

Before the  
Federal Communications Commission  
Washington, DC 20554

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VERIZON FLORIDA LLC, )	Docket No. 15-73
)	File No. EB-15-MD-002
Complainant, )	
v. )	
)	Related to
FLORIDA POWER AND LIGHT )	Docket No. 14-216
COMPANY, )	File No. EB-14-MD-003
Respondent. )	
_____ )	

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**VERIZON FLORIDA’S OPPOSITION TO  
FLORIDA POWER AND LIGHT COMPANY’S MOTION FOR LEAVE TO FILE**

The Enforcement Bureau should deny FPL’s Motion for Leave to File, the sole purpose of which is to delay and frustrate the implementation of just and reasonable rates for Verizon as of July 12, 2011.<sup>1</sup> Nothing in Verizon’s state court appeal will challenge the single issue the Enforcement Bureau waited for the state court to rule upon—namely, the “correct contractual rates” under the rate formula in the parties’ Joint Use Agreement (JUA).<sup>2</sup> Now that the Commission knows the “correct contractual rates” for 2011 and 2012 are the invoiced \$35.465 and \$36.225 rates, it should promptly rule on the key issue in this proceeding: whether those “rates comply with Section 224(b)(1).”<sup>3</sup> FPL has previously conceded that the FCC is the proper

<sup>1</sup> See 47 U.S.C. § 224(b)(1).

<sup>2</sup> Letter Ruling at 2, *Verizon Fla. v. FPL*, Docket No. 15-73, File No. EB-15-MD-002, related to Docket No. 14-216, File No. EB-14-MD-003 (Sept. 22, 2015) (“*Verizon v. FPL*”).

<sup>3</sup> *Id.*

forum for that question, and there is no good cause for delay or additional briefing, which is not contemplated by the rules.<sup>4</sup>

FPL repeatedly represented to the state court that it should *not* consider whether FPL's rates comply with Section 224(b)(1) because the FCC is the only entity that could properly make that determination. For example, when Verizon filed counterclaims in state court claiming that FPL's rates are unlawfully high under Section 224 and the *Pole Attachment Order*, FPL argued that the state court "must refrain" from considering the counterclaims "until the FCC's process has run its course."<sup>5</sup> This, according to FPL, was because the state court did not have jurisdiction over Verizon's counterclaims:

- "Only the FCC can calculate a rate that might impact the contract governing the parties here."<sup>6</sup>
- "[A]n FCC complaint is Verizon's sole legitimate avenue for redress, if it believes the contract rate is unfair and unreasonable . . . ."<sup>7</sup>
- "The FCC, and only the FCC, can provide the relief that Verizon improperly requests from this Court."<sup>8</sup>
- "If it wants a new contract [rate], Verizon must exhaust its administrative remedies at the FCC."<sup>9</sup>

The state court accepted these arguments and dismissed Verizon's counterclaims without prejudice so that Verizon could first pursue relief in this FCC proceeding.<sup>10</sup>

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<sup>4</sup> See 47 C.F.R. § 1.1407(a) (limiting motions, other than for an extension of time, in Pole Attachment Complaint proceedings to those "authorized by the Commission").

<sup>5</sup> Mot. to Dismiss at 13, *FPL v. Verizon Fla.*, Case No. 13-014808-CA-01 (Fla. 11th Cir. Ct. Mar. 27, 2014) ("*FPL v. Verizon*").

<sup>6</sup> Mot. to Dismiss at 4, *FPL v. Verizon* (Dec. 5, 2013).

<sup>7</sup> Mot. to Dismiss Reply at 8, *FPL v. Verizon* (Jan. 17, 2014).

<sup>8</sup> Mot. to Dismiss at 12, *FPL v. Verizon* (Mar. 27, 2014).

<sup>9</sup> Mot. to Dismiss Reply at 10, *FPL v. Verizon* (Apr. 25, 2014).

Having secured dismissal of Verizon's Section 224 claims in state court (by claiming the FCC is the only proper venue for them), FPL now seeks to thwart the FCC's review. Indeed, FPL has made it clear that it now intends to seek dismissal of those claims here by arguing exactly the opposite: that the FCC should defer to the state court on that issue.<sup>11</sup> FPL previewed its argument at an October 15 state court hearing, where it claimed that the "full faith and credit" doctrine somehow limits the FCC's ability to rule. According to FPL's counsel: "Your Honor, so whatever your judgment says, we are comfortable that the FCC would not disturb it . . . ."<sup>12</sup>

Of course, the state court can do nothing to divest the FCC of jurisdiction. Moreover, FPL's suggestion that the FCC should somehow await further state court proceedings is disingenuous given FPL's success in arguing that the state court could *not* hear Verizon's federal claims. FPL repeatedly argued to the state court that the federal law issues were separate and distinct from the questions before the court *and* that the FCC's decision would ultimately control:

- "[T]his Court's interpretation of the *meaning* of the Joint Use Agreement [has] no bearing upon the FCC's review of the *reasonableness* of the rates set by the parties in that agreement."<sup>13</sup>
- "If the FCC determines . . . that Verizon is entitled to pay less than the contract rate for any relevant time period, it can order FPL to reimburse Verizon for any overpayment resulting from this Court's ruling."<sup>14</sup>

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<sup>10</sup> Order, *FPL v. Verizon* (Jan. 22, 2014) (requiring "determination by the FCC as to whether the contract rate is unfair and unreasonable"); Order, *FPL v. Verizon* (May 31, 2014) ("Counter-plaintiff may re-file its counterclaim when the matter is resolved by the FCC.").

<sup>11</sup> See Email from C. Zdebski, Counsel, FPL, to C. Killion, R. McEnery, and L. Royle, FCC, *Verizon v. FPL* (Dec. 1, 2015).

<sup>12</sup> Tr. at 36:11-13, *FPL v. Verizon* (Oct. 15, 2015).

<sup>13</sup> Opp. to Mot. to Dismiss at 8-9, *FPL v. Verizon* (Aug. 13, 2013) (emphasis in original).

<sup>14</sup> Opp. to Mot. to Stay at 2, *FPL v. Verizon* (Mar. 27, 2014).

- “If and when an FCC determination is reached, that result can be superimposed, if appropriate, on whatever decision this Court has reached.”<sup>15</sup>
- “We agree the FCC, at some point, is going to set a rate, at some point, and whatever rate they set will be the rate. We have never disagreed with that.”<sup>16</sup>
- “The FCC didn’t say go back and have that Judge do our work for us. The FCC said go get a judgment in State Court, and then come back to us.”<sup>17</sup>

FPL made the same representation to the Commission: “[T]he Commission’s ‘just and reasonable’ rate determination will govern Verizon’s attachments to FPL’s poles. That ‘just and reasonable’ rate determination may be different from what FPL seeks in state court and will supersede any rate determination by the state court.”<sup>18</sup> FPL cannot take a different position now.<sup>19</sup>

Verizon filed a Notice of Appeal in the state court solely to protect itself from FPL’s continual efforts to deny Verizon *any* avenue of relief for FPL’s unjust and unreasonable rates. FPL successfully asked the state court to defer discovery on, and resolution of, Verizon’s counterclaims based on Section 224 until *after* the FCC rules. Now FPL is trying to defer FCC action on those same claims. This the FCC should not allow.

There is no reason to defer FCC action because nothing in Verizon’s appeal will challenge the only issue the Enforcement Bureau waited for the state court to rule upon: the “correct contractual rates” under the JUA formula.<sup>20</sup> Verizon will appeal only two issues in the

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<sup>15</sup> *Id.* at 13.

<sup>16</sup> Tr. at 20:17-20, *FPL v. Verizon* (Mar. 17, 2015).

<sup>17</sup> Tr. at 58:4-6, *FPL v. Verizon* (Oct. 15, 2015).

<sup>18</sup> Joint Motion ¶ 2, *Verizon v. FPL* (Apr. 1, 2015).

<sup>19</sup> *See, e.g., In the Matter of Time Warner Cable*, 21 FCC Rcd 9016, 9020 (¶ 13 n.25) (2006) (“Judicial estoppel applies where a party assumes a successful position in a legal proceeding, and then assumes a contrary position simply because interests have changed . . . .”) (citation omitted).

<sup>20</sup> Letter Ruling at 2, *Verizon v. FPL* (Sept. 22, 2015).

state court proceeding, neither of which is related to the contractual rates. Specifically, Verizon will ask the court to (1) retain jurisdiction over the matter, so that it can enforce any state court remedies that flow from the FCC's ruling here (including the ability to reinstate any state court counterclaims that may flow from the FCC ruling), and (2) strike factually inaccurate statements (not related to the rental rate calculation) contained in the court's summary judgment order.

FPL's recent actions leave no doubt that its sole objective is to delay this proceeding in hopes that it will be able to postpone<sup>21</sup> or avoid<sup>22</sup> the just and reasonable rates required by Section 224(b) and the *Pole Attachment Order*. And the need for prompt FCC action is all the more apparent considering FPL's most recent foray into state court: FPL has filed a *second* state court lawsuit, this time seeking an immediate state court judgment in its favor with respect to the 2013 and 2014 rental years. Rather than agreeing to stay the second state court case pending the outcome of this proceeding, FPL instead is trying to leapfrog the FCC by slowing down FCC action and rushing what it hopes will be a second state court judgment in its favor. Thus, while FPL consistently argues that the FCC should delay its review, FPL argues that the state court should rush to judgment on the 2013 and 2014 rates, because the FCC cannot provide relief fast enough. Opposing Verizon's request to stay or dismiss the new lawsuit pending the Commission's decision in this case, FPL criticized Verizon's prediction that the Commission

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<sup>21</sup> See, e.g., Response at 45, *Verizon v. FPL* (June 29, 2015) (arguing that "any potential remedy the Commission considers fashioning should begin only if and when there is an order from the Commission finding a rate or term under the Agreement to be unjust or unreasonable"); but see 47 C.F.R. § 1.1410(a)(3) (providing for relief "consistent with the applicable statute of limitations"); Reply at 52-54, *Verizon v. FPL* (Nov. 24, 2015) (refuting FPL's argument).

<sup>22</sup> See, e.g., Tr. at 36:11-13, *FPL v. Verizon* (Oct. 15, 2015) (relying on the "full faith and credit" doctrine).

will promptly rule in this fully briefed docket, arguing that the Commission’s “track record does not invite confidence in this wishful prediction.”<sup>23</sup>

This is part of a pattern and practice by FPL, which first seeks to delay FCC action, then disparages the speed of the Commission’s efforts before the state court. In the parties’ first state court proceeding, FPL urged the state court to rush to judgment because:

- “It is not uncommon for FCC proceedings of this nature to reside, unaddressed, in the FCC’s administrative machinery for years.”<sup>24</sup>
- “[A]ttachment-related complaints before the FCC have taken years to resolve, when they are resolved at all.”<sup>25</sup>
- “The FCC moves at its own pace we have learned. We don’t know when they will get to this or if they will get to this.”<sup>26</sup>

FPL thus seeks to profit from complaints of FCC delay in state court—while trying to create that very delay here.

Were FPL’s true aim the resolution of this dispute (and receipt of additional amounts due under federal law, if any) instead of evasion of Section 224(b)’s standard, FPL would not seek to delay the Commission’s ruling. The quickest and most efficient path to resolution of this dispute is for the Commission to determine the lawfulness of FPL’s charges under federal law. The state court repeatedly recognized that this is a question for the FCC that must be resolved irrespective of its decision. According to the state court, “the two sides and the Court, everybody has been in agreement that whatever is decided here, the FCC is going to do their own thing as far as the fair

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<sup>23</sup> Opp. to Mot. to Dismiss at 5, *FPL v. Verizon Fla.*, Case No. 15-024288-CA-01 (Fla. 11th Cir. Ct. Nov. 25, 2015).

<sup>24</sup> Opp. to Mot. to Stay at 5, *FPL v. Verizon* (Mar. 27, 2014).

<sup>25</sup> Mot. for Reconsideration at 6-7, *FPL v. Verizon* (Nov. 11, 2014).

<sup>26</sup> Tr. at 9:22-24, *FPL v. Verizon* (Mar. 17, 2015).

and reasonable . . . rates are concerned, which is a complete and separate issue.”<sup>27</sup> Indeed, the state court recognized the limitations on its case throughout the state court proceedings, stating:

- “[T]he FCC can come along and they would say up until X point it was this amount, after X point the pole attachment [order] means this is the amount to be set . . . .”<sup>28</sup>
- “[W]hat [FPL] want[s] is for me to go through the trial, enter that judgment and then say, you know what, maybe we were wasting our time, now you can keep it, Verizon . . . .”<sup>29</sup>
- “I [could] spend five days in a trial and the FCC then later comes along and says, well, we have to change it . . . .”<sup>30</sup>
- “[T]he real question is, in whose pocket does the rest of the money lie between now and whenever the FCC rules . . . ?”<sup>31</sup>
- “All [the Letter Ruling is] saying is . . . [w]e won’t decide the issue of what’s fair and reasonable until this Court determines what the correct contractual rates are . . . .”<sup>32</sup>

In sum, the state court concluded that: (1) “I’m here to determine what the correct contractual rate is,” (2) the FCC must ensure that the rates paid by Verizon are just and reasonable because “that’s not my job,” and (3) “the FCC ha[s] the power to make any rate change that they might make retroactive.”<sup>33</sup>

Accordingly, the FCC’s prompt decision is needed now more than ever. The Bureau should deny FPL’s latest attempt to delay a decision on the merits of Verizon’s federal law claims. Verizon’s appeal will not change the sole issue that the FCC waited for the state court to resolve—a “determination of the correct contractual rates” under the JUA rate formula. The

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<sup>27</sup> Tr. at 33:11-18, *FPL v. Verizon* (Oct. 15, 2015).

<sup>28</sup> Tr. at 5:2-5, *FPL v. Verizon* (Dec. 9, 2014).

<sup>29</sup> *Id.* at 6:4-8.

<sup>30</sup> Tr. at 12:8-10, *FPL v. Verizon* (Mar. 17, 2015).

<sup>31</sup> Tr. at 10:13-15, *FPL v. Verizon* (Oct. 15, 2015).

<sup>32</sup> *Id.* at 32:1-5.

<sup>33</sup> *Id.* at 9:20-25, 32:17-18, 38:14-19.

Commission can, and should, finally decide whether those "JUA rates comply with Section 224(b)(1)."<sup>34</sup>

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Dated: December 11, 2015

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<sup>34</sup> Letter Ruling at 2, *Verizon v. FPL* (Sept. 22, 2015).



## CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2015, I caused a copy of the foregoing Opposition to FPL's Motion for Leave to File to be filed via the Federal Communications Commission's Electronic Comment Filing System and to be served on the following (service method indicated):

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