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March 16, 2009 – VIA ELECTRONIC MAIL

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

Re: Docket No. 090084-TP
Joint petition for declaratory statement regarding limitations on third party billing imposed by the Telecommunications Consumer Protection Act and for order prohibiting telecommunications companies from billing for services other than those authorized within the Act, by Attorney General and Office of Public Counsel

Dear Ms. Cole:

Enclosed for filing in the above-referenced matter is Verizon Florida LLC's Motion to Dismiss or Deny Joint Petition Filed by the Attorney General and OPC. 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 NO. DATE
02253-09 3/16/09
FPSC - COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint petition for declaratory statement) Docket No. 090084-TP
regarding limitations on third party billing imposed) Filed: March 16, 2009
by the Telecommunications Consumer Protection)
Act and for order prohibiting telecommunications)
companies from billing for services other than those)
authorized within the Act, by Attorney General and)
Office of Public Counsel)
_____)

**VERIZON FLORIDA LLC'S MOTION TO DISMISS OR DENY
JOINT PETITION FILED BY THE ATTORNEY GENERAL AND OPC**

Verizon Florida LLC ("Verizon") moves to dismiss or deny the Joint Petition ("Petition") filed by the Attorney General and the Office of Public Counsel ("OPC") because it seeks to invoke the declaratory statement process inappropriately and because it fails to state a claim under the Telecommunications Consumer Protection Act¹ ("TCPA"). Granting the Petition would deny a beneficial and useful service to consumers and lead to unintended consequences, such as precluding consumers from receiving the convenience of a single bill that includes telephone services and third-party wireless and Internet access services. The Petition also ignores the multiple safeguards that have been implemented to prevent consumer harm. Moreover, the Attorney General and OPC settled substantially the same claims with Verizon and other carriers less than two years ago and dismissed them with prejudice in Docket No. 060650-TL. They should not be permitted to relitigate those claims.

¹ Fl. Stat. § 364.601-604.

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I. BACKGROUND

A. Overview

Verizon and other telephone companies offer billing and collection services to third-party telecommunications carriers (such as long distance carriers) and other service providers, which enables customers to receive charges for multiple services on a single bill. Some service providers submit their charges directly to the billing telephone company while others send them to billing clearinghouses which, in turn, send them to the appropriate telephone company for billing. The service providers that send their charges to clearinghouses are known as "SubCICs," a term that refers to the customer identification codes that clearinghouses assign to them. Third-party service providers, including SubCICs, establish their own customer relationships and provide services directly to their customers. Thus, Verizon does not provide the services or create the billing information, but rather includes on its bills the information provided to it by service providers and clearinghouses. Verizon requires clearinghouses to screen bills for accuracy and requires Sub-CICs that choose to use its billing and collection services to meet rigorous requirements. Indeed, the Attorney General and OPC helped establish those requirements in settlements they reached with Verizon less than two years ago.

B. 2006 Petition

The Attorney General and OPC filed a petition against Verizon, AT&T-Florida and Embarq in 2006 ("2006 Petition") involving substantially the same issues they have raised here. Their allegations centered on a Sub-CIC that provided e-mail services

and was alleged to have employed deceptive practices by failing to adequately inform consumers that charges for its services would appear on their telephone bills and by charging them for services they did not request.² Petitioners claimed that Verizon, AT&T Florida and Embarq had violated the TCPA by billing customers for the services of the Sub-CIC in question because the Sub-CIC did not provide a telecommunications service or an "information service" (defined in the TCPA to include only 900 and 976 services). Petitioners asserted that the TCPA only permits telecommunications companies to bill third-party charges for those specific services and that Verizon, AT&T Florida and Embarq should be prohibited from billing third-party charges for other services.³

*Verizon and the other carriers moved to dismiss the 2006 Petition because the TCPA does not limit the third-party services for which telecommunications companies may bill.*⁴ Evidently recognizing the weakness of their argument, the Attorney General and OPC settled before the motions were decided. The Verizon settlement agreement required Verizon to incorporate into its contracts with billing clearinghouses lower thresholds for customer complaints and customer notice requirements for Sub-CICs exceeding those thresholds. The agreement provided that these requirements would be incorporated in the billing clearinghouse contracts as they came up for renegotiation. As required by the settlement agreement, the Attorney General and OPC in July 2007 dismissed their 2006 Petition against Verizon with prejudice. Verizon complied with the settlement agreement by incorporating the complaint threshold and customer notice

² 2006 Petition, p. 3.

³ *Id.* at 4.

⁴ See Verizon Florida Inc.'s Motion to Dismiss Petition (October 18, 2006).

requirements when its contracts with its billing clearinghouses were renegotiated in 2007, 2008 and early this year.

C. 2009 Petition

The Attorney General and OPC in this case make allegations similar to those made in the 2006 Petition, although here they request a declaratory statement and generic order rather than relief against only certain carriers. Petitioners again allege that third-party vendors (*i.e.*, Sub-CICs) submit charges to billing clearinghouses which, in turn, send the charges to telecommunications companies so they can include the charges on customers' telephone bills.⁵ Instead of making allegations about a particular Sub-CIC as they did in 2006, Petitioners now make general allegations that unidentified Sub-CICs obtain telephone numbers using unspecified methods and then bill customers for services they did not order. Further, although Petitioners themselves settled the 2006 Petition by agreeing to additional safeguards that have become effective fairly recently, they now assert that the consumer protections in carriers' third-party billing programs are insufficient.⁶

Petitioners argue, as they did in 2006, that the TCPA limits the third-party services for which a telecommunications carrier may bill. Specifically, they claim that the TCPA prohibits these carriers from providing third-party billing services except for telecommunications service and "information service" (*i.e.*, 900 and 976 service).⁷ Petitioners request that the Commission declare that telecommunications companies "may provide third party billing services only for 'telecommunications services' and

⁵ Petition, p. 4.

⁶ *Id.* at 5.

⁷ *Id.* at 6.

'information services' as those terms are used and defined within the [TCPA], and in doing so must conform to the full requirements of the [TCPA]."⁸ Petitioners further request that the Commission issue an order prohibiting telecommunications carriers from violating the TCPA as thus interpreted.⁹

II. MOTION TO DISMISS

Verizon moves to dismiss Petitioners' request for a declaratory statement because Petitioners have failed to make allegations that would support such a request under Florida law. Verizon further moves that both the request for a declaratory statement and for a generic order be dismissed because Petitioners fail to make allegations sufficient to support their claims.

A. Petitioners Are Not Entitled to a Declaratory Statement

Section 120.565, Florida Statutes, which establishes when a party may obtain a declaratory statement, provides in pertinent part as follows:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, *as it applies to the petitioner's particular set of circumstances.*

(2) *The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.*¹⁰

Similarly, Florida Rule 28-105.001 provides that "[a] petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may

⁸ *Id.* at 10.

⁹ *Id.*

¹⁰ Emphasis added.

apply to the petitioner's particular circumstances." As the Commission has stated, "the purpose of a declaratory statement is to resolve an ambiguity in the law, to enable the petitioner to select a proper course of action in advance, thus avoiding costly administrative litigation."¹¹

The Petition only sets out general factual allegations that do not meet the statutory requirement of pleading a particular set of circumstances. The root of the problem is that Petitioners are not asking for a Commission ruling that would guide customers' future actions and therefore do not make specific allegations concerning any uncertainty customers face or any possible courses of action they might take. Rather than seeking an opinion from the Commission that would guide customers' conduct, Petitioners are attempting to limit the billing services that telecommunications companies may provide. The Petition seeks to misuse the declaratory statement process because "[a] declaratory statement is not the appropriate means for determining the conduct of another person."¹² In other words, Petitioners may not use the declaratory statement process to relitigate their claims under the TCPA. Their request for a declaratory statement therefore must be dismissed.

B. Petitioners Fail to State a Claim Under the TCPA

The TCPA requires telecommunications companies that act as "billing parties"¹³ on behalf of "originating parties"¹⁴ to provide certain information on their bills, including

¹¹ *In re: Petition for declaratory statement concerning urgent need for electrical substation in North Key Largo by Florida Keys Electric Cooperative Association, Inc.*, pursuant to section 366.04, Florida Statutes, Docket No. 020829-EC, Order No. PSC-02-1459-DS-EC, p. 5 (Oct. 23, 2002).

¹² Rule 28-105.001, Florida Administrative Code.

¹³ A "billing party" is defined by the TCPA as "any telecommunications company that bills an end user consumer on its own behalf or on behalf of an originating party." Section 364.602(1), Florida Statutes.

the name and toll-free number of the originating party, the “telecommunications service”¹⁵ or “information service”¹⁶ (i.e., 900 or 976 service) billed, and the specific charges, taxes and fees associated with each telecommunications or information service.¹⁷ Originating parties are responsible for providing the billing party with all required information and responding to customer inquiries.¹⁸ In compliance with the TCPA, Verizon provides the required information for third-party charges submitted by originating parties. When Verizon receives charges from billing clearinghouses, it includes on its bills the information specified in Section 364.604 for all charges, whether or not they relate to telecommunications service or information service.

The Attorney General and OPC contend that the TCPA only applies to telecommunications and information services provided by originating parties and that it prohibits telecommunications companies from billing for other third-party services. Even assuming that the TCPA only focuses on telecommunications and information services,¹⁹ that does not mean the TCPA prohibits charges for other services. Petitioners do not point to any language in the TCPA that imposes such a limitation, nor do they attempt to construe the statute in a way that would support one. In fact, nothing in the TCPA states that charges for services outside the scope of the statute may not be

¹⁴ 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, except the term “originating party” does not include any entity specifically exempted from the definition of ‘telecommunications company’ as provided in s. 364.02(14).”

¹⁵ “Telecommunications service” is not defined in the TCPA, but is defined in federal law to mean “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153 (46).

¹⁶ Under the TCPA, “information service” means “telephone calls made to 900 or 976 type services,” and “does not include Internet services.”

¹⁷ Section 364.604(1), Florida Statutes.

¹⁸ *Id.*

¹⁹ This assumption may be questioned because an “originating party” includes a billing clearinghouse that “bills a customer through a billing party” and Section 364.604 requires the billing party to identify the originating party’s name and toll-free number on the bill.

included on telephone bills. Likewise, the Commission's rules implementing the TCPA do not restrict the third-party services for which telecommunications companies may bill.²⁰ And of course, Petitioners previously settled this matter in direct opposition to the position they now take.

Petitioners argue that it would have been "absurd on its face" for the legislature to limit the application of the TCPA to the services described in the statute and then not prohibit billing for other third-party services.²¹ Not only does this assertion lack textual support, but it would lead to undesirable consequences. For example, Petitioners would prohibit local exchange companies from billing for third-party wireless and Internet access services, thus denying consumers the benefit of receiving local, wireless and Internet access services on a single bill. Such a limitation would make no sense and clearly was not intended by the legislature.

Petitioners' interpretation also is unsound because 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.²² Among other things, this means that 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. Petitioners' argument fails to pass this test.

²⁰ Rule 25.4.110, Florida Administrative Code.

²¹ Petition, pp. 7-8.

²² 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).

For all these reasons, Petitioners' request for a declaratory statement and generic order have no merit and must be dismissed.

III. IN THE ALTERNATIVE, THE PETITION SHOULD BE DENIED

If the Commission does not dismiss the Petition despite its many deficiencies, it should deny Petitioners' request to issue the requested declaratory statement and generic order for the legal reasons outlined above and because the allegations in the Petition are inaccurate and incomplete. As explained below, Petition ignores the benefits of third-party billing and the many safeguards that are in place and disregards the previous settlement entered into by the parties less than two years ago.

A. Verizon's Third-Party Billing Services Benefit Customers

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 and costly to do well. Accordingly, many of these companies contract with third-party billing clearinghouses that contract with bill issuers like Verizon to have the charges placed on the bill. 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. 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.

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. 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 for these services beyond those with formal credit accounts.²³ 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 services in a consolidated bill fosters competition by lowering providers' costs and enabling them to

²³ 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).

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.

B. Verizon's Third-Party Billing Services Provide Safeguards in Compliance With its Settlement Agreement With Petitioners

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.

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 offers 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. 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.

C. The Petitioners Recently Settled Substantially the Same Claims

Petitioners asserted substantially the same legal theory and claims in 2006 in Docket No. 060650-TL, settled that case with Verizon (and AT&T-Florida and Embarq) and dismissed their petition with prejudice in 2007, less than two years ago. Although

Petitioners reserved their right to litigate the applicability of the TCPA in a factually distinct case, they have made no effort to explain how their general allegations here are factually distinct from the allegations they made in 2006. Moreover, they fail to make any specific allegations concerning the effectiveness of the new safeguards that Verizon began implementing under the settlement agreement as it renegotiated its billinghouse contracts. Under these circumstances, the Commission should not allow the Petitioners to relitigate their claims.

Verizon therefore respectfully requests that the Petition be dismissed or denied.

Respectfully submitted on March 16, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail on March 16, 2009 to the following:

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