FILED MAR 08, 2016
DOCUMENT NO. 01256-16
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Before the
Federal Communications Commission
Washington, DC 20554

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

VERIZON FLORIDA'S OPPOSITION TO FLORIDA POWER AND LIGHT COMPANY'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF REGARDING IMPACT OF STATE COURT JUDGMENT

The Commission should reject FPL's Motion, which is just its latest unprincipled attempt to thwart a ruling on the reasonableness of its rates under federal law. FPL previously assured the Enforcement Bureau that "the Commission's 'just and reasonable' rate determination will govern Verizon's attachments to FPL's poles" because the Commission's decision "will supersede any rate determination by the state court."[1] And having successfully argued that the state court should *not* rule on the issue of whether FPL's rates were just and reasonable – because, FPL represented, that issue could be considered *solely* by the Commission – FPL is estopped from raising arguments about the purported preclusive effect of the state court judgment here.[2] There is no "good cause" to grant FPL leave to make the meritless argument

[1] Joint Motion ¶ 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 (Apr. 1, 2015) ("*Verizon v. FPL*").

[2] *See In the Matter of Time Warner Cable*, 21 FCC Rcd 9016, 9020 (¶ 13 & n.25) (2006) (estopping party from taking "flatly inconsistent" position because "[j]udicial 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).

that a state court judgment on state law issues could somehow deprive the Commission of its obligation under federal law to set rates that are just and reasonable.[3]

Again and again, FPL insisted that the state court should move forward with judgment on a state law issue (what rate results from the rate formula in a joint use agreement), representing that such an action would *not* deny the Commission of its authority to decide the federal law issue (what rate is just and reasonable under federal law):

- "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."[4]
- "If and when an FCC determination is reached, that result can be superimposed, if appropriate, on whatever decision this Court has reached."[5]
- "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."[6]

According to FPL, its state court "Complaint neither requests nor requires that this Court set any rate, interpret any FCC regulations, or do anything other than enforce a contract," meaning that "there is no risk that adjudicating FPL's contract claims will compromise the integrity or uniformity of the FCC's regulatory scheme."[7] FPL emphasized that the state court's "interpretation of the *meaning* of the Joint Use Agreement [will] have no bearing upon the FCC's review of the *reasonableness* of the rates set by the parties in that agreement."[8] The state court accepted FPL's arguments, reasoning that: "the two sides and the Court, everybody has

[3] *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").

[4] Opp. to Mot. to Stay at 2, *FPL v. Verizon Fla.*, Case No. 13-014808-CA-01 (Fla. 11th Cir. Ct. Mar. 27, 2014) ("*FPL v. Verizon*").

[5] *Id.* at 13.

[6] Tr. at 20:17-20, *FPL v. Verizon* (Mar. 17, 2015).

[7] Opp. to Mot. to Dismiss at 8, *FPL v. Verizon* (Aug. 13, 2013).

[8] *Id.* at 8-9 (emphasis in original).

been in agreement that whatever is decided here, the FCC is going to do their own thing as far as the fair and reasonable . . . rates are concerned, which is a complete and separate issue" and may include a "rate change that they might make retroactive."[9]

Now that FPL secured a state court judgment on the part of the case it likes, FPL has changed its tune – arguing that the state court judgment on one small contract law aspect of the parties' dispute somehow overcomes the Commission's federal law authority.

As an initial matter, the Commission long ago rejected the premise that state contract law principles could trump its judgment regarding what rates are just and reasonable under federal law: "The Commission has a duty under section 224 to 'adopt procedures necessary and appropriate to hear and resolve complaints concerning . . . rates, terms, and conditions' of pole attachment pursuant to the requirements of section 224. The Commission would not be fulfilling that duty if it were to substitute the requirements of contract law for the dictates of section 224."[10] Congress decided that "the Commission *shall regulate* the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[11] And the Commission decided to do so in a manner that provides rate relief retroactively as far back as the statute of limitations allows.[12] FPL cannot hide behind state law (or some partial state court judgment still on appeal) to limit the Commission's authority or make it prospective only.

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[9] Tr. at 9:20-25, 33:11-18, *FPL v. Verizon* (Oct. 15, 2015).

[10] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11908 (¶ 105) (2010) (cited with approval at *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future,* Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5292 (¶ 119 n.368) (2011), *aff'd Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 118 (2013) ("*Pole Attachment Order*").

[11] 47 U.S.C. § 224(b)(1) (emphasis added).

[12] *Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12); 47 C.F.R. § 1.1410.

The Enforcement Bureau recognized the distinction between the state and federal law aspects of this dispute when, in its September Letter Ruling, it asked the state court to decide a narrow issue – namely, "what the correctly calculated JUA rates are" – so that the Commission could then decide "whether [those] JUA rates comply with Section 224(b)(1)."[13] The state court's decision on the state law issue before it thus sets the stage for the Commission to rule, as the Enforcement Bureau always intended. Nothing in the state court decision can rob the Commission of its jurisdiction over the issue it reserved for itself regarding the question of whether such rates are just and reasonable under federal law.

And nothing in the Full Faith and Credit Clause says otherwise. The Full Faith and Credit Clause of the U.S. Constitution and the Full Faith and Credit statute (28 U.S.C. § 1738) do not apply where, as here, the state court did not decide the federal issue: "a state judgment will not have claim preclusive effect" under the Full Faith and Credit doctrine if a party "was unable to rely on a certain theory of the case or to seek a certain remedy" in state court.[14] And, of course, "full faith and credit need not be given to determinations that [a state court] had no power to make."[15] Moreover, the Full Faith and Credit doctrine "is not violated if . . . a federal government agency[] chooses not to give effect to a state court judgment" that is on-point.[16] "The Full Faith and Credit Clause is of course not binding on federal [entities] . . ."[17] And the Full Faith and Credit statute does not apply to federal agencies.[18] "[C]ommon law doctrines

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[13] Letter Ruling at 2, *Verizon v. FPL* (Sept. 22, 2015).

[14] *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985) (emphasis added); *see also Gov't Employees Ins. Co. v. Kisha*, 163 So. 3d 1266, 1268 (Fla. Dist. Ct. App. 2015).

[15] *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 241 (1998).

[16] *Peterkin v. Warden*, 584 Fed. App. 342, 343 (9th Cir. 2014) (citation omitted).

[17] *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986).

[18] *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 799 (5th Cir. 2000); *N.L.R.B. v. Yellow Freight Sys., Inc.*, 930 F.2d 316, 320 (3d Cir. 1991).

extending full faith and credit to state court determinations" also do not bind federal agencies to state court judgments because the judgments "are trumped by the Supremacy Clause."[19]

The Commission should reject FPL's Motion, because there is no "good cause" to require briefing on a doctrine that does not apply, or to reward the procedural games FPL has played in bifurcating this dispute. The Commission should deny FPL leave to make any additional filings, and should set Verizon's just and reasonable rate as of the July 12, 2011 effective date of the *Pole Attachment Order* without future delay. Doing so will finally resolve this longstanding dispute, provide valuable precedent that could resolve other pending and emerging disputes, and ensure the rate reductions that are so vital to the Commission's broadband deployment goals.

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Dated: March 7, 2016

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[19] *Arapahoe Cty. Pub. Airport Auth. v. F.A.A.*, 242 F.3d 1213, 1219 (10th Cir. 2001); *see also Consol. Oil & Gas, Inc. v. F.E.R.C.*, 806 F.2d 275, 280 n.5 (D.C. Cir. 1986).

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2016, I caused a copy of the foregoing Opposition to FPL's Motion for Leave to File Supplemental Brief Regarding Impact Of State Court Judgment 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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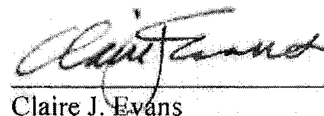

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