

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement that NPCR, Inc. d/b/a Nextel Partners, commercial mobile radio service provider in Florida, is not subject to jurisdiction of Florida Public Service Commission for purposes of designation as "eligible telecommunications carrier."

DOCKET NO. 030346-TP

In re: Petition for declaratory statement that ALLTEL Communications, Inc., commercial mobile radio service provider in Florida, is not subject to jurisdiction of Florida Public Service Commission for purposes of designation as "eligible telecommunications carrier."

DOCKET NO. 030413-TP
ORDER NO. PSC-03-1063-DS-TP
ISSUED: September 23, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

DECLARATORY STATEMENT

BY THE COMMISSION:

I. INTRODUCTION

A. The Parties

By petitions filed April 16, 2003, and April 29, 2003, respectively, NPCR, Inc., d/b/a Nextel Partners (Nextel), and ALLTEL Wireless Holdings, L.L.C. and New York NEWCO Subsidiary, Inc., subsidiaries of ALLTEL Communications, Inc. (ALLTEL), both of which are commercial mobile radio service (CMRS) providers, requested declaratory statements pursuant to Section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code, that the Florida Public Service Commission (Commission) lacks jurisdiction to designate CMRS carriers eligible

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telecommunications carrier (ETC) status for the purpose of receiving federal universal service support.¹

Northeast Florida Telephone Company (Northeast Florida) and GTC, Inc. d/b/a GT COM (GT Com) filed petitions to intervene in these dockets on May 22, 2003. TDS TELECOM/Quincy Telephone (Quincy) filed a petition to intervene on May 29, 2003. ALLTEL filed a response but did not oppose the intervention. The petitions were granted by Order Nos. PSC-03-0712-PCO-TP and PSC-03-0713-PCO-TP, respectively, on June 16, 2003.

B. Summary of Ruling

After careful consideration and as discussed, *infra*, the Commission grants Nextel's and ALLTEL's petitions for declaratory statements.

ETC status is a prerequisite for a carrier to be eligible to receive universal service funding. The Federal Communications Commission (FCC) has determined that CMRS carriers, such as Nextel and ALLTEL, may be designated as ETCs. Section 214(e)(6) of the federal 1996 Telecommunications Act (1996 Act) provides that where a carrier is not subject to the jurisdiction of a state commission, then the FCC shall make the ETC determination. The FCC has ruled that, in order for it to consider requests for ETC status, the requesting carrier must provide an "affirmative statement" from the state commission or a court of competent jurisdiction that the state commission lacks the jurisdiction to make the designation.² *See Federal-State Joint Board on Universal Service: Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 00-208 (released June 30, 2000) at ¶ 93.³

¹ Notice of receipt of Nextel's Petition for Declaratory Statement was published in the May 2, 2003, issue of the Florida Administrative Weekly. Notice of receipt of ALLTEL's Petition was published in the May 16, 2003, issue. The petitioners agreed to toll the statutory time for disposition in order for us to consider their petitions at our August 19, 2003, agenda conference.

² We note that numerous state commissions have held that they do not have jurisdiction to designate CMRS carriers ETC status.

³ *See also FCC 01-283, Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, CC Docket No. 96-45, 16 FCC Rcd 18133; 2001 FCC LEXIS 5313, fn. 46 (released October 5, 2001); FCC 97-419, *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to § 214(e)(6) of the Telecommunications Act* (released December 29, 1997).

As discussed, *infra*, this Commission does not have jurisdiction over CMRS carriers for purposes of determining eligibility for ETC status. Indeed, the Florida Legislature has expressly excluded CMRS providers from the jurisdiction of the Commission. As the Commission lacks jurisdiction over CMRS providers, the FCC is the appropriate venue for Nextel and ALLTEL to seek ETC status.

II. THE COMMISSION LACKS JURISDICTION OVER CMRS PROVIDERS

A. Lack of Jurisdiction Over CMRS Providers

As a legislatively created body, the jurisdiction of the Commission is that conferred by statute – but no more than that. Chapter 364, Florida Statutes, governs our resolution of this threshold, and dispositive, jurisdictional issue. For present purposes, Chapter 364 expressly limits our jurisdiction to jurisdiction over “telecommunications companies” as set forth in that chapter.⁴ A telecommunications company does not include a CMRS provider. Indeed, the Legislature specifically provided to the contrary in Section 364.02(12), Florida Statutes, which expressly states that:

The term “telecommunications company” *does not include*:

...
(c) A commercial mobile radio service provider;

§ 364.02(12)(c), Fla. Stat. (emphasis added).⁵

The Commission has previously recognized, correctly so, that it lacks jurisdiction over CMRS providers. Specifically, in *In re: Application for certificate to provide pay telephone service by Radio Communications Corporation, and request for waiver of Rule 25-24.515(6), (10), and (14), F.A.C.*, the Commission noted that, pursuant to Section 364.02(12)(c), Florida Statutes, CMRS providers are “not regulated by this Commission” and that CMRS providers are “not subject to

⁴ Section 364.01, Florida Statutes, titled “Powers of commission, legislative intent,” states that “(1) The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers conferred by this chapter.”

⁵ The one exception, not applicable here, is that CMRS providers along with intrastate interexchange telecommunications companies (also not regulated by the Commission) shall continue to be 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. *See* § 364.02(12), Fla.Stat.

Commission rules.” See Order No. PSC-00-1243-PAA-TC, Docket No. 991821-TC (July 10, 2000).⁶

B. The Arguments of the Intervenor

Intervenors’ reliance on the Commission’s Order in *In re: Establishment of Eligible Telecommunications Carriers Pursuant to Section 214(e) of the Telecommunications Act of 1996* is misplaced. See Commission Order No. PSC-97-1262-FOF-TP, issued October 14, 1997, in Docket No. 970644-TP. That order states, in pertinent part:

We believe that the requirements of the 1996 Act can be met initially by designating the incumbent LECs as ETCs. Upon consideration, we hereby designate the incumbent LECS (ILECs) as ETCs. LECs should continue to serve their current certificated service areas. All other carriers (non-ILECs) who wish to receive ETC status in the service area of a non-rural LEC should file a petition with the Commission for ETC status . . .

Id. at 4. In that order, the Commission also opined that “mobile carriers may serve those areas [where ALECs were prohibited from offering basic local telecommunications services within the territory served by a small LEC before January 1, 2001, unless the small LEC has elected price regulation], and may apply for ETC status.” *Id.* at 4.

⁶ Numerous state commissions have likewise held that they lack jurisdiction to designate ETC status for CMRS carriers. See, e.g., *In the Matter of Designation of Carriers Eligible for Universal Carrier Support*, Docket No. P-100, SUB 133c, 2003 WL 21638308, 2003 N.C. PUC LEXIS 686 (N.C.U.C., June 24, 2003) (“...the Commission ...lacks jurisdiction to designate ETC status for CMRS carriers.... [North Carolina statute] G.S. 62-3(23)j, enacted on July 29, 1995, has removed cellular services, radio common carriers, personal communications services, and other services then or in the future constituting a mobile radio communications service from the Commission's jurisdiction”); *In re Telecommunications Act of 1996*, 2002 WL 1277821, 2002 Va. PUC LEXIS 315, (Va. S.C.C., April 9, 2002) (“The Commission finds that § 214(e) (6) of the Act is applicable to Virginia Cellular’s Application as this Commission has not asserted jurisdiction over CMRS carriers and that the Applicant should apply to the FCC for ETC designation”); *In re Pine Belt Cellular, Inc.*, Docket U-4400, Alabama Public Service Commission, 2002 WL 1271460, 2002 Ala. PUC LEXIS 196 (March 12, 2002) (“it seems rather clear that the Commission has no jurisdiction to take action on the Application of the Pine Belt companies for ETC status in this jurisdiction. The Pine Belt companies and all other wireless providers seeking ETC status should pursue their ETC designation request with the FCC as provided by 47 USC § 214(e)(6)”).

Reliance on this statement to conclude that this Commission has jurisdiction to designate CMRS carriers as having ETC status is misguided. Simply put, the Commission cannot by fiat simply declare its own jurisdiction where, as the Florida Legislature has made clear, no jurisdiction exists.⁷ See, e.g., *Gulf Coast Hospital, Inc. v. Dept. of Health and Rehabilitative Services*, 424 So. 2d 86, 91 (Fla. 1st DCA 1982) (noting that even if an agency's policy concerns might be valid, "[a]rguments concerning the potential effect of the legislation or questioning the wisdom of such legislation are matters which should be presented to the Legislature itself.").

Intervenors' public interest argument must likewise fail. Intervenors argue that Florida's public interest would not be served by having competitive carriers, including CMRS providers such as petitioners, designated as ETCs in rural areas. They continue that this Commission is best situated to make the public interest inquiry. This argument is fundamentally flawed. It is only if this Commission has jurisdiction over CMRS carriers in the first instance that the Commission could exercise that jurisdiction to perform the inquiry proposed by Intervenors.

C. Intervenors Run Afoul of *Cape Coral* and its Progeny

The arguments of the Intervenors run counter to the clear teachings of *Cape Coral* and its progeny. Florida law makes clear that the Commission does not have jurisdiction over CMRS carriers. Even if there was doubt about that proposition, which the Florida Legislature has made clear there is not, such doubt would have to be resolved against finding jurisdiction. As the Florida Supreme Court made clear in *City of Cape Coral v. GAC Utilities, Inc., of Florida*:

All administrative bodies created by the Legislature are not constitutional bodies, but, rather, simply mere creatures of statute. This, of course, includes the Public Service Commission.... As such, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State.... Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof,... and the further exercise of the power should be arrested.

281 So. 2d 493, 495-96 (Fla. 1973). See also *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

⁷ We also note that the issue of the Commission's jurisdiction to determine ETC status for CMRS providers was not raised, litigated, or relevant to the holding in Order No. PSC-97-1262-FOF-TP, which designated local exchange companies in Florida as ETCs. We also note that in the time since that holding, Congress, through the enactment of Section 214(e)(6) to the 1996 Act, expressly authorized the FCC to make ETC designations of CMRS providers when states like Alabama, Florida, North Carolina, Virginia, and others lack jurisdiction over such carriers.

that doubt against the exercise of jurisdiction”); *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. Dept. 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”).

The Commission has previously (and correctly) recognized the limited nature of its jurisdiction. *See In re: Complaint Against Florida Power & Light Company Regarding Placement of Power Poles and Transmission Lines*, Docket No. 010908-EI, Order No. PSC-02-0788-PAA-EI, Florida Public Service Commission, June 10, 2002; *In re: Complaint and Petition by Lee County Electric Cooperative, Inc. for an Investigation of the Rate Structure of Seminole Electric Cooperative, Inc.*, Docket No. 981827-EC, Order No. PSC-01-0217-FOF-EC, Florida Public Service Commission, January 23, 2001 (recognizing that any doubt as to the Commission’s jurisdiction must be resolved against an exercise of jurisdiction).

The authority of this Commission is derived from state law as written by the Florida Legislature, and that authority is expressly limited as it pertains to CMRS providers. Regardless of the merits of the debate of state versus federal designation of ETC status for wireless providers, the Commission must remain cognizant of our role and not regulate beyond our specific mandate. Despite good intentions, we should avoid even the appearance that we are replacing the Legislature's judgment with our own.

Florida as a state certainly has an interest in universal service issues. That interest, however, does not create jurisdiction in this Commission to determine whether CMRS carriers should be granted ETC status (a status, we note, that is one of federal creation),⁸ especially where the Legislature has specifically provided that the Commission does not have jurisdiction over CMRS providers.⁹ As a creature of statute, this Commission is not free to operate according to its “own “inscrutable wisdom, ‘an administrative Frankenstein, once created, (acting) beyond the control of its Legislature creator.’” *Turner v. Wainwright*, 379 So. 2d 148 (Fla. 1st DCA 1980) (discussing the

⁸ We note that other states have an interest in universal service issues, notwithstanding that their utility commissions do not regulate CMRS providers. *See, e.g., N.C. Gen. Stat. A. § 62-110, § 105-164.4c and § 143B-437.40 (North Carolina); Virginia's Universal Service Plan (Va. S.C.C. Case Nos. PUC970135 and PUC970063) and Va. Code Ann. § 56-468.*

⁹ Section 364.025, Florida Statutes, provides for alternative local exchange companies (now known as competitive local exchange companies by virtue of Chapter 2003-32, § 3, Laws of Fla., amending Section 364.02, Florida Statutes), which are “telecommunications companies” subject to Commission jurisdiction, to apply to the Commission for universal service provider and carrier of last resort status. Notably, no similar provision exists regarding CMRS providers.

Parole Commission). Indeed, “[a]rguments concerning the potential effect of the legislation or questioning the wisdom of such legislation are matters which should be presented to the Legislature itself.” *Gulf Coast Hospital, Inc. v. Dept. of Health and Rehabilitative Services*, 424 So. 2d 86, 91 (Fla. 1st DCA 1982).

D. Conclusion

Based on the foregoing, the Commission does not have jurisdiction over CMRS providers for purposes of determining eligibility for ETC status pursuant to 47 U.S.C. § 214(e).

III. A DECLARATORY JUDGMENT OF “NO JURISDICTION” IS PROPER

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement. In pertinent part, that section provides:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency’s opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner’s particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner’s set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, Florida Administrative Code, further explains that: “a declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority.” The purpose of a declaratory statement by an administrative agency is to allow a petitioner to select a proper course of action in advance. *Novick v. Dept. of Health, Bd. of Medicine*, 816 So. 2d 1237 (Fla. 5th DCA 2002).

Petitioners have satisfied the requirements for the issuance of a declaratory statement by the Commission. At issue is the applicability of Chapter 364, Florida Statutes, which excludes CMRS providers from Commission jurisdiction. As CMRS providers seeking ETC status, which status is a prerequisite to being eligible to receive federal universal service funds, petitioners are “substantially affected persons” within the meaning of Section 120.565, Florida Statutes. Petitioners have stated with particularity their circumstances and have identified the statutory provision that applies to their circumstances.

Intervenors urge us to deny the petitions for declaratory statement. Intervenors first assert that to receive ETC status in the service area of a rural LEC, a non-ILEC must file a petition proposing an appropriate service area and demonstrating that designation as an ETC is in the public interest, a determination that they assert can properly be made only after a formal administrative

hearing and not in a declaratory statement proceeding. They next assert that the petitions require a response that amounts to a rule stating that CMRS providers are not subject to the jurisdiction of the Commission for purposes of designation as an ETC. Finally, Intervenor asserts that the petitions fail to allege an uncertainty about a Commission statute, rule, or order and thus, fail to meet the pleading requirements of Rule 28-105.001, Florida Administrative Code.

Intervenor's arguments fail. Regarding their first assertion, where the Commission lacks jurisdiction, as it does here, it would be illogical for a party to seek to have the Commission exercise jurisdiction to do something it does not have the power to do. To exercise jurisdiction, the Commission would have to determine that the petitioners are telecommunications companies, a determination that is expressly precluded by the statute. As the Commission does not have jurisdiction to make the ETC designation for CMRS providers, it is not necessary for Nextel or ALLTEL to file an application that addresses the eligibility requirements to be designated an ETC.

We also disagree that we should deny the petitions for declaratory statement because the statement requested would amount to a rule. On numerous occasions, the Commission has resolved controversies about the scope of our jurisdiction in declaratory statement proceedings. *See In re: Petition of St. Johns Service Company for declaratory statement on applicability and effect of 367.171(7), Florida Statutes*, Order No. PSC-99-2034-DS-WS, issued October 18, 1999, in Docket No. 982002-WS; *In re: Petition of PW Ventures, Inc., for declaratory statement in Palm Beach County*, Order No. 18302, issued October 16, 1987, in Docket No. 870446-EU, *aff'd on other grounds, PW Ventures, Inc. v. Nichols*, 533 So. 2d 281 (Fla. 1988).

Intervenor confuses the notion of a rule with the issue of jurisdiction. Commission jurisdiction over a matter either exists or it does not. It cannot be created or denied by a rule. Indeed, the Commission could only issue a rule where it has jurisdiction over the subject matter of the rule. Further, determining whether the Legislature has vested the Commission with jurisdiction is typically a one-time determination, whereas rulemaking is more appropriate for such matters as recurring issues, implementation of statutes, and codification of policy.

Finally, we dismiss the assertion that the petitions should be denied for failing to allege an uncertainty about a Commission statute, rule, or order. The petitions seek a statement that our statutes, rules, and orders are not applicable to ALLTEL or Nextel as CMRS providers, for the purposes of determining whether they are eligible to receive federal universal service funding. As set forth herein, we agree. And on the facts presented, this determination is properly made in a declaratory statement proceeding. We therefore conclude that the petitions satisfy the requirements for a declaratory statement.

Based on the foregoing, we grant the petitions and declare that Nextel and ALLTEL, as commercial mobile radio service providers, are not subject to the jurisdiction of the Florida Public Service Commission for purposes of designation as an eligible telecommunications carrier under 47 U.S.C. § 214(e).

Now, therefore, it is

ORDERED by the Florida Public Service Commission that the Petitions for a Declaratory Statement filed by Nextel & ALLTEL are granted. It is further

ORDERED that the substance of the Declaratory Statement is as set forth in the body of this Order. It is further

ORDERED that this docket should be closed.

By ORDER of the Florida Public Service Commission this 23rd Day of September, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

CTM

Commissioner Baez dissents. Chairman Jaber dissents from the majority's decision with the following opinion:

Rule 28-105.001, Florida Administrative Code, states in part: "A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency." The circumstances brought before us in these two cases are not limited to the two wireless providers that have filed petitions for declaratory statement. Rather, our decision will impact not only all of the wireless carriers and other telecommunications service providers in Florida, but, more importantly, will impact the state's overall universal service policy. This is a case of first impression, and will result in a policy of general applicability. I do not believe a declaratory statement is the appropriate mechanism for

deciding this very important issue. I would rather establish an expedited proceeding that allows us to hear from other providers in the form of testimony, if appropriate, or legal briefs on federal and state law regarding ETC status and the impact of such on Florida's stance on universal service. In making a decision regarding the jurisdictional issues in this matter, it is critical to fully understand the ramifications of our decision on the size and applicability of the federal universal service fund to Florida's ratepayers. The declaratory statement process does not allow an opportunity for that critical review. Without input from all affected parties on the legal and policy implications of this decision, I am uncomfortable with the conclusion that we do not have jurisdiction in this matter. For these reasons alone, I dissent.

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 or judicial review of Commission orders that is available under Sections 120.57 or 120.68, 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 or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.