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Via Electronic Mail

May 5, 2008

Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399

Re: Docket No. 080065-TX - Motion to Dismiss Proceeding for Lack of Subject Matter Jurisdiction or in the alternative to Abate Proceedings Pending Federal District Court Decision on Subject Matter Jurisdiction ("Motion to Dismiss")

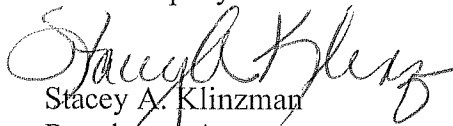
Sir/Madam:

Attached for filing in Docket No. 080065-TX is Vilaire Communications, Inc.'s Motion to Dismiss filed pursuant to 28-106-204(1) F.A.C. and a Motion for Oral Argument. Electronic copies of these documents also have been served upon the individuals listed on the service lists attached to these documents.

As jurisdiction is a threshold matter in this case, VCI respectfully submits that the Commission may not rule on VCI's pending motion for reconsideration of the Commission's discovery order until it has investigated this matter. Before the Commission can rule on what documents and information the parties must provide pursuant to the discovery phase of this proceeding, it must be determined if, or to what extent, the Commission has jurisdiction over the issues to be adjudicated therein. Further, VCI respectfully submits that irreparable harm will result if the Commission orders VCI to submit documents and information on matters outside of the Commission's jurisdiction.

Sincerely,

VCI Company


Stacey A. Klinzman
Regulatory Attorney

Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of Vilaire Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange company certificate status in the State of Florida.	DOCKET NO. 080065-TX DATED: May 5, 2008
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VILAIRE COMMUNICATIONS, INC.'S MOTION TO DISMISS PROCEEDING FOR LACK OF SUBJECT MATTER JURISDICTION OR IN THE ALTERNATIVE, TO ABATE PROCEEDINGS PENDING FEDERAL DISTRICT COURT DECISION ON SUBJECT MATTER JURISDICTION

Comes now, VCI Company, doing business in Florida as Vilaire Communications, Inc. ("VCI"), and, pursuant to Rule 28-106-204(1), moves the Florida Public Service Commission for an order dismissing this proceeding for lack of subject matter jurisdiction. Should the Commission choose not to dismiss this case, VCI moves this Commission for an order abating this proceeding pending the Federal District Court's decision regarding the Commission's jurisdiction to hear the subject matter of this proceeding.

I. EXECUTIVE SUMMARY

This proceeding arises out of Staff's interpretation and construal of the results of the Commission's audit of VCI's administration of the Lifeline and Link-Up program conducted between September and November 2006 and of responses to additional requests for information submitted by to Commission staff ("Staff") by VCI post-audit. In January, 2008, Staff recommended that the Commission take punitive action against VCI for alleged violations of federal law, federal rules, state statutes and Commission

rules¹, which recommendation was memorialized in the Commission's Notice of Proposed Agency Action issued February 13, 2008. The Commission seeks to rescind VCI's status as an Eligible Telecommunications Carrier and cancel its certificate to provide local exchange service as a competitive local telecommunications carrier ("CLEC Certificate")² on the basis of alleged violations of federal law and FCC rules governing ETCs. VCI protested the PAA Order and requested a hearing to resolve disputed issues of fact.³

The overarching issues in this case are 1) whether the Commission has the subject matter jurisdiction to disqualify VCI from participating in the federal universal service program and cancel VCI's CLEC Certificate based on alleged violations of the Communications Act of 1934, as amended (the "Act") and the FCC's ETC rules; 2) whether the Commission has the subject matter jurisdiction to disqualify VCI from participating in the federal universal service program and to cancel VCI's CLEC Certificate for alleged violations of the Florida law and Commission rules pertaining to universal service. In this proceeding, the Commission seeks to adjudicate issues regarding and compel discovery with respect to VCI's operations⁴ as an ETC.⁵

¹ Among the rules and statutes cited in the Commission's order are: 47 C.F.R. § 54.201(d)(1), 47 C.F.R. § 54.201(i), § 364.10(2)(b), F.S., 47 C.F.R. § 54.201(c) and Section 214(e) of the Telecommunications Act of 1934, as amended (the "Act").

² In re: Investigation of Vilare Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange carrier certificate status in the State of Florida, Docket No. 080065-TX, Order No. PSC-08-0090-PAA-TX ("PAA Order"), issued February 13, 2008.

³ Vilare Communications, Inc.'s Protest of Proposed Agency Action Order No. PSC-08-0090-PAA-TX Issued February 13, 2008 and Petition for Formal Hearing, filed March 5, 2008.

⁴ VCI's operations as an ETC are operational duties VCI has with respect to its offering of Lifeline and Link-Up service pursuant to the Act and the FCC's universal service rules. Its operations as an ETC encompass the method by which it provides Lifeline and Link Up service to eligible Florida consumers and reporting to the Universal Service Administrative Company ("USAC") to obtain reimbursement for revenues foregone in providing Lifeline and Link-Up service. VCI is required to report using FCC form 497's solely pursuant to federal rules to obtain reimbursement from the federal universal service fund. The Florida Legislature has not enacted law creating a Florida state universal service fund.

Of immediate import is the Commission's Motion to Compel VCI to comply with discovery requests pertaining solely to VCI's operations as an ETC under the federal universal service program. These discovery requests seek, inter alia., copies of VCI's FCC Forms 497 and information regarding the company's methods of reporting data on those Forms 497, documents and information regarding VCI's provision of toll limitation service under the FCC's universal service rules, copies of documents certifying that VCI's customers are eligible for the federal universal service program, information as to the number of Lifeline and Link-Up customers served and the method of delivery of local service to those customers, and information regarding VCI's private business relationship with ATT-Florida with respect to the provision of Lifeline and Link-Up service.

VCI has filed a Motion for Reconsideration of the Commission's order compelling discovery on these matters. However, this Commission cannot rule on the Motion for Reconsideration, nor can Staff depose VCI's witness with respect to the Universal Service issues, until the Commission has determined its jurisdiction to consider

⁵ Order Establishing Procedure in Docket No. 080065-TX, Order No. PSC-08-0194-PCO-TX, issued March 26, 2008 ("Procedural Order"), lists the following issues to be adjudicated with respect to VCI's operations as an ETC ("the Universal Service Issues"):

1. Is the PSC authorized to audit an ETC's records for compliance with applicable Lifeline, Link-Up, and ETC statutes, rules, processes, procedures, and orders?
2. Did VCI provide Lifeline service to its Florida customers using a combination of its own facilities and resale of another carrier's services between June 2006 and November 2006?
3. Did VCI correctly report Link-Up and Lifeline lines on USAC's Form 497 for reimbursement while operating as an ETC in Florida in accordance with applicable requirements?
- 4.(a) Does VCI provide toll limitation service to Lifeline customers using its own facilities?
 - (b) If so, is VCI entitled to obtain reimbursement for incremental costs of TLS?
 - (c) If yes, what is the appropriate amount of reimbursement?
5. Does the PSC have the authority to enforce an FCC statute, rule or order pertaining to ETC status, Lifeline, and Link-Up service?
- 6.(a) Has VCI violated any FCC statute, rule or order pertaining to ETC status, or Lifeline and Link-Up service?
 - (b) If so, what is the appropriate remedy or enforcement measure, if any?
- 7(a) Has VCI violated any PSC rule or order applicable to VCI pertaining to ETC status or Lifeline and Link-Up service?
 - (b) If so, what is the appropriate remedy, if any?

these matters. Were VCI to be ordered to comply with the Commission's discovery requests prior to the determination of subject matter jurisdiction, VCI would be irreparably harmed. As the Florida Appellate Court stated in Redland, if discovery is wrongfully granted, the complaining party is beyond relief as it has no adequate remedy on appeal. *The Redland Co., Inc. v. Atlantic Civil, Inc.*, 961 So. 2d 1004, 1005 (Fla. App. 2007).

Upon a review of relevant law and regulations, as set forth below, VCI concludes that by its actions, the Commission has assumed authority not delegated either by the United States Congress under the Act, by the Florida state legislature under Florida law, or otherwise authorized by law. Thus, the Commission lacks jurisdiction over the issues of this case regarding the Universal Service Issues and should dismiss this case as to those matters.

If the Commission should decline to dismiss these proceedings as to the Universal Service Issues, VCI will file a complaint in Federal District Court for the Northern District of Florida requesting the court to adjudicate this issue. Accordingly, the Commission should abate this proceeding until the Federal District Court issues a ruling on the Commission's assumption of jurisdiction over the Universal Service issues.

II. BACKGROUND

VCI holds Competitive Local Exchange Carrier ("CLEC") Certificate No. 8611 and was designated an Eligible Telecommunications Carrier by the Commission on May 22, 2006 in Docket No. 060144-TX. The company provides local exchange service to Lifeline and Link-Up eligible Florida consumers, in accordance with federal law and Federal Communication Commission rules, in the service area of Bell South

Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast Florida (“AT&T”).

The Lifeline program clarifies the Federal Communications Commission’s (“FCC”) and the states’ commitments to making local exchange service universally available to consumers and is codified at Section 254 of the Communications Act of 1934, as amended. Lifeline service furthers the FCC’s policy that consumers throughout the United States, including low-income consumers, have access to comparable telecommunications and information services at affordable rates. The Lifeline program requires that carriers designated as ETCs provide discounted local exchange service to consumers who participate in Lifeline eligible programs, such as food stamps, Section 8 and LIHEAP, and provide qualified consumers with a discount off of the carrier’s service connection fee.

As an ETC, VCI passes through to eligible consumers the FCC mandated discounts off of local exchange service and the connection fee. VCI also is eligible to obtain reimbursement, pursuant to the FCC’s rules, for revenues forgone in service Lifeline and Link-Up eligible consumers from the Universal Service Administrative Company (“USAC”), which administers the federal programs. VCI reports its foregone revenues on a monthly basis to the USAC on FCC Forms 497. VCI provides only Lifeline and Link-Up service and thus obtains reimbursement from the Low-Income Division of the USAC. VCI does not participate in the High-Cost funding program administered by the USAC.

This case arises from a Lifeline audit conducted by the Florida Public Service Commission staff (“Staff”) between September and November 2007, culminating in an

auditor's report issued November 19, 2007. VCI questioned the Staff regarding the Commission's authority to audit the Lifeline program as early as September 2007, but did not pursue the issue at that time in the interest of maintaining an amicable working relationship with Staff. It is VCI's understanding that, based on the audit findings, information obtained from both VCI and AT&T after the audit, and possibly other sources,⁶ Staff formally presented its allegations and recommended penalties to the Commission, asking the Commission to initiate compliance proceedings against VCI. The Commission accepted Staff's recommendation, and memorialized its decision in Order No. PSC-08-0090-PAA-TX, issued February 13, 2008. Thereafter, VCI timely filed its Protest of Proposed Agency Action and Petition for Formal Hearing on March 5, 2008, pursuant to which this matter has been set for a Section 120.57, Florida Statutes, hearing. In accordance with the requirements of *Cherry Communications, Inc. v. Deason*, 652 So. 2d 803 (Fla. 1995), the Staff assigned to this case have now been bifurcated into Prosecutorial Staff and Advisory Staff.

In furtherance of the anticipated hearing schedule, the Prosecutorial Staff conducted an Issues Identification meeting in which VCI participated, as did Advisory Staff. During that meeting, the two parties to this proceeding, Prosecutorial Staff and VCI, reached an accord regarding the wording of the specific issues to be addressed in this proceeding. The Prehearing Officer subsequently issued the Order Establishing Procedure on March 26, 2008, which accepted those issues and set forth the procedural requirements and filing dates for this proceeding.

Thereafter, Staff served VCI with Interrogatories and Requests for Production of

⁶ On February 2, 2008, VCI filed a public records request seeking production of, in sum, all documents regarding complaints by Florida consumers against VCI, all documents relied upon by Staff in making its allegations in the recommendation, and all documents by and between Staff and third-parties.

Documents (“Discovery Requests”) on March 31, 2008, to which VCI filed timely objections and responses (“Discovery Responses”). Staff then filed a Motion to Compel (“Motion”) on April 22, 2008, seeking to have discovery compelled by April 30. Order No. PSC-08-0258-PCO-TX was issued on April 25, 2008, before VCI was able to provide its Response to the Motion.

On May 2, 2008 VCI filed its Motion for Reconsideration, respectfully suggesting that Order No. PSC-08-0258-PCO-TP must be reconsidered, because it is based upon factual inaccuracies, as well as mistakes regarding the application of Florida law. Before this case can move forward, indeed before the Commission can rule on VCI’s Motion for Reconsideration of the Commission’s Order regarding discovery, the Commission’s jurisdiction over these matters must be determined.

III. STANDARD FOR MOTION TO DISMISS

A motion to dismiss for lack of subject matter jurisdiction may be brought at any time. *Fl. R. Civ. P. 1.140(b)*. Where, as here, a motion to dismiss questions the Commission’s authority to hear the subject matter of a case, the Commission must determine whether it has subject matter jurisdiction regardless of whether the allegations in a complaint are facially correct.⁷ If a motion to dismiss for lack of subject matter jurisdiction does not implicate the merits of a cause of action, a court must satisfy itself that it has the power to hear the case. *Garcia, M.D. v. Copernhaver, Bell & Associates, M.D.’s*, 104 F3d 1256, 1261 (11th Cir. 1997). Neither the truthfulness of allegations nor the existence of disputed facts are relevant to an adjudicatory body’s evaluation of whether it has subject matter jurisdiction. *Id.*

⁷ See, *In re: Request for arbitration concerning complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes*, Docket No. 001097-TP, Order No. PSC-02-0484-FOF-TP issued April 8, 2002.

It is well settled that the Commission must possess jurisdiction over the parties as well as the subject matter. *Keena v. Keena*, 245 So. 2d 665, 666 (Fla. Dist.Ct. App. 1971). Subject matter jurisdiction arises by virtue of law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence. *Jesse v. State*, 711 So. 2d 1179, 1180 (Fla. 2nd Dist. Ct. App. 1998). Subject matter jurisdiction is the power to hear and determine a cause. *Fla. Power & Light Co. v. Canal Auth.*, 423 So. 2d 421, 424 (Fla. App. 5th Dist. 1982). A complaint is properly dismissed if the Commission is asked to address matters over which it has no jurisdiction or if it seeks relief that the Commission is not authorized to grant. *See, Order No. PSC 01-02178-FOF-TP.*

IV. ARGUMENT

- A. NEITHER THE UNITED STATES CONGRESS NOR THE FCC CAN CONFER JURISDICTION UPON THE COMMISSION TO ADMINISTER THE FEDERAL UNIVERSAL SERVICE PROGRAM. THIS COMMISSION IS WITHOUT SUBJECT MATTER JURISDICTION UNDER FEDERAL LAW TO ADJUDICATE THE UNIVERSAL SERVICE ISSUES AND SHOULD DISMISS THIS CASE.

The Commission submits that in addition to the authority to designate ETCs, state commissions also “possess the authority to rescind ETC designations for failure of an ETC to comply with the requirements of Section 214(e) of the Telecommunications Act or any other conditions imposed by the state.”⁸ However, the United States Congress cannot neither confer jurisdiction upon nor require the Commission to adjudicate federal law pertaining to the federal universal service program. Congress also cannot confer jurisdiction upon or require a state commission to apply the provisions of federal law or

⁸ PAA Order, P. 8, citing *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Released March 17, 2005, FCC 05-46 (¶ 71-72) (“March 2005 Order”) as authority therefor.

the FCC's universal service rules upon state regulated carriers. The Commission obtains its powers and duties solely from the Florida Legislature pursuant to statute. Further the FCC has no authority to *subdelegate* duties and obligations conferred to it by Congress to any state commission. The upshot is that this Commission has no authority with respect to the ETCs or federal universal service fund other than that which the Florida Legislature has conferred upon it. Thus the Commission has no jurisdiction pursuant to the Act or FCC Orders to apply federal law as to or the FCC's federal universal service rules against VCI.

1. Congress Did Not Specify a Role for State Commissions with Respect to ETCs other than Designation thereof and Permitting ETCs to Relinquish Their Designations.

a. In the Act, a State Commission's Primary Role is to Designate ETCs. State Commissions Also May Permit ETCs to Relinquish their Designations. Regardless of the Act's provisions, Congress Cannot Constitutionally Mandate State Commissions to Do Anything.

47 USC Section 214(e)(2) sets forth a state commission's primary responsibility with respect to universal service, namely designation of ETCs:

...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)....

The Act also provides for a state commission to permit an ETC to relinquish its designation under 47 U.S.C. § 214(e)(4).

It is also true that Section 254(f) of the Act permits states to “adopt regulations not inconsistent with the [FCC’s] rules to preserve and advance universal service,” determine the method by which interstate telecommunications carriers will contribute to the preservation and enhancement of universal service, and adopt regulations to preserve and advance universal services within that state. 47 U.S.C. § 254 (f).

However, both the FCC and Federal Courts have construed Section 254(f) to apply to regulations promulgated by states for state universal service funding mechanisms only. For example, the FCC found CMRS providers required to contribute to state universal service support mechanisms pursuant to Section 254(f) of the Act. *In the matter of Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 1735, 1737 (FCC 1997). The FCC further found that Section 254(f) merely imposes an obligation on carriers within a state to contribute if the state establishes universal service programs. *In the Matter of Federal-State Joint Board on Universal Service; High-Cost Universal Service Support*, 20 FCC Rcd 19731, 19739 (FCC 2005).

Federal Courts agree with the FCC’s interpretation of the language in Section 254(f). *See Sprint Spectrum, L.P. v. State Corp. Comm’n*, 149 F.3d 1058, 1061 (10th Cir. 1998) (Section 254(f) empowers states to require telecommunications carriers that provide intrastate services to contribute financially to state universal service mechanisms); *WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1271 (10th Cir. Colo. 2007) (Section 254(f) authorizes a state to create its own universal service standards only to the extent that a state is providing state funding to meet those standards.)

The Act, then, does not provide for or contemplate duties for state commissions with respect to ETCs post-designation.⁹ Congress could have prescribed a larger role for state commissions with respect to universal service, but did not.¹⁰ Further, under the statutory construction maxim of *expressio unis est exclusion alterius*, it may be presumed that Congress intended to limit a state commission's role with respect to universal service.

b. Congress' Mandate that State Commissions Designate ETCs is Unconstitutional. The Commission Cannot Derive Authority to Regulate ETCs from Congress's Command to Designate ETCs.

Furthermore, Congress was without constitutional authority to compel state commissions to take any action with respect to any provisions of the Act. Simply put, the Federal Government cannot commandeer Florida's legislative processes by compelling it "to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992). Moreover, "Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Printz v. United States*, 521 U.S. 898, 935 (1997). The Supreme Court explained:

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the State's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not that whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system

⁹ Similarly, the FCC's universal service rules do not provide for action on a state commission's part, other than designation or relinquishment, for a carrier seeking low income funding. 47 C.F.R. § 54.313(a) provides that states must certify to the administrator that a recipient of high-cost funding is using that support for the purposes it is intended. Certification of low-income providers is unnecessary. The FCC has determined that a Lifeline provider uses universal service support for the purpose it was intended when that carrier passes through discounts to its Lifeline eligible customers. *In the Matter of Federal-State Joint Board on Universal Service; Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, 20 FCC Red 15095, 15105-15106 (FCC 2005).

¹⁰ Compare Sections 251, 252, and 271 of the Act, in which Congress prescribed a larger role for state commissions.

of dual sovereignty. *Id.*

By commanding that the Commission “shall” designate the ETCs that will be eligible to receive specific federal universal service support, *see* 47 U.S.C. §§ 214(e)(2) and 254(e), Congress crossed the constitutional separation of powers by commanding state commissions to act with respect to the federal universal service program. *See Petersburg Cellular Partnership v. Bd. of Supervisors of Nottoway County*, 205 F.3d 688, 701-05 (4th Cir. 2005). This Commission derived no authority from Congress’s unconstitutional act of ordering state commissions to designate ETCs.

c. The FCC Cannot Presume Authority Not Provided in the Act or Subdelegate Authority Delegated to it by Congress to Third-Parties, Such as State Commissions.

1. FCC Orders Opining that States Have Authority to Rescind ETC Designations Have No Basis in Law. The FCC Itself Has No Authority to Rescind ETC Designations.

To Commission also is mistaken to the extent that it relies on FCC orders for authority to rescind or revoke ETC designations. A review of FCC decisions reveals that the Commission has misconstrued language in FCC decisions or that the FCC itself fails to bolster its pronouncements with relevant cites to the Act. In fact, Congress did not authorize the FCC to revoke or rescind ETC designations in the Act. Federal law provides that the FCC cannot subdelegate its Authority to third parties. Beyond that, the FCC certainly cannot delegate to state commissions authority Congress did not confer in the Act, and the Act does not provide the FCC with authority to revoke or rescind ETC designations.

For example, Robert Casey, in his testimony, cites to the FCC’s March 17, 2005 Order at para. 60 for the proposition that, “[t]he FCC has stated

that states exercising jurisdiction over ETC proceedings should apply requirements in a manner that will best promote the universal service goals found in Section 254(b) of the Telecommunications Act of 1996 (Act).” *In the Matter of Federal-State Joint Board on Universal Service*, 20 FCC Rcd 6371, 6397 (FCC 2005), Para. 60 (“the March 17, 2005 Order”). The Commission’s reliance on this order is misplaced because the order was issued based on the Joint Board’s order making recommendations on the ETC *designation* process and the FCC’s rules regarding high-cost support. *Id.* at 6375, para. 9.

Upon review of the March 17, 2005 Order, it becomes clear that where the order references “states exercising jurisdiction over these proceedings,” the proceedings referenced are state ETC *designation* proceedings. Further, the “requirements” to be applied are the ETC *designation* requirements the FCC permits states to adopt pursuant to the March 17, 2005 Order. As the FCC states in the March 17, 2005 Order at para. 58: “We encourage state commissions to require all ETC applicants over which they have jurisdiction to meet the same conditions and to conduct the same public interest analysis outlined in this Report and Order.” In the March 17, 2005 Order at para. 59, the FCC further clarifies, “...we encourage state commissions to consider the requirements adopted in this Report and Order when examining whether the state should designate a carrier as an ETC.” Finally, it also becomes clear that the states are to apply the universal service principles enumerated in 47 U.S.C. § 254(b) with respect to ETC designations only.

With respect to revocation of ETC designations, the March 17, 2005 Order references the Joint Board’s statement that “state commissions possess the authority to rescind ETC designations for failure of an ETC to comply with the requirements of

section 214(e) of the Act or any other conditions imposed by the state.” Id. at 6402, para. 72. In n205, the FCC cites to the following order in support of this statement: *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling*, CC Docket No. 96-45, 15 FCC Rcd 15168, 15174, para. 15 (2000) (“the Western Wireless Order”). In the Western Wireless Order, the FCC states, at para. 15, “We also note that the state commission may revoke a carrier's ETC designation if the carrier fails to comply with the ETC eligibility criteria.” Upon review, it is clear that the FCC provides no legal authority for its opinion.¹¹

Indeed, no such authority exists. The FCC is subject to the provisions of the federal Administrative Procedure Act (“APA”), which provides that “[a] sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law.” 5 U.S.C. § 558(b). Moreover, the federal APA requires an express grant of statutory authority for an agency to impose a sanction. *See American Bus Ass’n v. Slater*, 231 F.3d 1, 6 (D.C. Cir. 2000). Neither the Act nor any other statute expressly authorizes the FCC to revoke its designation of an ETC under 47 U.S.C. § 214(e)(6). If the FCC cannot revoke an ETC designation under federal law, the Commission cannot evoke federal law for its authority to rescind VCI’s ETC designation.

2. The Commission Cannot Rely On FCC Orders for Authority to Regulate ETCs Because The FCC Cannot Subdelegate to Third-Parties, Such as State Commissions, Authority Conferred to it by Congress.

¹¹ The FCC cites to the Western Wireless Order for this proposition in at least one other document, also without citing to legal authority. *See, e.g., In the Matter of Federal-State Joint Board on Universal Service*, 19 FCC Rcd 10800 at Para. 76, n186.

In addition, the Commission cannot rely upon FCC orders for authority to regulate ETCs because the FCC cannot empower the Commission under the Act. In the Act, Congress delegated to the FCC specific duties and obligations. For example, Congress delegated to the FCC the authority to “execute and enforce” the provisions of the Act, 47 U.S.C. § 151, and to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions” of the Act. *Id.* § 201(b). *See National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 980-81(2005); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-78 (1999). Congress also granted the FCC broad authority to enforce compliance with its rules through various administrative sanctions. *See* 47 U.S.C. §§ 154(i), 159(c), 214(d), 225(e), 401(b), 503(b); *DeYoung v. Patten*, 898 F.2d 628, 634 (8th Cir. 1990).

However, in the Act, Congress delegated authority solely to the FCC to promulgate rules to implement the new universal service requirements, *see* 47 U.S.C. § 254(a), in accordance with universal service principles enumerated in the statute. *See id.* § 254(b). Congress did not delegate to the FCC the authority to *subdelegate* to state commissions its universal service rulemaking or its enforcement authority. Thus, any attempt by the FCC to subdelegate its § 254(a) authority or its power to determine violations of its universal service rules would be contrary to federal law.

Federal courts have provided guidance as to what duties may and may not be delegated to third-parties, such as state commissions, as well as the state commission’s proper role with respect to federal agency decision-making. The D.C. Circuit Court’s decision in *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir.2004),

where the court determined that the FCC could not lawfully subdelegate its authority under 47 U.S.C. § 251(d)(2) to "determine which network elements shall be made available to CLECs on an unbundled basis," is squarely on point. The court stated, "[w]hen a statute delegates authority to a federal officer or agency, subdelegation to a subordinate *federal officer or agency* is presumptively permissible absent affirmative evidence of a contrary congressional intent." *Id.* However, subdelegations to parties other than federal agencies are presumed to be improper unless expressly authorized by Congress. *See id.* Nowhere in the Act does Congress expressly authorize a non-federal agency to enter into decision making with respect to the federal universal service fund or ETCs. Thus, any attempt by the FCC to subdelegate its § 254(a) authority or its power to determine violations of its universal service rules to state commissions would be unlawful.

In conclusion, Congress can neither confer jurisdiction upon nor require the Commission to adjudicate federal law pertaining to the federal universal service program. Congress also cannot confer jurisdiction upon or require a state commission to apply the provisions of federal law or the FCC's universal service rules upon state regulated carriers. The Commission obtains its powers and duties solely from the Florida Legislature pursuant to statute. Further, the Commission cannot rely on FCC orders or rules for authority to enforce federal law or federal universal service rules. It is unlawful for the FCC to *subdelegate* duties and obligations conferred to it by Congress to any state commission. In short, the Commission has no jurisdiction pursuant to the Act or FCC Orders to enforce federal law or the FCC's federal universal service rules against VCI.

- B. THE LEGISLATURE HAS NOT GRANTED THE COMMISSION THE AUTHORITY TO ADMINISTER THE FUSF, OVERSEE ETC'S OPERATIONS OR RESCIND AN ETC DESIGNATION.

The Commission further must consider whether it has the authority under Florida law to interpret or enforce federal law or the FCC's regulations pertaining to universal service as well as whether the Florida legislature has enacted statutes under which the Commission has adopted rules pertaining to universal service that it can enforce against VCI. Florida courts have recognized that "State agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they were created" *Supra Telecommunications & Information Systems, Inc. v. BellSouth Telecommunications, Inc.*, 2003 WL 22964278, at *2 (Fla. P.S.C. 2003).

The Commission should find that Chapter 364 of the Florida Statutes does not authorize the Commission to enforce federal law pertaining to universal service or the FCC's universal service rules. The Commission should further find that the Legislature has not enacted statutes with respect to universal service that can be enforced against VCI in this proceeding. Finally, the Commission should find that it has not adopted the FCC's federal universal service rules it seeks to enforce against VCI. Thus, the Commission cannot revoke VCI's ETC designation or cancel VCI's CLEC Certificate for alleged violations of universal service rules.

- A. The Commission Must Dismiss This Case as to the Universal Service Issues Because Nothing in Chapter 364, Florida Statutes, Authorizes the Commission to Enforce Federal Law Pertaining to ETCs or the FCC's Universal Service Rules.

The Commission may not *presume* legislative grants of authority. The Legislature has never conferred upon this Commission any general authority to regulate

public utilities, including telephone companies. *City of Cape Coral v. GAC Util., Inc.*, 281 So. 2d 493, 496 (Fla. 1973). This Commission agrees that, because the Commission derives its power from the Legislature, jurisdiction requires a grant of legislature authority. *Sprint-Florida, Inc. v. Jaber*, 885 So. 2d 286, 290 (Fla. 2004). The Commission concedes this point. *See, e.g., Supra Telecommunications & Information Systems, Inc. v. BellSouth Telecommunications, Inc.*, 2003 WL 22964278, at *2 (Fla. P.S.C. 2003) ("State agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they were created"). The Commission recognizes that, despite its broad authority to regulate the telecommunications industry under § 364.01 Fla. Stat., it only has "those powers expressly granted by statute or necessarily implied." *AT&T Communications of the Southern States, Inc.*, 213 P.U.R.4th 383, 387 (Fla. P.S.C. 2001). The Commission must find that it has statutory authority in Chapter 364, Florida Statutes, to enforce federal law or the FCC's universal service rules against VCI. Because no such statute exists in Chapter 364, this Commission must find that it does not have subject matter jurisdiction to enforce federal law or the FCC's universal service rules. Thus, the Commission must dismiss this case as to the Universal Service issues.

1. No Statute in Chapter 364 Expressly Grants the Commission the Authority to Enforce Federal Law or Rules Against VCI and None Can be Interpreted to Grant that Authority.

In considering whether the Legislature has granted the Commission authority to enforce federal law, the Commission should bear in mind the rules of statutory construction. When the meaning of the statute is clear and unambiguous and conveys a clear and definite meaning, courts do not apply the rules of statutory interpretation. *A.R. Douglas, Inc. v. McRainey*, 137 So. 157, 151 (Fla. 1931). Terms

within statutes must be given their plain and ordinary meanings, which may be determined by reference to a dictionary or to case law when the term is not defined in statute. *Crist v. Jaber*, 908 So. 2d 426, 432 (Fla. 2005).

Where an agency charged with the enforcement of a statute has interpreted that statute, the courts will defer to the enforcing agency's interpretation and will not depart from that construction unless it is clearly erroneous. *P.W. Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla. 1988). Courts do not, however, rely solely on the principle of deference in interpreting statutes because all parts of a statute must be read together to achieve a consistent whole. *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992). Furthermore, the rules of statutory construction provide that the more specific statute controls over the general. *State ex rel. Johnson v. Vizzini*, 227 So. 2d 205, 207 (Fla. 1969). Finally, Florida law requires a reasonable interpretation of statutes and one which avoids an absurd result. *Goehring v. Broward Builders Exchange, Inc.*, 222 So.2d 801, 802 (Fla. Dist. Ct. App. 1969).

a. Section 364.10(2) Does Not Vest the Commission with Authority to Enforce Federal Law or the FCC's Rules

First of all, while the Commission claims in the PAA Order that it is “vested with authority under Section 364.10(2), Florida Statutes (F.S.), to regulate eligible telecommunications carriers pursuant to 47 C.F.R. Section 54.201,”¹² upon review and analysis of Section 364.10(2), F.S., the Commission must find that it is vested

¹² PAA Order, p. 3.

with authority under Section 364.10(2) F.S., if at all, only to *designate* ETCs. Fla. Stat. § 364.10(2) F.S.¹³ provides as follows:

(2) (a) ... an eligible telecommunications carrier shall provide a Lifeline Assistance Plan to qualified residential subscribers, as defined in a commission-approved tariff or price list, and a preferential rate to eligible facilities as provided for in part II. *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.* [Emphasis added.]

It would strain credulity if the Commission were to attempt to base subject matter jurisdiction to enforce federal law and rules on this the sentence in Section 364.10(2)(a). In merely referencing 47 CFR 54.201, a federal rule, section 364.10 F.S. does not specify the Commission's authority to enforce federal law and rules. The plain meaning of this section is that Section 364(2)(a) merely defines the manner in which a telecommunications company, which is itself defined in Section 364.02 F.S., is *designated* an ETC.

It is clear from the plain meaning of the terms in the statute that the Legislature has authorized the Commission only to designate ETCs, not enforce federal law and rules. To "designate" means, in pertinent part, "[t]o indicate, select, appoint, nominate or set apart for a purpose or duty...." *Black's Law Dictionary* 447 (6th Edition, 1990). The purpose for the designation under 364.10(2) is to be an eligible telecommunications carrier. The remainder of Section 364.10 specifies the duties for ETC's designated by the Commission: 1) provide Lifeline assistance to qualified consumers; 2) offer Lifeline

¹³ Section 364.10(2)(a) provides, in pertinent part: "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. 54.201.

eligible consumers the option of toll blocking; 2) forbear from collecting deposits from Lifeline eligible consumers if the consumer elects toll blocking; 3) forbear from charging Lifeline consumers for local number portability; 4) notify a Lifeline eligible consumer of impending termination of service and permit the subscriber 60 days to demonstrate continued eligibility 5) timely credit a Lifeline eligible consumer's bills with the Lifeline assistance discount; 6) notify agencies of the availability of the company's Lifeline service; and 7) forbear from discontinuing basic local exchange service for a consumer's failure to make payment for non-basic services.

The Commission itself has interpreted this statute to limit its authority with respect to ETCs. *See, 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*, 2007 Fla. PUC LEXIS 180 at *14 (Fla. PUC 2007) (The Commission uses Section 364.10, F.S. to designate ETCs and to require ETCs to provide a Lifeline Assistance Plan.). *See also VCI's ETC designation order*, Order No. PSC 06-0436-PAA-TX, Docket No. 060144-TX, issued May 22, 2006 at p. 2, 4 (“We have authority under Section 364.10(2), Florida Statutes, to decide a petition by a CLEC seeking designation as an eligible telecommunications carrier pursuant to 47 C.F.R. § 54.201.”)

The Commission has heretofore assumed jurisdiction to enforce federal law and rules in other cases based on express legislative grants of authority. For example, the Commission determined it had jurisdiction over federal rules limiting air emissions, but cited to Section 366.8255, F.S. for jurisdictional authority, which defines the term “Environmental laws or regulations” to include “all *federal*, state, or local statutes,

administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities and are designed to protect the environment.” Section 366.8255, F.S. *In re: Petition for approval of Integrated Clean Air Regulatory Compliance Program for cost recovery through Environmental Cost Recovery Clause, by Progress Energy Florida, Inc.*, 2005 Fla. PUC LEXIS 642, *3 (Fla. PUC 2005).

The Commission also has cited to express legislative grants of authority to resolve complaints arising under interconnection agreements. *See, e.g., In re: Request for arbitration concerning complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes*, 2002 Fla. PUC LEXIS 275, *37-*38 (Fla. PUC 2002) (stating that the Commission is not authorized to resolve disputes arising out of approved interconnection agreements without a grant of authority under state law and citing to Section 364.162(1) F.S. as express authority.)

It seems reasonable to assume that the Legislature knew and desired to limit the Commission’s duties and obligations with respect to ETCs, as there are other instances where the Legislature explicitly has directed the state and state agencies to comply with federal law. For example, Fl. Stat. 421.55 requires compliance with the federal Surface Transportation and Uniform Relocation Assistance Act of 1987 and Fla. Stat. 403.061 explicitly authorizes the Florida Department of Environmental Regulation to adopt rules and regulations consistent with federal law.¹⁴ The Legislature attached no similar requirement to Fla. Stat. 364.10.

¹⁴ Pursuant to Fl. Stat. § 403.061, the department [of public health] has have the power and duty to control and prohibit pollution... (7)... Any rule adopted pursuant to this act shall be consistent with the provisions of federal law....

b. Section 364.012(1) Does Not Vest the Commission with Authority to Enforce Federal Law or the FCC's Rules

Neither does Fl. Stat. 364.012(1) grant the Commission authority to enforce federal law or rules against ETCs. Fl. Stat. 364.012(1) directs the Commission to maintain liaisons with federal agencies whose policies and rulemaking affect Florida jurisdictional telecommunications companies, and encourages the Commission to participate in federal agency authority proceedings. Arguably, this statute permits the Commission to keep abreast of developments in federal law and federal regulations and to file comments in federal proceedings affecting Florida carriers. This interpretation rings true as the role of advisor is one that is appropriate for state commissions pursuant to federal law *See United States Telecom Ass'n*, 359 F.3d at 568. It does not, however, authorize the Commission to expend state funds to administer the federal universal service program, enforce federal law, or enforce the FCC's universal service rules.

c. Sections 120.80 and 364.025 F.S. Do Not Vest the Commission with Authority to Enforce Federal Law or the FCC's Rules

The Commission's reliance on Fla. Stat. §§ 120.80(13)(d) and 364.025 for the Commission's jurisdiction to enforce federal law or the FCC's rules is similarly misplaced. In its most pertinent part, Fla. Stat. § 364.025 authorizes the Commission to grant the petition of a CLEC to become a universal service provider and a carrier of last resort if it determines that the CLEC will provide "high-quality, reliable service." Fla. Stat. 364.025(5). The Commission also is authorized to set a period of time in which a CLEC must meet these "objectives and obligations." *Id.* Those provisions do not constitute "specific provisions of law" to be implemented by adopting the FCC's universal service rules. Fla. Stat. 120.52(8)(c).

Nor does the Florida Administrative Procedures Act grant such authority. APA § 120.80(13)(d) authorizes the Commission to employ “procedures” consistent with the Act when it is “implementing” that act. Clearly, § 120.80(13)(d) is not a jurisdictional grant. It simply allows the Commission to use procedures similar to those employed by the FCC under the Act, when it is obligated “to give practical effect to” the federal statute. *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.*, 278 F.3d 12231238 (11th Cir. 2002) (defining “implement”). Arguably, the Commission followed the dictates of Fla. Stat. 120.80(13)(d) during proceedings to designate VCI and ETC. In any event, § 120.80(13)(d) gives the Commission the limited authority to employ Act procedures and clearly does not authorize the Commission to adopt any substantive rules, much less the FCC’s rules.

- d. The Legislature Has Not Enacted A Law With the Same Provisions as 47 U.S.C. 214(e) Pertaining to Eligible Telecommunications Carriers that it Seeks to Enforce Against VCI.

The Commission also claims that it possesses the authority to rescind ETC designations for failure of an ETC to comply with the requirements of Section 214(e) of the Act.¹⁵ ¹⁶However, Chapter 364 F.S. provides the Commission with no support for this statement. Simply put, the Legislature has not enacted a law with provisions that are the same as or even similar to 47 U.S.C. Section 214(e) that it seeks to enforce against VCI.¹⁷

¹⁵ PAA Order, P. 8.

¹⁶ The Commission should be reminded that Section 214(e) contains no express delegation to state commissions other than designation of ETCs. Congress delegated to the FCC all other provisions in 214(e) and the FCC cannot subdelegate to state commissions pursuant to federal law.

¹⁷ 47 U.S.C. § 214(e)(1) provides: (1) Eligible telecommunications carriers. A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 [47 U.S.C. § 254] and shall, throughout the service area for which the designation is received--

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) [47 U.S.C. § 254(c)], either using its own facilities or a combination of its own facilities and resale

Nor has the Legislature authorized the Commission to regulate ETCs or administer the Universal Service program “as authorized by federal law.” The term “federal law” is mentioned in three (3) statutes found in Chapter 364. Two of the three statutes provide that certain types of services are either exempt from oversight by the Commission, Section 364.011, or free of state regulation whatsoever, 364.013, *except as specifically authorized by federal law*. In the third statute, the Legislature speaks to Lifeline providers, not the Commission. In Fla. Stat. Section 364.10(3)(a), Lifeline providers are cautioned that a Lifeline income eligibility test “must augment, rather than replace, the eligibility standards established by federal law...” Fl. Stat. Section 364.10(3)(a).

- e. Sections 364.01(1)(2) and (4) Do not Grant the Commission the Authority to Enforce Federal Law or the FCC’s Universal Service Rules Against VCI.

Finally, the Commission cannot rely upon the Legislature’s general grant of authority over telecommunications carriers Fla. Stat. Sections 364.01(1), (2) and (4), for the proposition that it can enforce federal law and the FCC’s universal service rules against VCI.

First, 364.01(1) and (2) give the Commission authority to exercise powers conferred Chapter 364 and exclusive jurisdiction to regulate telecommunications companies pertaining to matters set forth in Chapter 364. Furthermore, Sections 364(1) and (2) must be read with Section (4) in mind.

Section 364(4) enumerates the reasons for which the Commission must exercise jurisdiction conferred in Chapter 364, which are, in sum a) to protect the public

of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

health, safety and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices; b) encourage competition; c) ensure that monopoly services continue to be subject to price, rate and service regulation; d) promote competition; e) encourage providers to introduce new services; f) eliminate rules or regulations that delay or impair competition; g) ensure the fair treatment of all providers; 7) recognize the continuing emergency of a competitive telecommunications environment through flexible regulatory treatment of competitive local telecommunications services; and 8) continue to act as a surrogate for competition for monopoly services.

However, Section 364(4) has been amended by the Legislature with respect to competitive local telecommunications carriers. The Legislature adopted at least one statute governing competitive local exchange companies that implements a less stringent regulatory scheme than that developed for incumbent local exchange carriers. Specifically Fla. Stat. 364.337(5), provides that the Commission has continuing jurisdiction over *competitive local exchange carriers only* for the purposes of 1) establishing reasonable service quality criteria; 2) assuring resolution of service complaints, and 3) ensuring the fair treatment of all telecommunications providers in the telecommunications marketplace. Fla Stat. § 364.337 also exempts CLECs from the provisions of other statutes in Chapter 364.^{18, 19} The Commission, then, can exercise its

¹⁸ CLECs are exempt from, *iter alia*, Fla. Stat. § 364.17. *The commission may, in its discretion, prescribe the forms of any and all reports, accounts, records, and memoranda to be furnished and kept by any telecommunications company whose facilities extend beyond the limits of this state...*, and Fla. Stat., 364.18: *The commission, or any person authorized by the commission, may inspect the accounts, books, records, and papers of any telecommunications company....*

¹⁹ Commission rule 25-24.800, pertaining to CLECs, states that provisions of chapters 25-4, 25-9 and 25-14 don't apply to CLECs unless specified. Rule 25-24-835, which sets forth rules pertaining to CLECs, does not specify that 25-4.0201 or 25-4.019 (Records and reports in general) apply to CLECs. As Commission

exclusive jurisdiction over matters in Chapter 364, with respect to competitive telecommunications carriers, only for the limited purposes set forth in Section 354.337 F.S.

The Commission cannot rely on Section 364.01 for authority to enforce federal law and FCC rules against VCI for the following reasons. As an initial matter, it is impossible for the Commission to exercise *exclusive* jurisdiction over ETCs because the federal universal service program administered by the FCC under under § 254 of the Act cannot be within the exclusive purview of the Commission and the Legislature has not enacted a state universal service program. The Legislature also was aware that the FCC's jurisdiction undoubtedly extends to enforcing its own universal service rules and, therefore, those rules were beyond the reach of the Commission's exclusive jurisdiction.

Second, a review of Chapter 364 reveals that nowhere does the Legislature confer to the Commission jurisdiction over ETCs other than designation. Finally, the Commission's jurisdiction over CLECs is limited to the purposes enumerated in Section 364.337(5).²⁰ None of the purposes numerated in Section 364.337(5) are issues identified in this proceeding or addressed in the PAA Order and VCI's ETC operations pursuant to the federal universal service program implicate none of the purposes for which the Commission is permitted to oversee competitive local exchange companies in Fla.

The law favors a reasonable interpretation of statutes and one which avoids an absurd result. *See, e.g., Goehring v. Broward Builders Exchange, Inc.*, 222 So.2d 801, 802 (Fla. Dist. Ct. App. 1969). Because the Commission cannot exercise exclusive

rule 25-4-0665, Lifeline, is not among the rules listed as applicable to CLECs in Rule 25-24.835, it may be argued that Commission rule 25-4.0665 does not apply to CLECs.

²⁰ *See Sprint-Florida, Inc.*, 885 So 2d. at 292, wherein the Commission acknowledges that Fla. Stat. §§ 364.16(3)(a) and 364.163 restrict the Commission's broader authority with respect to definition of local calling areas set forth in 364.01(4).

jurisdiction over a federal program, has no specific authority elsewhere in Chapter 364 to regulate ETCs, and cannot oversee the ETC operations of competitive local exchange carriers under Chapter 364, it would be absurd to imply that Section 364.01 grants the Commission authority to enforce federal law pertaining to ETCs or the FCC's universal service rules.

- f. This Commission Cannot Maintain This Proceeding Solely on Federal Law and Thus, Must Dismiss this Proceeding as to the Universal Service Issues

In sum, none of the provisions of Chapter 364 of the Florida Statutes expressly or impliedly grant the Commission jurisdiction to enforce federal law pertaining to ETCs or enforce the FCC's universal service rules against VCI. Where only federal law applies, this Commission must dismiss this proceeding pursuant to the dictates of *Curtis v. Taylor*, 648 F. 2d 946 (5th Cir. 1986), stating that a state agency cannot take administrative action solely on federal statutes. See, also Order No. PSC-03-1892-FOF-TP, issued December 11, 2003, in Docket No. 030349-TP, In re: Complaint by Supra Telecommunications and Information Systems, Inc. Against BellSouth Telecommunications, Inc. Regarding BellSouth's Alleged Use of Carrier-to-Carrier Information (Sunrise Order), p. 4-5 (Dismissed as to complaint under 47 USC Section 222); In re: Complaint against BellSouth Telecommunications, Inc. for alleged overbilling and discontinuance of service, and petition for emergency order restoring service, by IDS Telecom, 2004 Fla. PUC LEXIS 419 at *21 (Fla. PUC 2004) (Count Five of complaint that BellSouth engaged in anticompetitive behavior under the Act dismissed because federal statute relied upon as sole the basis for relief).

C. THE FLORIDA LEGISLATURE HAS NOT ENACTED A STATUTE PERMITTING THE COMMISSION TO ADOPT THE FCC UNIVERSAL SERVICE RULES IT SEEKS TO ENFORCE AGAINST VCI AND NO SUCH RULES HAVE BEEN ADOPTED. THE COMMISSION MUST DISMISS THIS PROCEEDING AS TO THE UNIVERSAL SERVICE ISSUES.

4. The Florida Legislature Did not Enact A Statute Authorizing the Commission to Adopt the Federal Rules It Seeks to Enforce Against VCI and No Such Rules were Adopted.

The statutory scheme adopted by Congress to preserve and advance universal service permitted states to adopt universal service rules that are “consistent” with § 254 of the Act, 47 U.S.C. § 253(b), and “not inconsistent” with the FCC’s universal service rules. *Id.*, § 254(f). The Federal Government left it to the states to decide whether to expend state funds to regulate telecommunications companies in the interest of preserving and advancing universal service. Thus, the Legislature was free to enact laws concerning universal service and to authorize the Commission to adopt rules, pursuant to provisions of the FAPA, to advance universal service and to regulate ETCs, so long as the state’s rules were consistent with the FCC’s rules.

Similarly, the FAPA provides that “in the pursuance of state implementation, operation, or enforcement of federal programs,” the Commission is empowered “to adopt rules substantially identical to regulations adopted pursuant to federal regulations” provided it does so in accordance with statutory procedures. Fla. Stat. § 120.54(6). But the Commission may do so only if there is a “specific law to be implemented” and only to adopt rules that “implement or interpret specific powers and duties granted by [its] enabling statute.” *Id.* § 120.536(1). However, the FAPA also confines agency rulemaking to the specific powers and duties conferred by the agency’s enabling statute.

See Golden West Financial Corp. v. Florida Dep't of Revenue, 975 So.2d 567, 571 (Fla. Dist. Ct. App. 2008). It is clear that the Commission has the rulemaking authority to adopt rules “only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties.” *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.*, 794 So.2d 696, 700 (Fla. Dist. Ct. App. 2001). To date, the Florida Legislature has not done so.

The Legislature has not enacted a statute empowering the Commission specifically to adopt the FCC's universal service rules. Specifically, the Legislature granted the Commission the Authority to adopt rules only to administer the provisions of the statute under Fla. Stat. 364.10(3)(j), which provides, “The commission shall adopt rules to administer this section.” Commission Rule 25-4.0665, adopted by the Commission pursuant to Fla. Stat. 364.10(3)(j), in sum, requires ETCs to 1) provide 60 days written notice of termination of Lifeline service; 2) reinstate terminated customers who subsequently prove eligibility; 3) participate in the Lifeline service Automatic Enrollment Process; and 4) provide current Lifeline service company information to the Universal Service Administrative Company for posting on the USAC's website. 25-4.0665 F.A.C.

The Commission does not seek to enforce the rules promulgated in 25.4.0665 against VCI, indeed neither the PAA Order nor Staff's testimony allege that VCI violated any of the provisions of 25-4.0665 F.A.C. Instead, the Commission seeks to enforce against VCI federal universal service rules that the Legislature has not granted the Commission the authority to adopt and that the Commission has not adopted as well as

provisions of FCC orders not adopted as rules or enacted into law. *See* testimony of Robert Casey, pp. 27-32.

4. The Commission Cannot Enforce Unadopted Rules or Law Not Enacted by the Legislature Against VCI. The Commission's Attempt to Do So Violates the FAPA and VCI's Constitutional Rights to Due Process.

The FAPA provides, "Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by § 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practical." Fla. Stat. § 120.54(1)(a). The FAPA "places an affirmative duty on the part of all state agencies to codify their policies in rules adopted in the formal rulemaking process." *Florida Dep't of Business and Professional Regulation v. Investment Corp. of Palm Beach*, 747 So.2d 374, 380 (Fla. 1999). A clear purpose of the rulemaking provisions of the FAPA "is to force or require agencies into the rule adoption process." *Osceola Fish Farmers Ass'n v. Division of Administrative Hearings*, 830 So.2d 932, 934 (Fla. Dist. Ct. App. 2002).

The Commission has not adopted the FCC's universal service rules it seeks to enforce against VCI, indeed it is without authority to do so, yet the Commission, by this proceeding, persists in attempting to do so despite the FAPA's clear requirements. The Commission's reliance on WWC Holding Co. for the proposition that the Commission is not required to promulgate rules is misplaced. (Testimony of Robert Casey at 32). The Commission cannot avoid its rulemaking responsibilities under the FAPA with respect to standards it chooses to enforce against ETCs using an inapposite federal case.²¹

²¹ In *WWC Holding Co.*, Western Wireless sought the court's review of conditions imposed upon it by the Colorado PUC's in order to designate the company an ETC. *WWC*, 488 F.3d at 1262, and the court held

When the FAPA authorizes it to adopt FCC rules on the condition that statutory rulemaking procedures are followed, the Commission cannot eschew the requisite rulemaking in favor of simply enforcing FCC rules against VCI in an adjudication. These FCC rules are agency statements of general applicability, falling within the meaning of the term “rule” defined in Fla. Stat. Section 120.52:

“Rule” means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. Fla. Stat. Section 120.52(15).

The Commission’s attempt to enforce the FCC’s universal service rules on an ad hoc basis constitutes an invalid agency action taken without rulemaking, in violation of Fla. Stat. Section 120.56(4).²² See *Kerper v. Dep’t of Environmental Protection*, 894 So.2d 1006, 1010 (Fla. Dist. Ct. App. 2005).

4. The Enforcement of the FCC’s ETC Rules Violates Section 364.27 and Constitutes an Invalid Exercise of Delegated Legislative Authority

The Commission is empowered to investigate interstate rules of practice for or in relation to the transmission of messages or conversations taking place within Florida which in the Commission’s opinion violate the Act or the FCC’s orders and regulations. See Fla. Stat. § 364.27. But the Commission’s power with respect to such interstate matters is limited to referring the violations to the FCC by petition. See *id.* The

that the FCC did not require the PUC “to engage in a rule-making proceeding when imposing conditions pursuant to making an ETC designation.” WWC, 488 F.3d at 1278.

²² VCI does not waive its right to bring a complaint under Fla. Stat. Section 120.56(4) to any other agency competent to hear such a complaint and to the extent the Commission is authorized to adjudicate violations of Fla. Stat. Section 120.56, VCI submits that this motion qualifies as such a complaint.

Legislature has not granted the Commission the authority to impose a penalty for violations of the Act or the FCC's rules. *See id.* That limitation on the Commission's authority clearly expresses the Legislature's intent that the Commission not enforce the Act or the FCC's rules, and that it not impose a penalty for carrier practices that violate federal law.²³

The Commission's belief that VCI may have violated the FCC's ETC rules should have led it to do no more than file a complaint with the FCC under Section 208(a) of the Act, which provides:

Any person ... or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. * * * If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

The Commission clearly exceeds the limit on its jurisdiction imposed by Section 364.27 by attempting to penalize VCI for alleged violations of Section 214(e) of the Act and the FCC's ETC rules. If it wanted to enforce the FCC's rules, the Commission should have adopted those rules in the rulemaking required by the FAPA. *See Fla. Stat. §*

²³ Again, the Commission has recognized that it is without authority to take an administrative action based solely on federal statutes. *See BellSouth Telecommunications, Inc.*, 2004 WL 962756, at *6 (Fla. P.S.C. 2004); *Supra Telecommunications*, 2003 WL 22964278, at *2.

120.54(6). Having failed to do so, the Commission is left without any authority beyond the specific powers given it by Section 364.27. And it grossly exceeded those powers by attempting to penalize VCI for its alleged violations of federal law instead of referring the matter to the FCC as required by law.

4. By Seeking to Enforce Unadopted Rules and Law not Enacted by the Legislature, the Commission is Violating VCI's Due Process Rights

The Commission's attempt to enforce against VCI the provisions of federal law not enacted by the Legislature, and enforce rules it has not adopted, also constitutes a violation of VCI's due process rights under the Fourteenth Amendment of the United States Constitution and Section 9 of the Florida Constitution. The Commission's ETC designation confers upon VCI the right to obtain reimbursement from the federal Universal Service fund, and, as such, constitutes a property right. The Commission cannot deprive VCI of property without due process of law, which includes notice and an opportunity to be heard. To deprive VCI of its property rights in the ETC designation the Legislature and the Commission must provide VCI with "notice" of the circumstances under which the company can be deprived of this property right. Florida statutes as enacted and rules as adopted fail to provide VCI with the required Constitutional "notice" that it may be deprived of its property. In doing so, the Commission has violated VCI's due process rights under the Fourteenth Amendment of the United States Constitution and Section 9 of the Florida Constitution.

[SIGNATURE NEXT PAGE]

Respectfully submitted this 5th day of May, 2008.

A handwritten signature in cursive script, appearing to read "Stacey Klinzman", written over a horizontal line.

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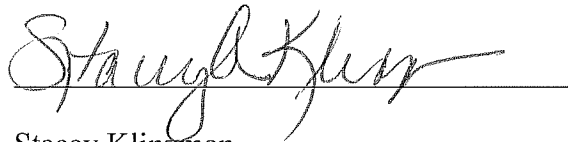
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss has been served via Electronic Mail* to the persons listed below this 5th day of May, 2008:

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