THE PUBLIC SERVICE COMMISSION

In re: Petition of Alltel Communications, Inc. for designation as eligible telecommunications carrier (ETC) in certain rural telephone company study areas located partially in Alltel's licensed area and for redefinition of those study areas.	DOCKET NO. 060581-TP
In re: Petition of Alltel Communications, Inc. for designation as eligible telecommunications carrier (ETC) in certain rural telephone company study areas located entirely in Alltel's licensed area.	DOCKET NO. 060582-TP ORDER NO. PSC-07-0288-PAA-TP ISSUED: April 3, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN

NOTICE OF PROPOSED AGENCY ACTION ORDER FINDING AUTHORITY TO CONSIDER APPLICATIONS BY CMRS PROVIDERS FOR ETC DESIGNATION

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. Case Background

On September 23, 2003, we issued Order No. PSC-03-1063-DS-TP (Declaratory Statement), in Docket Nos. 030346-TP and 030413-TP regarding our jurisdiction over commercial mobile radio service (CMRS) providers for purposes of determining eligibility as eligible telecommunications carriers (ETC). In the Declaratory Statement, this Commission held that we do not have the jurisdiction because the Florida Legislature expressly excluded commercial mobile radio services (CMRS) providers from the jurisdiction of this Commission.

On August 30, 2006, Alltel Communications, Inc. (Alltel) filed two Applications for Designation as an Eligible Telecommunications Carrier in the State of Florida (Applications).[1] Docket 060581-TP was opened to address Alltel's application for redefinition of the service area requirement in the rural telephone company areas. Docket 060582-TP was opened to address the application requesting ETC designation in rural telephone company service areas that are located entirely within Alltel's licensed service area in the State of Florida.

According to Alltel, it intends to obtain high cost support in the rural telephone company areas to expand its coverage to include unserved or underserved areas, to increase the service quality and reliability of its network, and to speed the delivery of advanced wireless service to the citizens of Florida. Furthermore, if designated as an ETC, Alltel asserts that it will offer a basic universal service package to subscribers who are eligible for Lifeline support.

Alltel claims that it satisfies all of the statutory and regulatory prerequisites for designation as an ETC. Alltel asserts that 47 U.S.C. §214(e)(2) of the Telecommunications Act of 1996 (the Act) authorizes state commissions to designate ETC status for federal universal service purposes, including wireless ETCs. As further support, Alltel cites to the Federal Communications Commission's (FCC) March 17, 2005, Federal-State Joint Board on Universal Service Report and Order, which states that 47 U.S.C §214(e)(2) of the Act 'provides state commissions with the *primary* responsibility for designating ETCs.'

Alltel also claims that this Commission has jurisdiction over CMRS providers in order to designate them as ETCs. In its Applications, Alltel acknowledges our aforementioned Declaratory Statement, but notes that the Florida Legislature has since enacted Section 364.011, Florida Statutes, which, Alltel asserts, sets forth an exception. Alltel states that this exception allows us oversight to the extent "specifically authorized by federal law." Since §214(e)(2) of the Act authorizes state commissions to designate eligible telecommunications status on CMRS providers, Alltel contends that the recent change in Florida law, *i.e.* Section 364.011, now confers upon us the authority to grant Alltel's request for designation as an ETC.

On October 11, 2006, Embarq Florida, Inc. (Embarq) petitioned to intervene in both dockets. On January 8, 2007, Order No. PSC-07-0020-PCO-TP was issued granting intervention

[1] On October 13, 2005, Alltel filed a petition with the FCC seeking designation as an ETC in the State of Florida. As of the filing of this recommendation, the FCC has yet to rule on Alltel's Petition (Docket No. 96-45).

to Embarq in this proceeding. On December 12, 2006, Embarq filed a Notice of Withdrawal of Petition to Intervene in Docket No. 060582-TP.

This Order addresses whether we have jurisdiction to designate CMRS providers as ETCs.

II. Analysis

The crux of Alltel's argument is that subsequent to our Declaratory Statement, the Legislature enacted Section 364.011, Florida Statutes, setting forth that Wireless telecommunications, including CMRS providers, are exempt from our jurisdiction except to the extent specifically authorized by federal law. Alltel argues further that pursuant to §214(e)(2) of the Act, state commissions are authorized to designate ETC status on CMRS providers. Consequently, Alltel asserts that pursuant to Section 364.011, Florida Statutes, in concert with §214(e)(2) of the Act, we now have the authority to consider applications for ETC designation filed on behalf of CMRS providers. Upon review of current state and federal law, we agree with Alltel's assertion.

Although this finding results in a different conclusion than our holding in the Declaratory Statement, we do not believe this finding is inconsistent with our rationale as set forth in the Declaratory Statement. In the Declaratory Statement we recognized that as a legislatively created body, our jurisdiction is that conferred by statute. Consequently, we held that pursuant to Section 364.02(12)(c), Florida Statutes, CMRS providers were not telecommunications companies and therefore, we lacked jurisdiction over these providers. We also noted that the legislature provided one exception at that time, although not applicable in its consideration, CMRS providers were liable for any taxes imposed by the State pursuant to Chapters 202, 203, and 212, Florida Statutes, and any fees assessed pursuant to Chapter 364, Florida Statutes.

We find that after the enactment of Section 364.011, Florida Statutes, a similar analysis leads to the conclusion that we now have jurisdiction to consider CMRS applications for ETC designation. Although Section 364.011, Florida Statutes, clearly excludes CMRS providers from our jurisdiction, the legislature provided an exception to our lack of authority in matters specifically authorized by federal law. As noted by Alltel, §214(e)(2) of the Act sets forth that a "state commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1)[2] as an eligible telecommunications carrier for a service area designated by the State commission."

We note that in the Act, Congress has specifically designated areas in which it anticipates that state commissions should have a role.[3] However, as noted by this Commission in the

[2] Paragraph (1) of §214(e)(2) of the Act sets forth that an ETC shall throughout the area for which designation is received ; (A) offer the services that are supported by Federal universal support mechanisms under §254(c) and (B) advertise the availability of such services and the charges therefore using media of general distribution.

[3] See §§ 252(b)(4)(c); 261(b) and (c); 230(d)(3); 251(e)(1); 252(d)(3); 251(e)(1); 252(d)(3); 252(e)(3); 253(b) and (c); 254(f).

Declaratory Statement, our powers, duties and authority are only those conferred expressly or impliedly by statute of the state. For example, although the Act sets forth in §252 that state commissions shall arbitrate interconnection agreements, this does not by itself confer jurisdiction upon the Commission. Rather, it is Sections 120.80(13)(d) and 364.012(2), Florida Statues, and which authorizes this Commission to arbitrate and enforce interconnection agreements pursuant to federal law where we derives our authority.

The U.S. District Court for the Northern District of Florida has upheld the cooperative federalism set forth in the Act. The Court found that "[n]othing in the United States Constitution prevents the federal and state governments from taking cooperative action, nor does the Constitution prevent Congress from allowing state administrative agencies to participate in a federal regulatory scheme if they so choose. MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 112 F. Supp. 2d 1286 at fn 2 (N.D. Fla. 2000), *affirmed by* 298 F.3d 1269(11th Cir. 2002).

Similar to the legislature's grant of authority to this Commission over interconnection agreements in accordance with federal law, we find that the exception contained in Section 364.011, Florida Statutes, affirmatively sets forth that we may assert jurisdiction over CMRS providers to the extent specifically authorized by federal law, i.e., where Congress has deemed it appropriate. In the instant case, §214(e)(2) of the Act sets forth that state commissions are authorized to designate ETC status on CMRS providers. Unlike the statutory scheme at the time of issuance of the Declaratory Statement, we find that with the enactment of Section 364.011, Florida Statutes, the legislature has set forth a limited area upon which we may assert authority over CMRS providers. Accordingly, because it is authorized by federal law, we find that this Commission has authority to consider applications by CMRS providers for ETC designation.

For purposes of clarity, this finding is limited to our authority, pursuant to state and federal law, to consider applications by CMRS providers for ETC designation. Section 364.011, Florida Statutes, is quite clear that unless authorized by federal law, this Commission retains no jurisdiction over CMRS providers. Furthermore, this finding is limited to the jurisdictional question and reaches no conclusion on the merits of Alltel's Application.

III. **Decision**

With the enactment of Section 364.011, Florida Statutes, the legislature has granted this Commission limited authority over CMRS providers to those matters specifically authorized by federal law. Because pursuant to §214(e)(2) of the Act, states are authorized to designate ETC status on CMRS providers, we hereby find that this Commission has authority to consider applications by CMRS providers for ETC designation.

These dockets shall remain open for further proceedings relating to Alltel Wireless' ETC Application. A person whose substantial interests are affected may file a protest within 21 days of the Commission Order. If no protest is filed by a person whose interests are substantially affected within 21 days of this Order, the Commission order shall become final upon the issuance of a consummating order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that this Commission has authority to consider applications by CMRS providers for ETC designation as set forth in the body of this Order. It is further

ORDERED that these dockets shall remain open for further proceedings relating to Alltel Wireless' ETC Application.

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

By ORDER of the Florida Public Service Commission this 3rd day of April, 2007.

ANN COLE
Commission Clerk

(SEAL)

AJT

Commissioner Katrina McMurrian dissents with the following opinion:

SUMMARY:

Florida law clearly exempts commercial mobile radio service (CMRS) providers from the jurisdiction of the Florida Public Service Commission (FPSC or the Commission). This exemption reflects the intent of the Legislature to encourage continued development of new communications technologies.[4] This long-standing policy has been consistently followed by the Commission, and I do not believe the addition of Section 364.011, Florida Statutes, (F.S.) has modified, changed, or repealed this policy. The majority is poised to broadly interpret this provision and give it a meaning inconsistent with the express legislative intent of Chapter 364, F.S. In the absence of compelling factors indicating modification, change, or repeal, I cannot conclude that the Florida Legislature consciously abandoned its long-standing policy against FPSC regulation of the wireless industry. Therefore, I respectfully dissent.

LEGAL & POLICY ANALYSIS:

My disagreement with the majority's decision is based on four fundamental points: (1) a plain reading of the relevant Florida law shows that the FPSC lacks jurisdiction over wireless providers; (2) the lack of modification to the existing statutes exempting wireless from FPSC jurisdiction suggests no conscious abandonment of existing law by the Legislature and provides reasonable jurisdictional doubt, precluding a finding of jurisdiction; (3) there is no compelling rationale for a shift in the long-standing jurisdictional policy with respect to wireless; and (4) the majority decision inappropriately suggests extension of the FPSC's jurisdictional reach based on current federal law as well as future acts of Congress.

(1) The FPSC Does Not Have Jurisdiction Under Current Florida Law

Under Florida law, it is clear and well-established that the FPSC does not have jurisdiction to regulate CMRS providers. Pursuant to the opening section of Chapter 364 of the Florida Statutes, the Commission has exclusive jurisdiction over "telecommunications companies" only, which, according to Section 364.02(14)(c), F.S., do not include "commercial mobile radio service provider[s]." Moreover, the statute currently used to designate eligible telecommunications carriers (ETCs) appears to prohibit CMRS providers from receiving ETC designation from this Commission.

Additionally, I am not convinced by the majority's argument that the recent enactment of Section 364.011, F.S. now confers upon the Commission new authority to designate CMRS providers as ETCs. In particular, I find the majority's interpretation of Section 364.011, F.S. to be inconsistent with other sections of Chapter 364, F.S., specifically:

[4] Section 364.01(4), Florida Statutes.

- Section 364.01(3), F.S., which provides, "Communications activities that are not regulated by the Florida Public Service Commission, including, but not limited to, VoIP, **wireless**, and broadband, are subject to this state's generally applicable business regulation . . ." (emphasis added).
- Section 364.02(14)(c), F.S., which provides, ". . . The term 'telecommunications company' does not include . . . a commercial mobile radio service provider."
- Section 364.10(2)(a), F.S., which provides, "For the purposes of this section, the term 'eligible telecommunications carrier' means a telecommunications company, as defined by s. 364.02 . . ." The definition of "telecommunications company" used here similarly excludes CMRS providers. Note that Section 364.10, F.S. is the statute currently used by the Commission to designate ETCs and to require ETCs to provide a Lifeline Assistance Plan.

(2) The Lack of Modification to the Existing Statutory Exemption Suggests No Conscious Abandonment and Provides Reasonable Jurisdictional Doubt

According to the United States Supreme Court, "courts are not at liberty to pick and choose among legislative enactments," and "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." See, Morton v. Mancari, 417 U.S. 535, 550-551 (1974), citing, Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961); Rodgers v. United States, 185 U.S. 83, 87-89 (1902).

> When there are two acts upon the same subject, the rule is to give effect to both if possible. United States v. Tynen, 11 Wall. 88, 92; Henderson's Tobacco, 11 Wall. 652, 657; General Motors Acceptance Corporation v. United States, 286 U.S. 49, 61, 62 S., 52 S.Ct. 468, 472, 82 A.L.R. 600. The intention of the legislature to repeal 'must be clear and manifest'. Red Rock v. Henry, 106 U.S. 596, 601, 602 S., 1 S.Ct. 434, 439.

See, United States v. Borden Co., 308 U.S. 188, 198-99, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939). Citing to that decision, the Supreme Court in Morton v. Mancari could not find that "Congress consciously abandoned" an earlier specific policy when it passed later amendments of general application, "in light of the factors indicating no repeal" of the earlier policy. 417 U.S. 535, 551 (1974)

In the instant matter, it is undisputed that wireless providers are exempt (and have been exempt for some time) from the definition of a "telecommunications company" as set forth in Section 364.02(14)(c), F.S. It is further undisputed that this definition has not been recently changed or repealed. Sections 364.01(3), 364.02(14)(c), and 364.10(2)(a), F.S. are clearly more specific than the phrase "or specifically authorized by federal law" in Section 364.011, F.S. According to the previously cited case law, the specific will not be nullified by the general, even if the general was enacted later. Because the pre-existing and more specific language excluding CMRS providers from the Commission's jurisdictional reach was not repealed, I cannot conclude that the Legislature "consciously abandoned" its long-standing policy of excluding wireless from Commission jurisdiction.

Furthermore, had the Legislature intended to grant us authority to designate CMRS providers as ETCs, it could have specifically done so. In accordance with McPherson v. Blacker, 146 U.S. 1; 13 S.Ct. 3 (1892), the Legislature is presumed to know the existing law of the land when crafting legislation. There can be no doubt that the Legislature knew that existing Florida law explicitly excluded CMRS providers from the definition of a "telecommunications company" and, therefore, from Commission jurisdiction. Because this law predates the newly enacted statute in question (Section 364.011, F.S.), it is reasonable to conclude that the Legislature drafted Section 364.011, F.S. with the understanding that CMRS providers would remain excluded from the definition of a "telecommunications company" without concurrent modification or repeal of the existing law. At a minimum, the lack of such revisions provides grounds for reasonable doubt regarding FPSC jurisdiction in this matter, and any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it. See, Lee County Elec. Co-op., Inc. v. Jacobs, 820 So.2d 297 (Fla. 2002) ("any reasonable doubt regarding its regulatory power compels the PSC to resolve that doubt against the exercise of jurisdiction").[5]

(3) There is No Compelling Rationale for Jurisdictional Policy Shift

As a matter of public policy, there is no compelling reason to create an exception to the long-standing policy of a "hands-off" approach to wireless. Based on previously referenced intent language, this approach presumably was adopted in order to promote continued innovation and investment in new technologies. To this end, the FPSC previously recognized that it does not have jurisdiction over CMRS carriers for purposes of determining eligibility for ETC status. See, Order No. PSC-03-1063-DS-TP, Docket No. 030346-TP (September 23, 2003). Moreover, the Commission has noted that pursuant to Florida law, CMRS providers are "not regulated by this Commission" and that CMRS providers are "not subject to Commission rules." See, Order No. PSC-00-1243-PAA-TC, Docket No. 991821-TC (July 10, 2000). In addition to the lack of a compelling legal basis for asserting jurisdiction in this instance, there appears to be no compelling policy reason to change course from Commission precedent.

In fact, wireless carriers, such as the petitioner in the instant case, are not without remedy. Specifically, remedy is provided under federal law with respect to states that lack the necessary jurisdiction to designate wireless ETCs. According to 47 U.S.C. § 214(E)(6),

> In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the

[5] See also, State, Dept. of Transp. v. Mayo, 354 So.2d 359 (Fla. 1977) ("any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it"); Schiffman v. Department of Professional Regulation, Board of Pharmacy, 581 So. 2d 1375, 1379 (Fla. 1st DCA 1991) ("An administrative agency has only the authority that the legislature has conferred it by statute."); Lewis Oil Co., Inc. v. Alachua County, 496 So. 2d 184, 189 (Fla. 1st DCA 1986) ("Administrative agencies have only the powers delegated by statute.").

> [Federal Communications] Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the [Federal Communications] Commission consistent with applicable Federal and State law.

(4) The Majority Decision Inappropriately Suggests Extension of FPSC Authority Based on Current Federal Law as well as Future Acts of Congress

This ruling may well invite a number of unintended consequences, both with respect to current federal law and future acts of Congress. For example, interpreting the language "specifically authorized by federal law" in Section 364.011, F.S. to encompass jurisdiction over wireless ETC designation under 47 U.S.C. § 214(e) may, by extension, provide a legal basis for exerting Commission jurisdiction over "terms and conditions" of CMRS providers pursuant to 47 U.S.C. § 332. While I do not believe the Legislature intended to provide for Commission jurisdiction over "terms and conditions" of wireless service, states are nonetheless "specifically authorized by federal law" to address such matters.[6]

In addition, the majority's interpretation of Section 364.011, F.S. inappropriately binds the Commission to future Congressional acts with respect to wireless (as well as VoIP, broadband, and intrastate interexchange telecommunications services) that are unknown and cannot be contemplated. For instance, if Congress were to "authorize" (not necessarily "require") a state commission role in the future with respect to VoIP, one might argue, based on the majority's interpretation of the phrase at issue, that the statutory exemption of VoIP from FPSC regulation under Florida law had been rendered less effective (and perhaps meaningless) by that Congressional act. Absent clear legislative guidance to the contrary, we should not begin down that slippery slope.

CONCLUSION:

Based upon the foregoing, I respectfully dissent from the majority's decision that the Commission possesses jurisdiction to determine a wireless carrier's eligibility for ETC designation. Despite efforts to narrow this ruling to the specific circumstances of the instant petition, the majority has broadly interpreted a statutory phrase in a manner that is inconsistent with legislative intent and that opens the door to future (and perhaps much broader) requests for regulatory intervention with respect to services otherwise exempt from Commission regulation, like VoIP and broadband. Had the Legislature intended to grant the Commission authority to exercise jurisdiction over wireless companies or, more specifically, to designate CMRS providers as ETCs, it certainly could have explicitly done so. The prohibition of Commission

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[6] For example, the Eleventh Circuit recently held that the language in 47 U.S.C. § 332(c)(3)(A) "unambiguously preserved the ability of the states to regulate the use of line items in cellular wireless bills." Nat'l Ass'n of State Util. Consumer Advocates v. FCC, 457 F.3d 1238, 1254 (11th Cir. 2006). Specifically, the court stated that "[a] straightforward reading of the complementary phrases 'regulate entry of or the rates charged' and 'other terms and conditions,' 47 U.S.C. § 332(c)(3)(A), evidences the 'clear and manifest purpose of Congress' to leave the regulation of line items to the states." Id.

jurisdiction over wireless is a long-standing policy enacted by the Florida Legislature and consistently followed by this Commission. I do not believe that the addition of Section 364.011, F.S., has modified, changed, or repealed the policy. In the absence of compelling factors indicating modification, change, or repeal of this long-standing policy, I cannot conclude that the Florida Legislature consciously abandoned it. Therefore, I respectfully dissent from the majority's decision.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on April 24, 2007.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.