange traffic as either intrastate or interstate, based on the actual end points of the traffic. (See, Attachment 3 to Embarq's Complaint) Yet Verizon wrongly assumes that it may choose to pay only the lower, interstate rate for the intrastate IP-to-PSTN calls terminated on Embarq's network.

The VoIP USF Order also confirms that the FCC has not preempted any exercise of jurisdiction over IP-to-PSTN traffic by state commissions, contrary to Verizon's assertions. Indeed, a federal court has expressly found that the FCC's orders on VoIP do not constitute a preemption of a state commission's jurisdiction to consider and determine issues related to intrastate VoIP service. In *Comcast IP Phone v. Missouri Public Service Commission*, the United States District Court for the Western District of Missouri, held that "the FCC has not pre-empted the entire field of VoIP" and that "the fact the FCC has opened a rulemaking proceeding is not an expression of the FCC's intent to pre-empt the entire field of VoIP services."<sup>18</sup>

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*Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format; IP-Enabled Services*, CC Docket Nos. 06-122, 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170 and 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) ("VoIP USF Order").

<sup>18</sup> Case No. 06-4233-CU-C-NKL, slip op., decided January 18, 2007, 2007 U.S. Dist. LEXIS 3628 at pages 13 and 15.

**D. Embarq's federal lawsuit has no bearing on the Commission's jurisdiction over this Complaint**

In the Supplement to its Motion to Dismiss, Verizon points to a collections suit Embarq and its affiliates recently filed against Verizon in federal court in Virginia.<sup>19</sup> While this lawsuit also involves claims by Embarq and its affiliates for intrastate access charges due from Verizon, the lawsuit explicitly excludes the claims of Embarq regarding traffic that Verizon asserts is VoIP that are the subject of this docket (as Verizon, itself, concedes).<sup>20</sup> Therefore, that claim is irrelevant to the Commission's consideration of Embarq's Complaint.<sup>21</sup>

The portion of the federal complaint that includes Embarq Florida, Inc. involves an entirely separate cause of action, based on Verizon's failure to pay intrastate access charges on certain prepaid calling card traffic that Verizon alleged to be "enhanced services" and exempt from access charges. The FCC expressly rejected the very same claims by AT&T. In an appeal of the FCC's decision, the U.S. Court of Appeals subsequently upheld the FCC's conclusion and made clear that interexchange carriers

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<sup>19</sup> *Embarq Missouri, Inc. et.al. v. MCI Communications Services, Inc. d/b/a Verizon Business Services*, Complaint, Civ. Action No. 1:08cv668 (E.D. Va.) included as an Attachment to the Supplement to Verizon's Motion.

<sup>20</sup> Verizon is mistaken in its implication that the federal complaint does not disclaim any intent to recover for VoIP traffic related to Embarq (as referenced in paras. 36-40). The referenced paragraphs explicitly flow from paragraph 35, which states unequivocally that if the FPSC Complaint is allowed to stand, Embarq does not intend to seek recovery from VZ for VoIP traffic in the federal lawsuit.

<sup>21</sup> The existence of a concurrent lawsuit in another jurisdiction, even when the suit may involve the same parties and the same causes of action (which is not true in the instant case), would not divest the Commission of jurisdiction. At best, it might serve as a discretionary basis for the Commission to stay a proceeding pending the outcome of the concurrent case. Under Florida law, various factors are considered in determining whether to grant a stay on this basis, including: the forum in which the proceeding was first initiated; the similarity of the parties, the facts and the relief requested; and the greater potential for delay in one or the other forum. These factors support the Commission's jurisdiction to proceed with Embarq's Complaint. See, e.g., *Maloy v. Gunster Yoakley, Valdes-Fauli and Stewart, P.A.*, 850 So. 2d 578, 581 (Fla. 2d DCA 2003) (the court in which jurisdiction first attaches should determine the controversy); *Sebor and Phillipson v. Rief Designs and DRH Corp.*, 706 So. 2d 52, 54 (Fla. 5<sup>th</sup> DCA 1998) (stay of earlier filed state action quashed because state claims could proceed without resolution of federal claims); *Sunshine State Service Corporation v. Dove Investments of Hillsborough*, 468 So. 2d 281, 283-284 (Fla. 5<sup>th</sup> DCA 1985)

like Verizon are responsible for access charges on those calls.<sup>22</sup> Embarq's federal complaint seeks payment of the access charges due for this traffic. Because these claims are not based on the same facts or law as the claims in Embarq's Complaint before this Commission, they provide no basis for the Commission to decline to consider Embarq's Complaint.

In addition, while the federal case includes allegations similar to the allegations in this Complaint regarding Verizon's failure to pay intrastate access charges in other states on what Verizon claims is "VoIP traffic," Embarq Florida, Inc. is specifically excluded as a plaintiff for that portion of the complaint. Significantly, Embarq's Florida Commission Complaint was filed before the federal complaint. The exclusion of Embarq Florida, Inc. from this portion of the federal complaint was expressly in recognition of the previously filed Florida action. In addition, Embarq's Florida Commission Complaint includes allegations of violations of state law that are clearly within the Commission's jurisdiction to resolve. Therefore, Embarq's filing in federal court has no bearing on the Commission's jurisdiction over Embarq's Complaint in Florida.

Finally, the fact that Embarq brought VoIP claims on behalf of other, non-Florida, companies in federal court does not constitute an admission that the FPSC is an inappropriate forum. Obviously, the FPSC does not have jurisdiction over the claims of those non-Florida companies for intrastate access charges for states other than Florida. Moreover, whether other PUCs have jurisdiction is dependent on their organic statutes, which differ from the FPSC's, and even if there is concurrent jurisdiction, Embarq is

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(quashing a stay granted by the trial court because the two actions did not have complete identity of parties and the state action was initiated prior to the federal action).

<sup>22</sup> *Qwest Servs. Corp. v. FCC*, slip.op., No. 06-1274 (Dec. 4, 2007).

entitled to select what it believes is the most appropriate forum for each of its subsidiaries.

**E. The Commission should not stay the Complaint pending the indefinite possibility of a federal ruling that has been pending for many years**

Perhaps signaling the weakness of its challenge to the Commission's jurisdiction, Verizon also asks that the Commission stay this docket pending "anticipated" rulings by the FCC on VoIP-related issues. Verizon's plea for a stay is nothing more than a tired refrain that has been raised again and again during the many years the FCC dockets referenced by Verizon have been pending.

Embarq recognizes that the FCC has several pending dockets that may include the nature of VoIP traffic and the appropriate intercarrier compensation for VoIP traffic. These dockets include the IP-enabled Services rulemaking<sup>23</sup> and the Intercarrier Compensation rulemaking<sup>24</sup> noted by Verizon.<sup>25</sup> These dockets have existed for many long years without action or resolution by the FCC.

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<sup>23</sup> *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("IP-Enabled Services NPRM").

<sup>24</sup> *In the Matter of Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("Intercarrier Compensation NPRM"). As Verizon notes, the Commission issued a Further Notice of Proposed Rulemaking in this docket in 2005 (20 FCC Rcd 4685); however, three years later the FCC has not acted on either one.

<sup>25</sup> Verizon also mentions a Petition for Forbearance Embarq filed at the FCC as showing that Embarq believes the FCC is the appropriate forum to resolve VoIP issues. (Verizon's Motion at page 11 & n.15.) Verizon is patently wrong in suggesting that Embarq's Petition supports Verizon's argument that the Florida Commission cannot or should hear Embarq's Complaint. Rather than supporting Verizon's attempts to strip the Commission of its authority, Embarq's forbearance petition is entirely consistent with, and supportive of, Embarq's Complaint and the Commission's jurisdiction. Embarq's petition counters a petition filed by a VoIP service provider that seeks forbearance from access charges for VoIP-originated calls. *Feature Group IP Petition for Forbearance from Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules*, WC Docket No. 07-256 (filed Oct. 23, 2007). Embarq's petition shows that VoIP-originated voice calls that terminate on the PSTN have never



It has been nine years since the Intercarrier Compensation NPRM was initiated and fully four years since the IP-Enabled Services NPRM was opened. While the FCC has issued discrete rulings in the IP-Enabled Service docket (e.g., the VoIP 911 Order and VoIP USF Order) it has made no rulings that would change the status of the law applicable to the calls at issue in Embarq's Complaint. Despite Verizon's representations that the FCC now has committed to rule on these dockets within the next six months, there is no guarantee that the FCC will do so. Regardless, even if the FCC did rule in these or similar dockets, there is no basis to assume its rulemaking would have anything but a prospective effect. Therefore, these potential rulings have no bearing on the Commission's decision in this docket to determine whether Verizon should have paid intrastate access charges in the past.

Verizon has unlawfully refused to pay intrastate access charges due on calls delivered to Embarq for termination. The Commission should reject Verizon's attempts to evade a resolution of Embarq's claims and should refuse to stay Embarq's Complaint until some indeterminate time in the future when the FCC might render a ruling that might affect the Commission's jurisdiction over VoIP traffic.

### **III. CONCLUSION**

Wherefore, for the reasons set forth above, the Commission should deny Verizon's Motion to Dismiss and its alternative request for a stay and should allow Embarq to proceed with its Complaint.

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been covered by the ESP Exemption from access charges, but it seeks forbearance to ensure the ESP Exemption is not misapplied. *Petition of the Embarq Local Operating Companies for 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*, WC Docket No. 08-8 (filed Jan. 11, 2008).

Respectfully submitted this 8<sup>th</sup> day of July 2008.

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