Ruth Nettles

From: Lisa Scoles [lscoles@radeylaw.com]

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To: Filings@psc.state.fl.us

Cc: 'Andrea Kruchinski'; 'Bill McCollum'; 'Booter Imhof'; Charles Murphy; David Christian; 'De O'Roarke'; 'Greg Follensbee'; 'J.R. Kelly'; 'Joseph McGlothlin'; Kathryn Cowdery; 'Keith Vanden Dooren'; 'Kip Edenfield'; 'Manuel Gurdian'; 'Mike Palecki'; Susan Masterton; Tracy Hatch

Subject: Electronic filing in Docket No. 090084-TP

Attachments: ILD's Motion in Support of Motions to Dismiss 03.23.09.pdf

Electronic Filing

a. Person responsible for this electronic filing:

Susan F. Clark
Donna E. Blanton
Radey Thomas Yon & Clark, P.A.
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301
(850) 425-6654
sclark@radeylaw.com
dblanton@radeylaw.com

b. Docket No. 090084-TP – In re: Joint Petition of Public Counsel and Attorney General for Declaratory Statement and for Order Limiting Third Party Billing by Florida Telecommunications Companies, Verizon, Embarq, AT&T, et al.

c. Document being filed on behalf of ILD Telecommunications, Inc.

d. There are 5 pages.

e. The document attached for electronic filing is ILD Telecommunications, Inc.'s Motion in Support of Motions to Dismiss, or Alternatively, to Deny the Joint Petition by the Attorney General and the Office of Public Counsel

(See attached files: ILD's Motion in Support of Motions to Dismiss 03.23.09.pdf)

Thank you for your assistance in this matter.

Lisa Scoles, JD, MBA
RADEY|THOMAS|YON|CLARK
Attorneys & Counselors at Law
301 S. Bronough Street, Suite 200
Tallahassee, Florida 32301
Telephone: 850.425.6662
Receptionist: 850.425.6654
Facsimile: 850.425.6694
Email: lscoles@radeylaw.com
www.radeylaw.com

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition of Public Counsel and Attorney General for Declaratory Statement and for Order Limiting Third Party Billing by Florida Telecommunication Companies, Verizon, Embarq, AT&T, et al.	Docket No. 090084-TP Filed March 23, 2009

MOTION IN SUPPORT OF MOTIONS TO DISMISS, OR ALTERNATIVELY, TO DENY THE JOINT PETITION BY THE ATTORNEY GENERAL AND THE OFFICE OF PUBLIC COUNSEL

ILD Telecommunications, Inc. ("ILD"), pursuant to rule 28-106.204(1), Florida Administrative Code, files this motion in support of the Motions to Dismiss, or alternatively, to Deny, the Joint Petition filed by the Attorney General ("AG") and the Office of Public Counsel ("OPC"), which were filed in this docket by Verizon Florida LLC ("Verizon"), Embarq Florida, Inc. ("Embarq") and BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") (collectively, the "telecommunications companies"), on March 16, 2009.

ILD supports the arguments asserted by Verizon, Embarq and AT&T Florida. In the interests of saving time for both the Florida Public Service Commission ("Commission") and its staff, ILD will not reiterate those arguments here.

Specifically, ILD agrees with the telecommunications companies that a declaratory statement is the improper vehicle for the relief sought by the AG and the OPC, which is a sweeping determination by the Commission regarding third-party billing arrangements between all local exchange companies ("LECs") and third-party billing aggregators. As the telecommunications companies explain, a declaratory statement can only seek an agency opinion as to the applicability of a statutory provision "as it applies to the petitioner's particular set of circumstances." § 120.565(1), Florida Statutes. A declaratory statement is *not* the appropriate means for determining the conduct of another person, the legality of past conduct, or for

obtaining a policy statement of general applicability from an agency. R. 28-105.001, Fla. Admin. Code.

ILD further agrees that the AG and the OPC have misinterpreted the Telecommunications Consumer Protection Act (the "Act"). The Act does not authorize the Commission to limit the LECs' ability to third-party bill for services other than telecommunications services and information services (900 or 976 services) or to prohibit billing for such services.

The Commission Lacks Authority to Adopt a Rule

Because the AG's and the OPC's petition seeks a statement of general applicability, the only way the Commission could accomplish the objectives of the AG and the OPC is through rulemaking, assuming the Commission had the necessary statutory authority to support rules addressing third-party billing by the LECs. Statements of general applicability are rules under Florida law.[1]

The Commission has denied requests for declaratory statements when the desired result is a statement of general applicability or a rule. *See e.g., In re: Petition for Declaratory Statement by Duke Energy New Smyrna Beach Power Company, L.L.P. Concerning Eligibility to Obtain Determination of Need Pursuant to Section 403.519, F.S., Rules 25-22.080 and .081, F.A.C., and Pertinent Provisions of the Florida Electrical Power Plant Siting Act*; Docket No. 971446-EU; Order No. PSC-98-0078-FOF-EU (Jan. 13, 1998) (denying a petition for declaratory statement because the resulting statement regarding whether Exempt Wholesale Generators were proper applications under the Electrical Power Plant and Transmission Line Siting Act would essentially be a rule of "general applicability interpreting law and policy" that "would not merely affect

[1] The Administrative Procedure Act ("APA") defines a "rule" as an "agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency . . . ." § 120.52(16), Florida Statutes.

petitioner in petitioner's set of circumstances only, but would carry implications for the entire power industry statewide.").

Rulemaking is not appropriate, however, because the Commission lacks statutory authority to adopt a rule accomplishing the objectives of the AG and the OPC. In order to enact a rule, an agency must have specific rulemaking authority to do so. Section 120.52(8), Florida Statutes, states:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. *An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute.* No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. *Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.*[2]

(Emphasis added). *See also* § 120.536(1), Florida Statutes (containing identical language).

The APA's stringent rulemaking requirements, as reflected in section 120.52(8), Florida Statutes, were adopted by the Legislature in 1996 and in 1999. Case law from the First District Court of Appeal construing these changes upholds the tight link that the Legislature requires between agency rules and the statutes they implement. *See State Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc., Inc.*, 798 So. 2d 847 (Fla. 1st DCA 2001) (*Day Cruise II*); *State Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc., Inc.*, 794 So. 2d 696 (Fla. 1st DCA 2001) (*Day Cruise I*); *S.W. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000). After the 1999 amendments, the Legislature and the courts said that administrative rules must "implement or interpret a *specific*

[2] Section 120.52(8), Florida Statutes, also enumerates six specific grounds for finding a proposed or an existing rule invalid. These include that the agency materially failed to follow the applicable rulemaking requirements as set forth in the APA and that the agency exceeded its rulemaking authority. § 120.52(8)(a)-(b), Florida Statutes.

power granted by the applicable enabling statute." *See Save the Manatee Club*, 773 So. 2d at 596 (emphasis added). As the First District Court of Appeal explained in 2001:

> Under the 1996 and 1999 amendments to the APA, it is now clear, *agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it*, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.

Day Cruise I, 794 So. 2d at 700 (emphasis added). This point was emphasized again in 2002. *See Hennessey v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering*, 818 So. 2d 697, 700 (1st DCA 2002) (citations omitted) ("It is clear that the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute. Otherwise the rule is not a valid exercise of delegated legislative authority.").

Accordingly, the Legislature and courts have made it clear that an agency cannot adopt a rule for which it does not have rulemaking authority from a specific enabling statute. As no statute grants the Commission the specific rulemaking authority to limit the services that can be billed under third-party billing on a LEC's bill, the Commission lacks authority to adopt such a rule. Accordingly, the Joint Petition should be denied.

For the reasons expressed, ILD supports the Motions to Dismiss, or alternatively to Deny, the Joint Petition filed by the AG and the OPC in Docket No. 090084-TP.

Respectfully submitted,

/s/Susan F. Clark
Susan F. Clark
Fla. Bar No. 179580
Donna E. Blanton
Fla. Bar No. 948500
Radey Thomas Yon & Clark
301 S. Bronough Street, Suite 200
Tallahassee, Florida 32301
(850) 425-6654 telephone / (850) 425-6694 fax

Attorneys for ILD Telecommunications, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via electronic mail this 23rd day of March, 2009, upon the following:

Office of Attorney General
Bill McCollum/Keith P Vanden Dooren/
Michael Palecki
The Capitol - PL01
Tallahassee, Florida 32399-1050
ag.mccollum@myfloridalegal.com
keith.vandendooren@myfloridalegal.com
michael.palecki@myfloridalegal.com

Office of Public Counsel
J.R. Kelly/Joseph A. McGlothlin
c/o The Florida Legislature
111 W. Madison Street, Room 812
Tallahassee, Florida 32399-1400
kelly.jr@leg.state.fl.us
mcglothlin.joseph@leg.state.fl.us

Florida Public Service Commission
Patrick L. "Booter" Imhof/
Kathryn Cowdery/Charles Murphy
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
bimhof@psc.state.fl.us
kcowdery@psc.state.fl.us
cmurphy@psc.state.fl.us

Embarq Florida, Inc.
Susan S. Masterton
Mailstop: FLTH00102
1313 Blair Stone Road
Tallahassee, Florida 32301
susan.masterton@embarq.com

AT&T Florida
E. Earl Edenfield, Jr./Tracy Hatch/
Manuel A. Gurdian
c/o Gregory R. Follensbee
Tallahassee, Florida 32303-1561
ke2722@att.com/th9467@att.com
mg2708@att.com
greg.follensbee@att.com

Verizon Florida, LLC
David Christian/Dulaney L. O'Roark
106 East College Avenue, Suite 710
Tallahassee, Florida 32301-7721
david.christian@verizon.com
de.oroark@verizon.com

Enhanced Services Billing, Inc.
Andrea P. Kruchinski
7411 John Smith Drive, Suite 1500
San Antonio, Texas 78229
andrea.kruchinski@bsgclearing.com

/s/Susan F. Clark
Susan F. Clark