

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Emerald Harbor Communications, LLC)	GN Docket No. 17-142
Petition for Declaratory Ruling)	
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MEMORANDUM OPINION AND ORDER

Adopted: February 9, 2023

Released: February 9, 2023

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order (Order), we dismiss a Petition for Declaratory Ruling (Petition) filed by Emerald Harbor Communications, LLC (Emerald Harbor or EHC).¹ Emerald Harbor requests that the Commission declare that Communications Processing System, Inc. (CPS) has exclusive rights to provide cable and telephone service to the residents of a condominium resort in violation of section 628 of the Communications Act of 1934, as amended (the Act) and sections 76.2000 and 64.2500 of the Commission's exclusivity rules, and that CPS must comply with the Commission's inside wiring rules set forth in section 76.804.² We dismiss the Petition pursuant to section 1.2 of our rules, and find that Emerald Harbor has not identified a controversy or uncertainty appropriate for the Commission to resolve with a declaratory ruling.³

II. BACKGROUND

2. The proceeding pertains to Palms of Destin Resort and Conference Center (The Palms),⁴ a condominium complex. It involves various iterations of the condominium's owners' association (Condo Association and Palms of Destin Club (PDC)) and providers of various communications services: (a) CPS, which has a contract with The Palms to provide cable, telephone, and Internet service to its residents,⁵ (b) Cox Communications, Inc. (Cox), which has a contract with CPS to provide service to The

¹ Petition for Declaratory Ruling of Emerald Harbor Communications LLC, GN Docket No. 17-142 (filed May 2, 2022).

² *Id.* at 1; 47 U.S.C. § 548; 47 CFR §§ 76.2000, 64.2500, 76.804.

³ 47 CFR § 1.2.

⁴ Petition at 1 & n.3, 3.

⁵ *Id.* at 2-3 & n.7; *Palms of Destin Club, LLC v. Communications Processing Systems, Inc.*, 2022 WL 293960, *1 (11th Cir. 2022) (*Palms II*) (attached as Exhibit D to Letter from James H. Barker, Counsel for CPS, to Marlene Dortch, Secretary, FCC, GN Docket No. 17-142 (filed June 3, 20022) (CPS 6-3 *Ex Parte*)).

Palms,⁶ and (c) Emerald Harbor, a wireless Internet service provider seeking to provide service to residents of The Palms.⁷

3. Emerald Harbor contends that “CPS has leveraged its real estate interest in The Palms” to be the condominium resort’s exclusive provider, in conjunction with Cox, of cable, telephone, and Internet service to The Palms.⁸ According to Emerald Harbor, CPS holds “an exclusive real estate interest in the rights-of-way and various areas within The Palms” and has “the exclusive right to provide cable, telephone, internet, and telecommunications” to The Palms.⁹ Emerald Harbor asserts that CPS currently provides services to the residents of The Palms through one service provider, Cox, and that CPS is attempting to enjoin Emerald Harbor from providing competing service to The Palms.¹⁰

4. Emerald Harbor argues that CPS’s exclusivity rights, its decision to contract with only one service provider, Cox, and its refusal to allow Emerald Harbor to provide competing service to residents at The Palms “are precisely the anticompetitive and unfair business practices that [section 628 was] designed to prevent.”¹¹ According to Emerald Harbor, CPS’s exclusive provision of Cox’s services to The Palms violates the Commission’s rules prohibiting cable operators and common carriers from entering into exclusive contracts in multiple tenant environments (MTEs)¹², specifically sections 76.2000 and 64.2500(b) of the Commission’s rules.¹³ In addition, Emerald Harbor asserts that if CPS loses its right to be the exclusive service provider to The Palms, and subsequently refuses to either remove, sell, or abandon its cable wiring infrastructure located at The Palms, it would be in “direct violation” of section

⁶ Letter from Tara M. Corvo, Counsel for Cox Communications, Inc., to Marlene Dortch, Secretary, FCC, GN Docket No. 17-142 (filed June 1, 2022) (Cox *Ex Parte*). The Petition initially argued that CPS “merely stands in the place of Cox and is attempting to leverage its ownership interests within the Palms to effect exclusive agreements that favor Cox.” Petition at 5. However, in an *ex parte* letter filed after the Petition, Emerald Harbor retracts its claim that CPS and Cox were working together as one entity, noting that “Cox’s *ex parte* letter of June 1, 2022, makes clear that CPS has been acting on its own behalf, not at the behest of Cox[.]” Letter from Mark J. Palchick, Counsel for EHC, to Marlene Dortch, Secretary, FCC, GN Docket No. 17-142, at n.1 (filed June 16, 2022) (EHC 6-16 *Ex Parte*).

⁷ Petition at 1 & n.3, 3.

⁸ *Id.* at 1-2.

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3-5.

¹¹ *Id.* at 5.

¹² The term MTE refers to “commercial or residential premises such as apartment buildings, condominium buildings, shopping malls, or cooperatives that are occupied by multiple entities.” *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Report and Order and Declaratory Ruling, 2022 WL 494081, *1, para. 1 & n.1 (2022). The term “encompasses everything within the scope of two other terms the Commission has used in the past—multiple dwelling unit and multiunit premises.” *Id.*

¹³ Petition at 5, 7; 47 CFR §§ 76.2000, 64.2500(b). Section 76.2000 prohibits cable operators or other providers of MVPD service subject to 47 U.S.C. § 548 from “enforce[ing] or execut[ing] any provision in a contract that grants to it the exclusive right to provide any video programming service (alone or in combination with other services) to a MDU.” 47 CFR § 76.2000. In addition, the “prohibition on exclusivity clauses for the provision of video services applies to both any common carrier or its affiliate and also to [open video system] operators to the extent that these entities provide video programming to subscribers or consumers.” *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20260, para. 51 (2007) (*2007 Exclusivity Order*). Section 64.2500(b) specifically prohibits common carriers from “enter[ing] into any contract, written or oral, that would in any way restrict the right of any commercial multiunit premises owner, or any agent or representative thereof, to permit any other common carrier to access and serve commercial tenants on that premises.” 47 CFR § 64.2500.

76.804 of the Commission's rules.¹⁴

5. Emerald Harbor requests that the Commission issue a ruling determining that “any contract provisions that give [CPS] the exclusive right to provide satellite cable programming services and telecommunications service at The Palms violate the Act and the Commission's rules.”¹⁵ In addition, Emerald Harbor asks that the Commission invalidate any contract provisions that give CPS the exclusive right to provide services at The Palms and further requests that CPS be directed to comply with section 76.804 of the Commission's inside wiring rules if CPS “loses the legally enforceable right to provide video services to The Palms.”¹⁶

6. This Petition is the latest challenge to CPS's provision of service at The Palms, which was previously litigated in state and federal court. In 2016, CPS and the Condo Association entered into a settlement agreement to resolve state and federal lawsuits that the Condo Association had filed against CPS and two other defendants.¹⁷ The suit alleged that CPS's exclusivity rights violated federal telecommunications law, specifically section 628 of the Communications Act and section 76.2000 of the Commission's rules.¹⁸ As part of the settlement agreement, the Condo Association agreed that CPS would be the “sole and exclusive provider” of cable, telephone, Internet, and other telecommunications-related services to The Palms.¹⁹ The Condo Association also agreed to the terms of a service agreement with CPS governing the provision of cable, telephone, and Internet service at The Palms.²⁰ In 2020, the Condo Association, using its new PDC moniker, filed suit against CPS alleging once again that its exclusivity rights at The Palms violated section 628 of the Act and sections 76.2000 and 64.2500 of the Commission's rules.²¹ In *Palms of Destin Club, LLC v. Communications Processing Systems, Inc.*, the District Court for the Northern District of Florida granted summary judgment in favor of CPS, finding that under the Condo Association's settlement agreement with CPS, the parties had resolved the issue involving CPS's exclusivity rights²² and intended to bar all future litigation arising from CPS's provision of cable and other telecommunications services to The Palms.²³ The court thus found that PDC's claim for declaratory relief was barred by *res judicata*.²⁴ The district court additionally found that the Condo Association's claims failed on the merits because CPS was not an entity subject to section 628 of the Act and its exclusivity arrangements were not prohibited by the Commission's exclusivity rules.²⁵ In

¹⁴ Petition at 8.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 8-9.

¹⁷ See *Palms of Destin Club v. Communications Processing Systems, Inc.*, 2021 WL 2787664, at *2-3 (N.D. Fla. 2021) (*Palms I*) (detailing the litigation history between the Condo Association and CPS) (attached as Exhibit C to CPS 6-3 *Ex Parte*).

¹⁸ *Palms I*, at *1.

¹⁹ Complaint for Injunctive Relief and Damages at 10-12, *Communications Processing Systems, Inc. v. Emerald Harbor Communications LLC*, No. 22-CA-000760-F (Fla. Okaloosa County Ct. Mar. 14, 2022) (attached as Exhibit A to Petition).

²⁰ Agreement as to CPS Services and Charges (attached as Exhibit B to Petition).

²¹ *Palms I*, at *1, *3; CPS 6-3 *Ex Parte* at 2.

²² *Palms I*, at *3 (explaining that as part of the settlement, the parties executed several contemporaneous documents, including a Purchase Agreement and Addendum to the Service Agreement, which extended the CPS Service Agreement for 40 years from March 1, 2017).

²³ *Palms I*, at *4-5.

²⁴ *Palms I*, at *4-6.

²⁵ *Id.* at *8-11.

February 2022, the Eleventh Circuit found that under the settlement agreement, the parties agreed to have CPS serve as the exclusive provider of cable and other telecommunications services to The Palms and to release CPS from any future liability for claims arising from its exclusive provision of service, including claims under FCC exclusivity rules.²⁶ The Eleventh Circuit thus affirmed the district court's finding that PDC's claims against CPS were precluded by the doctrine of *res judicata*.²⁷

7. Following the Eleventh Circuit's judgment, CPS filed separate actions against Emerald Harbor and PDC seeking to enjoin both entities from violating its exclusivity rights at The Palms.²⁸ In March 2022, CPS filed suit against Emerald Harbor in Florida state court alleging that Emerald Harbor wrongfully contracted with PDC to act as an alternative service provider at The Palms.²⁹ Separately, CPS commenced arbitration against PDC.³⁰ In May 2022, Emerald Harbor filed this Petition with the Commission, and since then Emerald Harbor, CPS, and Cox have filed several *ex parte* letters in response to the Petition.³¹

III. DISCUSSION

8. The Commission has broad discretion to decide whether or not to consider a request for declaratory relief.³² Section 1.2 of the rules provides that the Commission "may . . . issue a declaratory ruling terminating a controversy or removing uncertainty."³³ Thus, although the Commission may issue a declaratory ruling, it is not compelled to act on every request for such a ruling.³⁴ Furthermore, "[t]he Commission has broad discretion under the Administrative Procedure Act and Commission rules to

²⁶ *Palms II* at *6.

²⁷ *Supra* note 5.

²⁸ Motion for Injunctive Relief, *Communications Processing Systems, Inc. v. Emerald Harbor Communications, LLC*, No. 22-CA-000760-F at 10-12 (Fla. Okaloosa County Ct. Mar. 18, 2022) (attached as Exhibit A of CPS 6-3 *Ex Parte*). See Letter from Mark J. Palchick, Counsel for EHC, to Marlene Dortch, Secretary, FCC, GN Docket No. 17-142, at 3 (filed Aug. 31, 2022) (EHC 8-31 *Ex Parte*).

²⁹ Complaint for Injunctive Relief and Damages, *Communications Processing Systems, Inc. v. Emerald Harbor Communications LLC*, No. 22-CA-000760-F (Fla. Okaloosa County Ct. Mar. 14, 2022) (attached as Exhibit A to Petition).

³⁰ See EHC 8-31 *Ex Parte* at 3.

³¹ Cox and CPS both suggest that we dismiss the Petition. Cox *Ex Parte*; CPS 6-3 *Ex Parte*; Letter from James H. Barker, Counsel for CPS, to Marlene Dortch, Secretary, FCC, GN Docket No. 17-142 (filed June 27, 2022) (CPS 6-27 *Ex Parte*); Letter from James H. Barker, Counsel for CPS, to Marlene Dortch, Secretary, FCC, GN Docket No. 17-142 (filed Sept. 19, 2022) (CPS 9-19 *Ex Parte*). CPS primarily contends that Emerald Harbor's attempt to relitigate the claims of the Condo Association should be barred on equity grounds as *res judicata*. CPS 6-3 *Ex Parte* at 4-5; CPS 6-27 *Ex Parte* at 1-3. EHC's responses assert that *res judicata* does not apply in this case and that CPS is subject to the Commission's exclusivity rules as a private cable operator or a common carrier. EHC 6-16 *Ex Parte*; Letter from Mark J. Palchick, Counsel for EHC, to Marlene Dortch, Secretary, FCC, GN Docket No. 17-142 (filed July 8, 2022) (EHC 7-8 *Ex Parte*); EHC 8-31 *Ex Parte*. In light of our exercise of discretion under section 1.2 to not issue a declaratory ruling in this matter, which we discuss below, the Bureau need not resolve the issue of *res judicata*.

³² *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 747 (D.C. Cir. 1986).

³³ 47 CFR § 1.2.

³⁴ *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 914 (1973) ("It is clearly within the discretion of the Commission to issue a Declaratory Order on a licensee's proposal. It is equally clear, however, that the Commission is not *required* to issue such a declaratory statement merely because a broadcaster asks for one."); *Telephone Number Portability*, CC Docket No. 95-116, 19 FCC Rcd 6800, 6810, para. 20 (2004).

decide whether a declaratory ruling is necessary to ‘terminate a controversy or remove uncertainty.’”³⁵ As set forth below, we decline to exercise our discretion to consider the Petition, where prior federal court actions have already decided the rights of interested parties³⁶ arising out of the same nucleus of operative facts as presented in the Petition.

9. Emerald Harbor contends that a controversy was created by the 2021 district court judgment, *Palms I*, because it “contained plainly erroneous interpretations of the FCC’s rules and the Communications Act[.]”³⁷ Emerald Harbor argues that the Commission should issue a declaratory ruling to “correct” the district court’s erroneous findings, and therefore resolve the controversy.³⁸ Specifically, Emerald Harbor takes issue with the district court’s determination that CPS is not a common carrier and therefore not subject to the prohibitions of section 64.2500 of the Commission’s exclusivity rules.³⁹ Additionally, Emerald Harbor contends that the Commission should resolve the “diversity of opinions on what constitutes ‘use’ of public rights of way for purposes of determining whether an entity is a cable system subject to 76.2000.”⁴⁰

10. We disagree that this matter presents a controversy that warrants exercise of our discretion to issue a declaratory ruling. Emerald Harbor takes issue with findings made in connection with the district court’s decision on the merits granting CPS relief. However, the district court proffered another independent basis for its ruling. Namely, the district court found that CPS was entitled to summary judgment on the grounds of *res judicata*, based on specific terms of a settlement agreement, contemporaneous documents, and witness affidavits.⁴¹ On appeal, the Eleventh Circuit agreed with the district court that declaratory relief was barred by *res judicata*, but declined to reach the merits of The Palm’s federal claims or the findings of the district court that Emerald Harbor finds objectionable. Given that the federal court has already entered a judgment concerning the same dispute involving the same key parties on *res judicata* grounds, which the Eleventh Circuit subsequently affirmed on the same narrow

³⁵ *Telephone Number Portability*, CC Docket No. 95-116, Order, 19 FCC Rcd 6800, 6810, para. 20 (2004); *Junk Fax Prevention Act of 2005*, 27 FCC Rcd 4912, 4912, para. 1 (CGB 2012).

³⁶ We note that CPS argues that in filing the Petition, Emerald Harbor is attempting to help the Condo Association avoid the effects of the federal court judgments. CPS 6-3 *Ex Parte* at 4-5 (maintaining that “within days of the [Condo Association] notifying CPS that it was purporting to unilaterally terminate the Service Agreement, the [Condo Association] sent letters to all Palms Resort unit owners advising them that [Emerald Harbor] was a new chosen alternative provider of cable and other telecommunications services, and further advised unit owners that the [Condo Association] had entered into a ‘bulk agreement’ with [Emerald Harbor] to provide TV and Internet services for all of the Palms resort” and that these actions amount to the Condo Association and Emerald Harbor “contract[ing] to do *precisely* what the [Condo Association] had been told by the federal courts it could not do: disregard the Service Agreement’s provisions governing CPS’s rights”). Emerald Harbor denies CPS’s “false and [unfounded]” allegation that Emerald Harbor “approached the [Condo Association] and offered to help it evade the Settlement Agreement,” instead maintaining that it is only “seek[ing] to defend its own economic rights to provide service to residents of the Palms[.]” EHC 6-16 *Ex Parte* at 1 & n.2 (quoting, in part, CPS 6-3 *Ex Parte* at 3); EHC 7-8 *Ex Parte* at 2. Because we exercise our broad discretion and decline to issue a declaratory ruling in this matter, we need not and do not decide the issue of whether Emerald Harbor is acting as a proxy for the Condo Association in filing this Petition with the Commission.

³⁷ EHC 6-16 *Ex Parte* at 5.

³⁸ *Id.* at 3 (“Misreading of the FCC’s rules and regulations by the district court is precisely why District Courts afford the FCC primary jurisdiction on matters interpreting its rules. The Commission should place the Petition on public notice and act expeditiously, if for no other reason than to correct the unfounded holding to the District Court Decision.”).

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 4.

⁴¹ *Palms I*, at *3-5.

grounds, we see no reason to re-examine or opine on the wider issues raised by Emerald Harbor in its Petition.

11. Additionally, Emerald Harbor argues that the Commission should grant the Petition and issue a declaratory ruling here to remove the uncertainty of whether the Commission's exclusivity rules apply to private cable operators.⁴² Emerald Harbor claims that the Commission created this uncertainty by issuing a further notice of proposed rulemaking (Further Notice) alongside its 2007 Exclusivity Order, which adopted a prohibition against cable operators entering into and enforcing exclusivity clauses in MTEs.⁴³ Emerald Harbor explains that the Further Notice "sought additional comment on whether the net effect of exclusivity clauses by private cable operators and non-cable MVPDs is harmful to consumers," but the Commission never issued an order on the FNPRM after receiving comments.⁴⁴ Therefore, Emerald Harbor reasons, "[t]he Petition provides the perfect vehicle for the FCC to conclude the Further Notice . . . and remove any uncertainty regarding the prohibition against entering into and enforcing exclusive arrangements for the provision of video and telephone services to MDUs and MTEs."⁴⁵

12. We disagree with Emerald Harbor that there is any uncertainty as to whether section 76.2000 of our rules applies to private cable operators. It is clear from the Commission's 2007 Exclusivity Order that section 76.2000 only applies to "cable operators and other entities that are subject to Section 628[.]" and that "[t]hese other entities are LECs and open video systems[.]"⁴⁶ In fact, Emerald Harbor itself does not seem uncertain about the application of the rule, conceding that "Section 76.2000 does not presently apply to private cable operators[.]"⁴⁷ Rather, it appears that Emerald Harbor is arguing that the Commission's prohibition against exclusive contracts in MTEs should apply to entities not subject to section 628, including private cable operators.⁴⁸ However, the decision as to whether the Commission should expand the application of section 76.2000 to new entities is an inquiry for a rulemaking proceeding, rather than a petition for declaratory ruling.⁴⁹ Therefore, Emerald Harbor has not identified any pending uncertainty that would be terminated by issuing a declaratory ruling regarding Emerald Harbor's claims concerning section 628 of the Act or sections 76.2000 or 64.2500 of the Commission's exclusivity rules.⁵⁰

⁴² EHC 6-16 *Ex Parte* at 2.

⁴³ 2007 *Exclusivity Order*, 22 FCC Rcd at 20264-65, paras. 61-66.

⁴⁴ EHC 6-16 *Ex Parte* at 2.

⁴⁵ *Id.*

⁴⁶ 2007 *Exclusivity Order*, 22 FCC Rcd at 20251, para. 30. In addition, the Further Notice explicitly states that section 76.2000 does not apply to private cable operators. *Id.* at 20264, para. 61.

⁴⁷ EHC 6-16 *Ex Parte* at 2.

⁴⁸ *Id.* ("While Section 76.2000 does not presently apply to private cable operators, the Commission has confirmed that it has the authority to do so . . .").

⁴⁹ See e.g., *Request of Cellular Telephone Company for a Declaratory Ruling*, 3 FCC Rcd 6274, 6275, para. 9 (1988) (explaining that the proper vehicle for seeking rule changes is through a petition for rulemaking rather than a declaratory ruling); *Comnet Wireless, LLC Petition for Declaratory Ruling*, Order, 27 FCC Rcd 4324, 4325, para. 3 (WTB 2012); *Bellsouth's Petition for Declaratory Ruling*, 6 FCC Rcd 3336, 3343, para. 28 (CCB 1991) ("Rulemaking serves as the regulatory process by which changes of broad applicability in Commission policy or regulations may be adopted.").

⁵⁰ 47 U.S.C. § 548; 47 CFR §§ 76.2000, 64.2500. We decline to consider whether CPS is subject to the requirements of section 76.804 of our inside wiring rules, as the issue is not ripe for consideration. The Petition makes evident that no controversy has yet occurred, which, as we have said above, is a condition precedent to us considering a petition for declaratory ruling. Petition at 8-9 (requesting that CPS be directed to comply with section 76.804 of the rules "if CPS . . . loses the legally enforceable right to provide video services to The Palms").

(continued....)

13. For the reasons discussed above, we exercise our discretion and decline to issue a declaratory ruling in this matter. Accordingly, we dismiss the Petition pursuant to section 1.2 of our rules.⁵¹

IV. ORDERING CLAUSE

14. **IT IS THEREFORE ORDERED**, pursuant to sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i); section 554(e) of the Administrative Procedures Act, 5 U.S.C. § 554(e); and sections 0.283 and 1.2 of the Commission's rules, 47 CFR §§ 0.283, 1.2, that the Petition for Declaratory Ruling filed by Emerald Harbor Communications LLC is **DISMISSED**.

FEDERAL COMMUNICATIONS COMMISSION

Holly Saurer
Chief, Media Bureau

Crucially, Emerald Harbor has not alleged that CPS has in fact violated section 76.804 because Emerald Harbor is not alleging that CPS has lost its right to provide service to The Palms.

⁵¹ 47 CFR § 1.2.