

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement concerning jurisdiction over wireless telecommunications, specifically commercial radio service providers, for the sole purpose of lifeline-only ETC designation, by TruConnect Communications, Inc.

DOCKET NO. 20200260-TP  
ORDER NO. PSC-2021-0103-DS-TP  
ISSUED: March 12, 2021

The following Commissioners participated in the disposition of this matter:

GARY F. CLARK, Chairman  
ART GRAHAM  
ANDREW GILES FAY  
MIKE LA ROSA

DECLARATORY STATEMENT

BY THE COMMISSION:

I. Background

On December 23, 2020, TruConnect Communications, Inc. (TruConnect), filed a petition for declaratory statement (Petition). TruConnect asks us to declare that, based on the facts presented, we can and should assert jurisdiction over wireless telecommunications, specifically commercial mobile radio service (CMRS) providers, for the sole purpose of Lifeline-only eligible telecommunications carrier (ETC) designation. In its Petition, TruConnect also requests that we hold a hearing before issuing our decision.

A. Overview of ETC Designation

ETC designation is a requirement for telecommunications carriers to receive federal Universal Service Funds (USF) for the Lifeline and High Cost programs. The Lifeline program enables low-income households to obtain and maintain basic telephone and broadband services and offer qualifying households a discount on their monthly bills. The High Cost program helps carriers provide voice and broadband service in remote and underserved communities.

Federal law, 47 U.S.C. § 214(e)(2), authorizes state commissions to designate a common carrier as an ETC. Section 214(e) provides in pertinent part:

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

Federal law, 47 U.S.C. § 214(e)(6), also provides that the Federal Communications Commission (FCC) will make such ETC designations in cases where a state commission lacks jurisdiction over the common carrier. Section 214(e) provides in pertinent part:

(6) Common carriers not subject to State commission jurisdiction

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 [FCC] 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 [FCC] consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the [FCC] may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the [FCC] shall find that the designation is in the public interest.

B. Florida Law Applicable to TruConnect's Petition

Section 364.10, Florida Statutes (F.S.), sets forth the framework for Lifeline service in Florida and provides the Florida Legislature's definition of an ETC. Section 364.10(1), F.S., provides in relevant part:

(a) An eligible telecommunications carrier shall provide a Lifeline Assistance Plan to qualified residential subscribers, as defined in the eligible telecommunications carrier's published schedules. For the purposes of this section, the term "eligible telecommunications carrier" means a telecommunications company, as defined by s. 364.02, which is designated as an eligible telecommunications carrier by the commission pursuant to 47 C.F.R. s. 54.201.

Section 364.02, F.S., outlines the definition of a telecommunications company for purposes of Chapter 364, F.S. Section 364.02(13), F.S., states, in pertinent part, that:

“Telecommunications company” includes every corporation, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, and every political subdivision in the state, offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility. The term “telecommunications company” does not include:

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(c) A commercial mobile radio service provider;

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However, each commercial mobile radio service provider and each intrastate interexchange telecommunications company shall continue to be liable for any taxes imposed under chapters 202, 203, and 212. Each intrastate interexchange telecommunications company shall continue to be subject to s. 364.163 and shall continue to pay intrastate switched network access rates or other intercarrier compensation to the local exchange telecommunications company or the competitive local exchange telecommunications company for the origination and termination of interexchange telecommunications service.

Section 364.011, F.S., lists the telecommunications services that are exempt from our oversight, except as otherwise set forth in Chapter 364, F.S. Section 364.011, F.S., exempts:

- (1) Intrastate interexchange telecommunications services.
- (2) Broadband services, regardless of the provider, platform, or protocol.
- (3) VoIP.
- (4) Wireless telecommunications, including commercial mobile radio service providers.
- (5) Basic service.
- (6) Nonbasic services or comparable services offered by any telecommunications company.

Section 364.01, F.S., sets forth our powers under, and the legislative intent of, Chapter 364, F.S. Section 364.01, F.S., provides in relevant part:

- (1) The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers conferred by this chapter.

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(3) Communications activities that are not regulated by the Florida Public Service Commission are subject to this state's generally applicable business regulation and deceptive trade practices and consumer protection laws, as enforced by the appropriate state authority or through actions in the judicial system. This chapter does not limit the availability to any party of any remedy or defense under state or federal antitrust laws. The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and has provided customers with freedom of choice, encouraged the introduction of new telecommunications service, encouraged technological innovation, and encouraged investment in telecommunications infrastructure.

### C. Procedural Matters

Pursuant to Section 120.565(3), F.S., and Rule 28-105.0024, Florida Administrative Code (F.A.C.), a Notice of Declaratory Statement was published in the December 29, 2020 edition of the Florida Administrative Register to inform interested persons of the Petition. No requests to intervene were filed, and the time for filing such a request expired on January 19, 2021.

This Order addresses whether TruConnect's request for a hearing on its Petition should be granted and whether TruConnect's Petition should be granted. We have jurisdiction to consider this matter pursuant to Section 120.565 and Chapter 364, F.S.

## II. Decision on TruConnect's Request for Hearing on its Petition

Citing to Rule 28-105.003, F.A.C., TruConnect requests that we hold a hearing before issuing our decision on the Petition. Rule 28-105.003, F.A.C., addresses agency disposition of petitions for declaratory statement and states that an agency may hold a hearing to consider a petition for declaratory statement. Additionally, the rule states the agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts. Thus, under Rule 28-105.003, F.A.C., we have the discretion to forgo a hearing on a petition for declaratory statement and rely solely on the statement of facts set forth in the petition without vetting those facts through a formal hearing process under Sections 120.569 and 120.57, F.S.

TruConnect's request for hearing is hereby denied because we find that a hearing is not necessary to dispose of TruConnect's Petition. Instead, we will rely on the facts set forth in the Petition without taking any position with regard to the validity of the facts.

## III. Decision on TruConnect's Petition for Declaratory Statement

### A. Law Governing Petitions for Declaratory Statement

Section 120.565, F.S., sets forth the necessary elements of a petition for declaratory statement. This 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, F.A.C., states the purpose of a declaratory statement:

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. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Rule 28-105.002(5), F.A.C., requires that a petition for declaratory statement include a description of how the statutes, rules, or orders may substantially affect the petitioner in the petitioner's particular set of circumstances. A party seeking a declaratory statement must not only show that it is in doubt as to the existence of some right or status, but also that there is a bona fide, actual, present, and practical need for the declaration. *State Department of Environmental Protection v. Garcia*, 99 So. 3d 539, 544-45 (Fla. 3d DCA 2011). A declaratory statement is intended to enable members of the public to definitively resolve ambiguities of law in the planning of their future affairs and to enable the public to obtain definitive binding advice as to the applicability of agency law to a particular set of facts. *Department of Business and Professional Regulation, Div. of Pari-Mutual Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374, 382 (Fla. 1999).

#### B. TruConnect's Petition

In its Petition, TruConnect states that it is a commercial mobile radio service provider that delivers prepaid wireless telecommunications services to consumers. TruConnect further states that it currently has an application for Lifeline-only ETC designation pending before the FCC. However, TruConnect explains that it believes the FCC has not acted upon its ETC application in a timely manner and, therefore, filed its Petition with this Commission to remedy the situation. TruConnect further provides that if we issue its requested declaratory statement, it will withdraw its ETC application from the FCC and file an ETC application with this Commission.

TruConnect maintains that we should be able to assert jurisdiction over commercial mobile radio service providers for the sole purpose of Lifeline-only ETC designation. The Petition contains four arguments in support of this belief:

- TruConnect argues that Section 364.011, F.S., is ambiguous because it does not contain a provision explicitly addressing our authority, or lack of authority, over ETC designations. TruConnect maintains that we erroneously rely upon the 2011 Florida Legislature's revisions to Section 364.011, F.S., in order to defer wireless ETC designation requests to the FCC and further suggests that, through those revisions, the Legislature unwittingly undermined its intent to foster competition in telecommunications services.
- TruConnect argues that an ETC designation request does not require us to regulate the provider or the services that will be offered. Accordingly, TruConnect asserts that we may simply grant ETC designation to non-jurisdictional entities and defer regulation to the FCC.
- TruConnect argues that our continued deferral of jurisdiction over wireless Lifeline-only ETC applications is contrary to the expressed legislative intent of Chapter, 364, F.S.
- TruConnect argues that, regardless of Florida law, we should recognize that the Telecommunications Act of 1996 grants us the authority to designate ETCs.

C. Statutory Provisions Identified in the Petition

TruConnect states in its Petition that Sections 364.011 and 364.01(3), F.S., are the statutory provisions applicable to the jurisdictional question raised in its Petition. The relevant text of these provisions are included in Section I of this Order.

D. TruConnect's Requested Declaratory Statement

TruConnect asks us to issue the following affirmative declaratory statement:

The Commission can and should assert jurisdiction over wireless telecommunications, specifically CMRS providers, for the sole purpose of Lifeline-only ETC designation.

E. Analysis of the Petition for Declaratory Statement

1. Threshold Requirements of Petition

The purpose of a declaratory statement is to address the applicability of statutory provisions, orders, or rules of the agency in particular circumstances. Section 120.565, F.S.; *See Chiles v. Department of State, Division of Elections*, 711 So. 2d 151, 154 (Fla. 1st DCA 1998). Further, pursuant to Rule 28-105.001, F.A.C., a petition for declaratory statement may be used to resolve questions or doubts as to how an agency's statutes and rules may apply to the petitioner's particular circumstances.

TruConnect's Petition contains specific facts as required by Section 120.565(2), F.S., and provides that TruConnect believes Sections 364.01(3) and 364.011, F.S., apply to its set of

circumstances. TruConnect alleges that it is substantially affected by these statutory provisions because they are ambiguous as to our jurisdiction, or lack of jurisdiction, over commercial mobile radio service providers (such as itself) for Lifeline-only ETC designation.

TruConnect further asserts that there is a need for its requested declaratory statement and that the statement will enable it to plan its future affairs. Specifically, TruConnect provides that, if we issue its requested declaratory statement, TruConnect will withdraw its ETC application from the FCC and file a new ETC application with this Commission.

As shown above, we find that TruConnect has satisfied the requirements for the issuance of a declaratory statement. Based on the information provided in the Petition, it appears that any declaratory statement issued to resolve TruConnect's questions or doubts about the provided statutes has the potential to apply to other individuals with an identical fact pattern. However, an agency has an obligation to issue a declaratory statement explaining how a statute or rule applies in the petitioner's particular circumstances even if the explanation would have a broader application than to the petitioner. *Society for Clinical & Medical Hair Removal, Inc. v. Department of Health*, 183 So. 3d 1138, 1144 (Fla. 1st DCA 2015).

## 2. Jurisdictional Question Raised by Petition

Although we find that TruConnect has satisfied the requirements for the issuance of a declaratory statement, we decline to issue the affirmative declaratory statement requested by TruConnect in its Petition. As discussed in more detail below, Sections 364.01, 364.011, 364.02, and 364.10, F.S., establish that we do not have jurisdiction to designate TruConnect, a commercial mobile radio service provider, as a Lifeline-only ETC.

### a. Section 364.10, F.S., Lifeline Service, and Section 364.02, F.S., Definition of Telecommunications Company

Section 364.10, F.S., addresses Lifeline service in Florida. Section 364.10(1)(a), F.S., states that an ETC for the purposes of the section means a telecommunications company, as defined by Section 364.02, F.S., that this Commission designates as an ETC pursuant to the federal law provisions provided in 47 C.F.R. § 54.201.

Section 364.02, F.S., defines the term "telecommunications company" as used in Chapter 364, F.S. Section 364.02(13)(c), F.S., provides that a commercial mobile radio service provider does not qualify as a telecommunications company. As such, a commercial mobile radio service provider does not fall within the definition of an ETC for purposes of Chapter 364, F.S.

The remainder of Section 364.10, F.S., sets forth the duties of ETCs designated by this Commission and our power to regulate Lifeline service in Florida. Under Florida law, if we designate a telecommunications company as an ETC, that company is then subject to the Lifeline service requirements set forth in Section 364.10, F.S.

In its Petition, TruConnect argues that we may consider commercial mobile radio service providers' applications for ETC designation because such a request does not require us to regulate the provider or the services that will be offered and that we can merely confer ETC designation and defer regulation to the FCC. However, Section 364.10, F.S., unambiguously states otherwise. In Florida, an ETC designation by this Commission requires us to regulate the provider or services that will be offered.

b. Section 364.011, F.S., Exemptions from Commission Jurisdiction

TruConnect argues that ambiguity exists within Section 364.011, F.S., that allows us to consider commercial mobile radio service providers' applications for Lifeline-only ETC designation. TruConnect further argues that we may assert jurisdiction over commercial mobile radio service providers for Lifeline-only ETC designation because the Florida Legislature has not explicitly prohibited us from doing so. Section 364.011, F.S., as currently enacted, unambiguously exempts commercial mobile radio service providers from any of our oversight, thus, leaving us with no authority to assert jurisdiction over such entities under Chapter 364, F.S., for purposes of ETC designation.

Section 364.011, F.S., as originally enacted in 2005, listed the services exempt from our oversight, "except to the extent delineated in [Chapter 364, F.S.] or specifically authorized by federal law." We subsequently relied on the phrase, "specifically authorized by federal law," to find that we had new authority to consider commercial mobile radio service providers' requests for ETC designation. However, in 2011, pursuant to H.B. 1231, the Florida Legislature removed that language from Section 364.011, F.S. As a result, effective July 1, 2012, in compliance with Florida law, we only evaluate wireline ETC applications.

We note that the House of Representatives Staff Analysis of H.B. 1231 expressly noted that this Commission previously relied upon this statutory language as the basis for our authority to designate wireless carriers in Florida as ETCs for purposes of receiving support from the USF that supports the Lifeline and Link-up programs. The House of Representative Staff Analysis further mentioned this Commission's assertion that without state authority to designate wireless ETCs in Florida, that authority would default to the FCC. Thus, it appears that the Legislature was aware that the 2011 change in the law would affect our jurisdiction to designate wireless carriers as ETCs.

This Commission is a creature of statute and only has the powers, duties, and authority that have been conferred expressly or impliedly to us by the Florida Legislature through statute. *City of Cape Coral v. GAC Utilities, Inc., of Florida*, 281 So. 2d 493, 495-96 (Fla. 1973). Further, we are barred from exercising a power when there is any reasonable doubt as to the lawful existence of that power. *See id.* The Florida Legislature specifically exempted wireless providers, including commercial mobile radio service providers, from our jurisdiction and, in 2011, deliberately removed a statutory provision that we previously relied upon to grant ETC designation to wireless carriers. As such, contrary to TruConnect's arguments, the Florida Legislature has both expressly and impliedly barred us from exercising jurisdiction over wireless providers, including commercial mobile radio service providers, through its promulgation of

Section 364.011(4), F.S., and its removal of statutory language that could be construed to allow for such Commission oversight. Moreover, Section 364.011, F.S., provides that any exceptions to the statutory exemptions are delineated within Chapter 364, F.S. We note that no other section of Chapter 364, F.S., contains language that permits us to exercise jurisdiction over wireless providers for purposes of Lifeline-only ETC designation.

Ultimately, Florida law provides that wireless telecommunications, including commercial mobile radio service providers, are exempt from our oversight. In its Petition, TruConnect submits that it is a commercial mobile radio service provider. TruConnect is, therefore, exempt from our oversight. Accordingly, we do not have jurisdiction to consider any potential request from TruConnect seeking ETC designation.

c. Section 364.01, F.S., Powers of the Commission, Legislative Intent

TruConnect argues that we are operating against the expressed legislative intent set forth in Section 364.01(3), F.S., by only evaluating wireline ETC applications. However, as previously addressed, the 2011 changes to Section 364.011, F.S., and the limitations on the definition of an ETC under Sections 364.02(13) and 364.10, F.S., are intended to clarify that we should only evaluate wireline ETC applications.

While Section 364.01(3), F.S., contains the general intent of the Legislature to promote competition in the telecommunications industry, Sections 364.011, 364.02(13)(c), and 364.10, F.S., contain specific provisions that exclude commercial mobile radio service providers from our oversight. Accordingly, our finding that we lack jurisdiction to consider any potential ETC designation application from TruConnect complies with the requirements and intent of Chapter 364, F.S.

d. Federal Law Provisions

TruConnect argues that we must acknowledge that, regardless of the change in Florida Statutes, the FCC rules authorize us to designate ETCs. Pursuant to Rule 28-105.001, F.A.C., 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. Accordingly, we hereby deny the Petition to the extent TruConnect may be requesting us to interpret federal law. Moreover, we are not providing any interpretation of federal law in this declaratory statement. However, in an effort to address TruConnect's argument, we make the following observations regarding federal law that appear to support the interpretation that we lack jurisdiction over TruConnect under Florida law.

TruConnect correctly points out that, pursuant to 47 U.S.C. § 214(e)(2), a state commission shall designate carriers that meet certain requirements as ETCs. However, we note that 47 U.S.C. § 214(e)(6) provides that the FCC will make such ETC designations if the state commission lacks jurisdiction over the carrier requesting the designation.

Specifically, 47 U.S.C. § 214(e)(6) states that the FCC will consider a common carrier's ETC application if the state does not have jurisdiction over that common carrier's telephone exchange service and exchange access. Under federal law, telephone exchange service is defined as:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(54). Exchange access is defined as the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services. 47 U.S.C. § 153(20).

We further note that the courts have found that a state agency is not authorized to take administrative action based solely on federal statutes. *See Curtis v. Taylor*, 648 F.2d 946, 948 (5th Cir. 1980)(finding that a state administrative hearing officer lacks jurisdiction to consider federal constitutional issues or to consider the invalidity of state regulations under applicable federal statutes). Additionally, state agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they were created. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374-75 (1986); *Florida Public Service Commission v. Bryson*, 569 So. 2d 1253, 1254-55 (Fla. 1990); *Charlotte County v. General Development Utilities, Inc.*, 653 So. 2d 1081 (Fla. 1st DCA 1995).

As provided above, we can only issue a declaratory statement concerning the applicability of statutory provisions, rules, or orders over which we have authority. Therefore, looking only to the controlling Florida Statutes, we find that we cannot consider commercial mobile radio service providers' applications for ETC designation because we lack jurisdiction and regulatory authority over such providers, pursuant to Sections 364.011(4), 364.02(13)(c), and 364.10, F.S.

#### IV. Conclusion

While we find that TruConnect has satisfied the requirements for the issuance of a declaratory statement, we decline to issue the affirmative declaration requested by TruConnect. Instead, we declare the following:

The Commission cannot and will not assert jurisdiction over TruConnect for the sole purpose of Lifeline-only ETC designation because TruConnect is a commercial mobile radio service provider exempted from the Commission's jurisdiction under Sections 364.011(4), 364.02(13)(c), and 364.10, F.S.

It is therefore,

ORDERED by the Florida Public Service Commission that TruConnect Communications, Inc.'s request for hearing on its petition for declaratory statement is denied as set forth in the body of this Order. It is further

ORDERED that TruConnect Communications, Inc. satisfied the requirements for the issuance of a declaratory statement, but we decline to issue its requested affirmative declaration. It is further

ORDERED that, for the reasons stated in the body of this Order, the Commission cannot and will not assert jurisdiction over TruConnect Communications, Inc. for the sole purpose of Lifeline-only ETC designation because TruConnect Communications, Inc. is a commercial mobile radio service provider exempted from the Commission's jurisdiction under Sections 364.011(4), 364.02(13)(c), and 364.10, F.S. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 12th day of March, 2021.



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ADAM J. TEITZMAN  
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Florida Public Service Commission  
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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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 Office of Commission Clerk, 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 Office of Commission Clerk, 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.