SUPREME COURT OF FLORIDA

Case Nos. SC03-235 & SC03-236

On Appeal from Final Orders of the Florida Public Service Commission

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VERIZON FLORIDA INC., ET AL.,
Appellants, Cross Appellees

and

SPRINT-FLORIDA, INC., ET AL.,
Appellants

v.

LILA A. JABER, ET AL.,
Appellees, Cross Appellees

v.

AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC, ET AL.,
Cross Appellants

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GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
ALEC	Alternative Local Exchange Carrier
APA	Florida Administrative Procedure Act
ECS	Extended Calling Service
FCC	Federal Communications Commission
ILEC	Incumbent Local Exchange Carrier
IXC	Interexchange Carrier
LATA	Local Access and Transport Area
LEC	Local Exchange Carrier
UNE	Unbundled Network Element
UNE-P	Unbundled Network Element Platform

PREFACE

Appellants and Cross Appellees in Case SC03-326, Verizon Florida Inc. ("Verizon"), ALLTEL Florida, Inc. ("ALLTEL"), Northeast Florida Telephone Company d/b/a NEFCOM, TDS TELECOM/Quincy Telephone, Smart City Telecommunications LLC d/b/a Smart City Telecom, ITS Telecommunications Systems, Inc., Frontier Communications of the South, Inc., and GTC, Inc. d/b/a GT Com, are incumbent local exchange carriers ("ILECs") in the State of Florida, and are referred to collectively as "ILEC Appellants." Appellants in Case SC03-325, Sprint-Florida, Inc. and Sprint Communications Company Limited Partnership, are referred to collectively as "Sprint." Appellees and Cross Appellees in Cases SC03-325 and SC03-326, the Florida Public Service Commission and its Commissioners, are referred to collectively as "the Commission." Cross Appellants in Cases SC03-325 and SC03-326, AT&T Communications of the Southern States, LLC and TCG South Florida, are referred to collectively as "AT&T." On July 11, 2003, this Court granted a motion to consolidate Cases SC03-325 and SC03-326.

The orders before this Court are the Commission's Order on Reciprocal Compensation, Order No. PSC-02-1248-FOF-TP, issued on September 10, 2002 (R.11:2034-97)[1] (hereinafter referred to as "Order"), and its Order Denying Motions for Reconsideration, Order No. PSC-03-0059-FOF-TP, issued on January

[1] Citations to the administrative record are by volume and page number; citations to transcripts of proceedings are by date, volume, and page number.

8, 2003 (R.13:2487-514) (hereinafter referred to as "Order on Reconsideration").

The Order was amended on September 12, 2002, by deleting Section III.B. That section, which was part of the Commission's discussion of the decision challenged in AT&T's Cross Appeal, was included "due to a scrivener's error." Order No. PSC-02-1248A-FOF-TP, at 1 (R.11:2098).

INTRODUCTION AND SUMMARY

The "default rule" that the Commission adopted — under which the ILEC Appellants' right to collect access charges depends on how competitors, such as AT&T, define their local calling areas for billing their retail customers — is contrary to the Legislature's 1995 Amendments to Chapter 364, Florida Statutes. Under § 364.16(3)(a), as the Commission itself had held in the *Telenet Order*, an alternative local exchange carrier ("ALEC") "is required *by statute* to pay the applicable access charges" based on the incumbent's tariffed, retail local calling areas even though the ALEC "may have a different [retail] local calling area than an incumbent LEC." Moreover, as the Commission had recognized in the *MCI Order*, "the specific limiting provisions" in § 364.163 that govern the setting of intrastate access charges prevent the Commission from "reduc[ing] access charges in *any other manner*" and "*must prevail* over the general grant[] of authority" in § 364.01, on which the Commission relied in the orders under review. Finally, the Commission failed to explain why it rejected one ALEC-proposed default rule because it discriminated against interexchange carriers ("IXCs"), but adopted another ALEC-supported rule that discriminates against those carriers to the same degree *and* also discriminates against ILECs.

In their answer briefs, the Commission and AT&T dispute little, if any, of this. Instead, both offer the same two arguments. First, they claim that the default rule is not contrary to the statutory provisions identified above, because those provisions do not state expressly that the Commission may not redefine local

calling areas for purposes of determining which calls are subject to reciprocal compensation rather than access charges. This claim is incorrect — § 364.16(3)(a) contains exactly such an express prohibition. In addition, both the Commission and AT&T ignore that the default rule authorizes ALECs to do what the Commission is prohibited from doing directly; namely, reduce the amount that an ALEC must pay for a call that is currently subject to access charges.

Second, the Commission and AT&T repeat the Commission's assertion in the Order that the originating carrier default rule was the most competitively neutral of the available options, because it was not supported by either the ILECs or the ALECs. *See* Order at 53 (R.11:2086). The record, however, unambiguously demonstrates that the ALECs initially supported the originating carrier rule. The Commission and AT&T do not address this record evidence, nor do they respond to the ILEC Appellants' demonstration that the rule the Commission adopted is *more* discriminatory than one of the ALEC-proposed rules that the Commission rejected on discrimination grounds. For these reasons, this Court should vacate this aspect of the orders under review.

In its Cross Appeal, AT&T challenges a separate decision that the Commission reached in the orders under review, involving the circumstances in which an ALEC's switch should be found to serve a geographic area comparable to that served by an ILEC's tandem switch, in which case the ALEC may charge the higher, tandem reciprocal compensation rate, rather than the lower, end-office rate. The Commission — largely adopting the arguments of AT&T and other

ALECs — held that an ALEC must show that it has: (1) deployed a switch to serve an area roughly the same size as that served by the ILEC's tandem switch, which serves numerous local calling areas; (2) obtained telephone numbers to serve the various local calling areas within that larger area; and (3) deployed its own facilities or facilities leased from an ILEC throughout that area. This is the minimum showing necessary to demonstrate that an ALEC is serving a given area and is consistent with the Federal Communications Commission's ("FCC") regulation governing this issue.

Even though it essentially prevailed on this issue below, AT&T now argues, based on its misreading of an order by a subdivision within the FCC known as the Wireline Competition Bureau, that the correct test is whether an ALEC's switch is *capable* of serving a broad geographic area, regardless of whether the ALEC has taken any steps to serve that area. Yet every switch — whether used by an ILEC or an ALEC — is theoretically *capable* of serving a broad geographic area; how wide an area simply depends on the length of the wires attached to that switch. Indeed, with sufficiently long wires a single switch could be used to serve customers located anywhere in an entire state, or even the entire country. If AT&T's interpretation of federal law were correct, therefore, ALECs would always be entitled to charge the higher, tandem reciprocal compensation rate. Because the FCC's regulation clearly contemplates that this will not always be the case, AT&T's interpretation of that rule must be wrong.

Nor is AT&T correct that the Commission is bound to adopt the Bureau's interpretation of the FCC's tandem-rate rule. The Bureau's order is not a decision of the FCC itself and is still subject to review by the FCC. Moreover, that order was intended to govern the parties to that proceeding only, not to establish rules applicable nationwide. For these reasons, the Commission correctly recognized, in rejecting AT&T's motion for reconsideration on this issue, that it was not bound by the Bureau's order. Tellingly, AT&T never mentions, let alone attempts to refute, the Commission's conclusion.

Finally, there is no merit to AT&T's claim that the Commission's decision is not competitively neutral or raises barriers to entry. AT&T points to no evidence in the record — and there is none — to support its claim that requiring an ALEC to charge the end-office rate, rather than the tandem rate, has "the effect of prohibiting the ability of [an ALEC] to provide . . . telecommunications service." 47 U.S.C. § 253(a). Furthermore, until an ALEC takes the minimum steps the Commission found were necessary to demonstrate the capability of an ALEC's switch — steps that the ALECs themselves proposed — an ALEC will not incur the costs of serving a large geographic area. Allowing that ALEC to charge the higher rate without incurring these costs would constitute an uneconomic subsidy. The Commission's refusal to require ILECs to subsidize their competitors in this manner does not raise any barrier to entry. For these reasons, the Commission's decision on this issue must be affirmed.

STATEMENT OF FACTS[2]

1. Regulatory Background. As the ILEC Appellants have explained (Init. Br. at 9-10), in the Telecommunications Act of 1996 ("1996 Act"), Congress established rules to ensure that an ALEC can interconnect its network with that of an ILEC. The 1996 Act requires interconnecting local exchange carriers ("LECs") "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Reciprocal compensation typically works as follows: When a customer of an ALEC calls a customer of an ILEC in the same local calling area, the ALEC pays the ILEC for "terminating" (or completing) that local call. Similarly, when it is the ILEC's customer that places a local call to the ALEC's customer, the ILEC pays the ALEC. Reciprocal compensation is generally computed on a minutes-of-use basis. Under federal law, reciprocal compensation rates are to be based on "a reasonable approximation of the additional costs of terminating such calls." *Id.* § 252(d)(2)(A).

In its 1996 *Local Competition Order*,[3] the FCC established a number of rules implementing the obligation to establish reciprocal compensation

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[2] This section is limited to the issue raised in AT&T's Cross Appeal. The ILEC Appellants' statement of facts with respect to the Commission's originating carrier default rule is set forth at pages 4-19 of the ILEC Appellants' initial brief.

[3] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

arrangements. One such rule implemented the "additional costs" requirement in 47 U.S.C. § 252(d). The FCC found that "the 'additional costs' incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved." *Local Competition Order*, 11 FCC Rcd at 16042, ¶ 1090. The ILEC Appellants' local networks utilize a hub-and-spoke, or spiderweb, design. At the outside of the network — the ends of the spokes — are switches[4] that directly serve customers in a particular local calling area, known as end-office switches. These end-office switches may be connected directly, one to another. In addition (or alternatively), the end-office switches are connected to a tandem switch — the hub of the wheel. These tandem switches do not directly serve customers, but instead route calls to the appropriate end-office switch and, therefore, serve a number of local calling areas. As a result, if a call originated on an ALEC's network is delivered to an ILEC's tandem switch, that call will normally have to be switched at least twice before it reaches its destination, imposing additional costs on the ILEC.

The FCC, therefore, authorized the use of two reciprocal compensation rates: a lower rate for traffic that an ALEC delivers directly to an ILEC's end-office switch ("end-office rate") and a higher rate for traffic that an ALEC delivers to an ILEC's tandem switch ("tandem rate"). *See id.* For example, Verizon currently offers all ALECs in Florida an end-office rate of slightly less than

[4] A switch is an electronic device that opens and closes the electrical pathway (or circuit) over which a telephone call travels.

three-tenths of a cent per minute ($0.0029030) and a tandem rate of slightly more than five-tenths of a cent per minute ($0.0050131).[5]

Turning to the rates that ALECs could charge ILECs for calls going in the opposite direction, the FCC recognized that ALECs might not adopt the ILECs' hub-and-spoke network design. Indeed, ALECs are not required to deploy their own switches — or *any* facilities of their own — in order to provide telecommunications service: under the 1996 Act and the FCC's regulations, ALECs may resell an ILEC's service or may provide service entirely over leased parts of the ILEC's network.[6]

If an ALEC does use its own switch and other facilities to provide service (alone or in combination with network facilities leased from an ILEC), the FCC held that an ALEC could be entitled to charge the same tandem rate as an ILEC, even if its switch directly served customers, like an ILEC end-office switch. *See Local Competition Order*, 11 FCC Rcd at 16042, ¶ 1090. Specifically, the FCC adopted a "geographic area test" for determining whether an ALEC could charge

[5] These rates appear in the interconnection agreement template that Verizon is required to make "available to any requesting carrier" pursuant to the conditions imposed by the FCC in its order approving the merger of Bell Atlantic and GTE. Memorandum Opinion and Order, *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent To Transfer Control*, 15 FCC Rcd 14032, 14175, ¶ 306 (2000).

[6] These leased parts of an ILEC's network are known as unbundled network elements, or "UNEs."

the tandem or the end-office rate for calls routed by its switch.[7] Pursuant to the FCC's regulation, known as the "tandem-rate rule," "[w]here the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem [reciprocal compensation] rate." 47 C.F.R. § 51.711(a)(3). The FCC, however, did not explicitly establish criteria for determining when an ALEC's switch "serves" a comparable geographic area.

2. Proceedings Before the Commission. In January 2000, the Commission established a proceeding to investigate the methods for compensating carriers for the exchange of traffic subject to 47 U.S.C. § 251. Numerous ALECs and ILECs, including the ILEC Appellants and AT&T, participated in that proceeding. Among the issues the Commission addressed was the question of how to determine whether an ALEC's switch is serving a geographic area comparable to the area served by the incumbent LEC's tandem switch for purposes of the FCC's tandem-rate rule. (R.2:209-11) The ILEC Appellants argued that an ALEC's switch must actually be providing service to customers in approximately the same geographic area served by the ILEC's tandem switch. Although this would entail a fact-specific inquiry, unless an ALEC is actually

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[7] Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9648, ¶ 105 (2001) ("*Intercarrier Compensation NPRM*").

serving customers over a dispersed area, it would not be incurring additional costs comparable to those that the ILEC incurs when it switches traffic at its tandem. *See* Order at 14-15 (R.11:2047-48); Verizon Post-Hearing Br. at 7-8 (R.5:932-33).

In contrast, the ALECs, including AT&T, argued that an ALEC switch serves a comparable geographic area when the ALEC has obtained telephone numbers — also referred to as NPA/NXXs[8] — associated with the various local calling areas in the area that an ILEC's tandem switch serves. As the ALECs explained, this information on the NPA/NXXs an ALEC has obtained "is readily available." Joint ALEC Post-Hearing Br. at 12 (R.6:1002); AT&T Post-Hearing Br. at 2-3 (R.5:962-63) (adopting position of Joint ALECs). The ALECs explained further that obtaining an NPA/NXX "requires the ALEC to make investments in both switch capacity and network capacity to offer service to the rate center with which the NXX is associated." Joint ALEC Post-Hearing Br. at 12 (R.6:1002); *see* Order at 17-18 (R.11:2050-51). As the witness for one ALEC explained, these investments can take the form of placing equipment in the buildings housing an ILEC's tandem or end-office switch (a practice known as collocation) or leasing transport facilities from the ILEC "to reach geographic areas where an ALEC's network does not currently reach." Order at 19 (R.11:2052).

[8] "NPA/NXX" refers to the first three and the middle three digits, respectively, in a 10-digit telephone number. For example, in the number (850) 488-0125, the NPA is 850 and the NXX is 488. Each NPA/NXX is associated with a local calling area (also known as a rate center) and is assigned to a specific switch.

3. The Orders Under Review. In resolving this issue, the Commission rejected the position advanced by the ILEC Appellants. Although the Commission acknowledged that it "may seem at first glance to be a logical approach" to look at "the quantity and dispersion of an ALEC's customers" in determining whether an ALEC's switch serves a geographic area comparable to the ILEC's tandem switch, the Commission concluded that "this approach would be more akin to basing the decision of whether an ALEC is entitled to the tandem rate on the ALEC's marketing success." *Id.* at 16 (R.11:2049). The Commission stated that this approach is inconsistent with the FCC's tandem-rate rule, "which bases the determination upon whether an ALEC serves a comparable geographic area, not a comparable customer base within this area." *Id.*

Instead, the Commission largely adopted the ALECs' position, holding that "an ALEC should be found to serve a geographic area if it has prepared and offered a product throughout that area," regardless of whether it actually serves customers throughout that area. *Id.* at 17 (R.11:2050). The Commission found that the "first step" in this analysis is determining whether the ALEC has "deploy[ed] a switch and [is] performing a switching function." *Id.* at 18 (R.11:2051). For this reason, the Commission rejected Sprint's claim that an ALEC's provision of service exclusively through the use of network elements leased from the ILEC should count in determining the geographic area served by

that ALEC's switch.[9] As the Commission explained, if the ALEC "utilize[s] the *ILEC's* local switching," it is "not . . . performing a switching function when providing service." *Id.* (emphasis added).

In addition to deploying a switch, the Commission found that it "is appropriate for an ALEC to provide a list of the NPA/NXXs that an ALEC has opened to show that it is prepared to serve customers in specific rate centers [*i.e.*, local calling areas]." *Id.* Finally, the Commission found that an ALEC should also "be required to make a showing of its actual capability to serve those customers" "through its own facilities, or a combination of its own facilities and UNEs leased from the ILEC." *Id.* at 18-19 (R.11:2051-52). Citing testimony from an ALEC witness, the Commission found that collocation and leasing transport from an ILEC are "examples of methods utilized to serve a comparable geographic area that would qualify an ALEC for the tandem rate." *Id.* at 19 (R.11:2052). However, the Commission stated that it was not "limit[ing] an ALEC's ability to qualify for the tandem rate by serving a particular area through some other combination of its own switch/facilities and facilities leased from an ILEC." *Id.*

AT&T sought reconsideration of the Commission's ruling on this issue, as well as on other aspects of the Order. In that motion, AT&T claimed that, "in order to prove that its switch 'serves' [a comparable geographic] area, an ALEC

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[9] When an ALEC provides service to a customer exclusively through facilities leased from an ILEC (including the ILEC's switching capability), the ALEC's service arrangement is known as the "UNE Platform" or "UNE-P."

need *only present evidence relating to the capability of its switch to serve the area*." AT&T Mot. for Recon. at 5 (R.12:2149). AT&T based its argument on its interpretation of a decision issued by the FCC's Wireline Competition Bureau, known as the *Virginia Arbitration Order*,[10] in which the Bureau arbitrated disputes between Verizon Virginia and three ALECs, including AT&T. *See id.* at 6-8 (R.12:2150-52). On January 8, 2003, the Commission issued its Order on Reconsideration, denying AT&T's motion for reconsideration. *See* Order on Reconsideration at 8 (R.13:2494). In denying AT&T's motion, the Commission explained that the "Wireline Bureau's decision does not appear to be binding on this Commission because the Bureau's decision was limited to the commercial parties included in that arbitration proceeding" and "is not recognized as an FCC order or rule." *Id.*

STANDARD OF REVIEW

The ILEC Appellants, Sprint, and AT&T all agree that, where there is a "reasonable doubt as to the lawful existence of a particular power that is being exercised" by the Commission,[11] this Court must, "[a]t the threshold, . . . establish

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[10] Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039 (Wireline Comp. Bur. 2002) ("*Virginia Arbitration Order*").

[11] *Radio Tel. Communications, Inc. v. Southeastern Tel. Co.*, 170 So. 2d 577, 582 (Fla. 1965).

the grant of legislative authority to act since the commission derives its power solely from the legislature."[12] *See* ILEC Appellants Init. Br. at 20; Sprint Init. Br. at 12; AT&T Ans./Init. Br. at 14-15. Although AT&T and the Commission imply that there is no such doubt about the Commission's authority to adopt its local calling area default rule, the Commission's own prior interpretation of the relevant statutory provisions is sufficient to establish that the Commission's authority in this area is, at the least, doubtful. Neither the Commission nor AT&T disputes that the Commission's prior interpretations of those statutory provisions are entitled to greater weight than the interpretations contained in the orders under review. *See, e.g.*, *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988) (deference accorded to "contemporaneous construction of a statute by [an] agency"); *Miller v. Agrico Chem. Co.*, 383 So. 2d 1137, 1139 (Fla. 1st DCA 1980) (courts "give greater weight to the first administrative interpretation, and reject [agency's] later . . . revision" where change, as here, is unexplained); ILEC Appellants Init. Br. at 20-21.

ARGUMENT

I. THE COMMISSION'S DEFAULT RULE IS CONTRARY TO STATE LAW AND ARBITRARY AND CAPRICIOUS

A. The Commission Is Precluded from Altering the Intrastate Access Charge Regime Established by the Legislature

It is undisputed that the Legislature's 1995 Amendments to Chapter 364, Florida Statutes — in particular, §§ 364.16(3)(a) and 364.163 — prohibit the

[12] *United Tel. Co. v. Public Serv. Comm'n*, 496 So. 2d 116, 118 (Fla. 1986).

Commission from modifying the Legislature's intrastate access charge regime.[13] Nor is there any dispute that, under the default rule the Commission adopted, an ALEC can change the rate it must pay an ILEC based on how the ALEC defines its retail local calling areas. For example, prior to the orders under review, a call from an ALEC customer in Sarasota to an ILEC customer in Tampa had been subject to intrastate access charges — even if the ALEC billed its customer for a local call. Under the originating carrier default rule, however, if that ALEC defines its retail local calling area to include both Sarasota and Tampa, it will only have to pay the ILEC the much lower reciprocal compensation rate. *See* ILEC Appellants Init. Br. at 10 & n.9, 28, 43.[14]

The Commission and AT&T, however, claim that the Commission is authorized to effect this reduction in the rate that an ALEC must pay an ILEC for

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[13] The Commission also agrees with the ILEC Appellants and Sprint that the FCC, in the *Local Competition Order*, "left the state commissions to act where state commissions previously had authority to act" and did not preempt any existing state law limitations on that authority. Commission Ans. Br. at 10-11; *see* ILEC Appellants Init. Br. at 37-40; Sprint Init. Br. at 23-24. AT&T does not dispute this. *See* AT&T Ans./Init. Br. at 19. Contrary to the Commission's claim (at 10), however, the ILEC Appellants do not argue here that the originating carrier default rule violates paragraph 1035 of the *Local Competition Order*. *See* ILEC Appellants Init. Br. at 38 n.31 (reserving the right to raise federal law arguments against the Commission's default rule in later federal court case).

[14] As the ILEC Appellants explained (Init. Br. at 44 n.40 (citing cases)), this default rule improperly delegates to the ALECs the unfettered discretion to determine which routes will be subject to reciprocal compensation and which routes will be subject to access charges. Neither the Commission nor AT&T addresses this constitutional infirmity in the Commission's default rule.

such calls based on the Commission's general authority under § 364.01 and because Chapter 364 purportedly lacks "any prohibition against the Commission defining a local calling area for reciprocal compensation purposes." Commission Ans. Br. at 14; *see id.* at 15-17; AT&T Ans./Init. Br. at 23-24. But Chapter 364 does contain such a prohibition, as the Commission itself had previously held in the *Telenet Order*.[15] Furthermore, the Commission and AT&T have no response to the ILEC Appellants' demonstration that the default rule would indirectly accomplish a reduction in ILECs' intrastate access charge rates, which the Commission is prohibited from doing directly.[16] Finally, the Commission's and AT&T's continued reliance on the Commission's general authority under § 364.01 cannot be squared with either the Commission's own interpretation of that

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[15] *In re Petition for Arbitration of Dispute with BellSouth Telecomms., Inc. Regarding Call Forwarding, by Telenet of South Florida, Inc.*, 97 F.P.S.C. 4:519, 1997 Fla. PUC LEXIS 476 (1997) ("*Telenet Order*").

[16] The ILEC Appellants, however, do not contend, as the Commission claims, that these provisions guarantee them a particular amount of access charge revenue. *See* Commission Ans. Br. at 4, 14. Once access charges are set, the amount of revenue an ILEC receives depends on the number of calls that are made. Instead, the ILEC Appellants' argument is that the Commission lacks authority to change the rate paid for completing a particular call — either directly (by reducing the access charge) or indirectly (by letting an ALEC reclassify a call from toll to local).

provision in the *MCI Order*[17] or the Legislature's 1999 Amendments to the Administrative Procedure Act ("APA").

1. Section 364.16(3)(a) expressly precludes the Commission from permitting ALECs to use "local interconnection arrangement[s]" to avoid paying the "access service charges [that] would otherwise apply" to a particular call — that is, in the absence of the local interconnection arrangement. § 364.16(3)(a), Fla. Stat. (2002). Ensuring that calls subject to access charges at the time of the adoption of the 1995 Amendments remained subject to those charges after the institution of competition in local telephone markets was so important to the Legislature that § 364.16(3)(a) is one of very few provisions that the Commission is expressly precluded from waiving for any ALEC. *See id.* § 364.337(2); ILEC Appellants Init. Br. at 7-8.

In the *Telenet Order*, the Commission expressly adopted this interpretation of § 364.16(3)(a). The Commission held that "Section 364.16 (3)(a) . . . does not allow an ALEC" to use its "authority to designate its local calling area in whatever way it chooses" to avoid paying access charges for calls that cross the boundaries of one of the ILEC's tariffed local calling areas. *Telenet Order*, 1997 Fla. PUC LEXIS 476, at *21. Therefore, even though "an ALEC may have a different local calling area than an incumbent LEC" for purposes of billing its retail customers, "it

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[17] *In re Complaint by MCI Telecomms. Corp. Against GTE Florida Inc. Regarding Anti-Competitive Practices Related to Excessive Intrastate Switched Access Pricing*, 97 F.P.S.C. 10:681, 1997 Fla. PUC LEXIS 1430 (1997) ("*MCI Order*").

is required *by statute* to pay the applicable access charges." *Id.* at *22 (emphasis added).

Sections 364.02(2) and 364.385(2), also adopted as part of the 1995 Amendments, similarly prevent the Commission from approving changes to local calling areas — in this case, by creating new, ILEC, retail Extended Calling Service ("ECS") areas — that result in the avoidance of access charges. *See* ILEC Appellants Init. Br. at 30-32. Although previously approved ECS areas had the effect of exempting calls in those areas from intrastate access charges, new ECS areas can be approved as *non-basic* local service only; the pricing rules for non-basic services require the ILEC to impute the access charges for such calls. *See Florida Interexchange Carriers Ass'n v. Clark*, 678 So. 2d 1267, 1269 & n.4 (Fla. 1996); *see also* ILEC Appellants Init. Br. at 5 n.3.

Neither the Commission nor AT&T addresses the inconsistency between the Legislature's rule for new ECS areas and the Commission's default rule.[18] And, although they attempt to distinguish the *Telenet Order*, neither confronts the Commission's express holding in that case or attempts to square the

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[18] Thus, AT&T is incorrect in suggesting that its reading of § 364.16(3)(a) "put[s] ILECs and ALECs on equal footing." AT&T Ans./Init. Br. at 22. While ILECs cannot avoid access charges by creating new ECS areas, ALECs can avoid access charges by expanding their local calling areas. Furthermore, as explained below (*see infra* Part I.B), the Commission's default rule also discriminates against IXCs, which will continue to pay access charges on calls within the ALECs' expanded local calling areas.

Commission's default rule with that holding.[19] To the contrary, AT&T acknowledges that, "at the time of the *Telenet Order*, the Commission had recognized the right of ALECs to establish their own local calling areas for purposes *only of their relationship with retail customers*." AT&T Ans./Init. Br. at 30 (emphasis added).[20] AT&T, however, ignores the Commission's conclusion that the independence of an ALEC's retail local calling areas and its obligation to pay access charges is "by statute" — namely, § 364.16(3)(a). *Telenet Order*, 1997

[19] The Commission and AT&T incorrectly claim that the Commission's interpretation of § 364.16(3)(a) was limited to the specific facts at issue in the *Telenet Order*, which involved call forwarding. *See* Commission Ans. Br. at 20; AT&T Ans./Init. Br. at 30-31. Indeed, neither the Commission nor AT&T points to anything in the order suggesting that, when the Commission held that "an ALEC may have a different local calling area than an incumbent LEC" but "is required by statute to pay the applicable access charges," it referred only to local calling areas established by reselling an ILEC's call-forwarding service. *Telenet Order*, 1997 Fla. PUC LEXIS 476, at *22. Nor do they offer any reason why the meaning of § 364.16(3)(a) could differ based on the means an ALEC uses to create its larger local calling areas.

[20] Thus, AT&T demonstrates the error in its claim that its right to designate a call as local for retail billing — a right that the ILEC Appellants do not dispute — "carries with it" the right to have those calls treated as local for purposes of intercarrier compensation. AT&T Ans./Init. Br. at 20. Not only did the Commission hold otherwise in the *Telenet Order*, but numerous other state commissions have as well — even though these "other state commissions . . . allow ALECs to define their local calling areas in a different geographic configuration than that of the ILEC," *id.* at 27, they have rejected the claim that the originating carrier's retail local calling areas control whether access charges apply, *see* ILEC Appellants Init. Br. at 41 n.35 (citing decisions of 10 state commissions).

Fla. PUC LEXIS 476, at *22.[21] The Commission's later interpretation of that section to permit an ALEC's definition of its local calling areas to alter its obligation to pay access charges, therefore, is an unexplained departure from precedent and, accordingly, is entitled to no deference; the Commission's error warrants vacatur of the Commission's default rule.

2. In § 364.163, the Legislature established a comprehensive system for the establishment and modification of intrastate access charges and limited the Commission's authority to ensuring that the Legislature's mathematical formulas are applied correctly. That section, therefore, precludes the Commission from directly reducing or increasing the intrastate access rates that an ALEC pays to an ILEC.[22] Indeed, the Commission previously held that this section "is a clear delineation of the process for reducing access charges and of [the Commission's] authority in this area," and that other, general provisions of Chapter 364, cannot "be construed as authorizing [the Commission] to reduce access charges *in any*

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[21] Thus, the Commission is incorrect in claiming that the orders under review here represent the "first instance" where the Commission addressed the provisions of state law that govern the relationship between an ALEC's retail calling areas and its obligation to pay access charges. Commission Ans. Br. at 19.

[22] AT&T incorrectly claims that § 364.163 does not prevent the Commission from adopting its default rule because that section "excludes local interconnection arrangements from its provisions." AT&T Ans./Init. Br. at 22. Contrary to the implication that AT&T seeks to leave, § 364.163 does not state that all *telephone calls* exchanged between an ALEC and an ILEC are excluded from the access charges established under that section. Instead, § 364.163 simply states that a local interconnection *arrangement* is not, itself, a "network access service[]" to which access charges apply. § 364.163, Fla. Stat. (2002).

other manner for any other reason." *MCI Order*, 1997 Fla. PUC LEXIS 1430, at *17 (emphasis added).

The orders under review contain no mention of the *MCI Order*, nor does AT&T address it in its brief.[23] The Commission's attempt to distinguish that order in its brief is limited to the claim that, in the orders under review, it "did not reduce access charge rates." Commission Ans. Br. at 20. But the Commission *has* reduced the rate that ILECs are permitted to charge ALECs for the delivery of interexchange calls to the ILEC's local customers. *See* ILEC Appellants Init. Br. at 28. Although the Commission did not do so directly — which it concedes it lacks authority to do — the Commission's default rule indirectly achieves that same result by allowing an ALEC to reduce the rate it will pay for a particular call by defining its retail local calling area to include that call. Because the Commission cannot "do indirectly that which [it] is prohibited from doing directly," the Commission's default rule exceeds its authority under state law and must be vacated. *Green v. Galvin*, 114 So. 2d 187, 189 (Fla. 1st DCA 1959); *see MCI Order*, 1997 Fla. PUC LEXIS 1430, at *13-*14 ("when a statute specifies a certain

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[23] AT&T, however, relies on a recent amendment to Chapter 364. *See* AT&T Ans./Init. Br. at 17, 23 (citing Ch. 2003-32, Laws of Fla.). That amendment, however, permits a LEC *voluntarily* to reduce its intrastate access rates and to increase its basic local service rates in a revenue-neutral manner. *See* Ch. 2003-32, § 6, at 7-8, § 15, at 16-17, Laws of Fla. It does not support the Commission's default rule, which permits *ALECs* to reduce the amount they pay an ILEC.

process by which something must be done, it implies that it shall not be done in any other manner”).

3. As the Commission did in the orders under review, the Commission and AT&T claim that the general provisions in § 364.01 authorized the Commission to adopt the default rule at issue here, notwithstanding the prohibitions in §§ 364.16(3)(a) and 364.163. *See* Commission Ans. Br. at 12-13, 15-17; AT&T Ans./Init. Br. at 18-19; Order at 39-40 (R.11:2072-73). The Commission, however, had previously held that “the specific limiting provisions of [§ 364.163] *must prevail* over the general grants of authority in” other provisions of Chapter 364, including § 364.01. *MCI Order*, 1997 Fla. PUC LEXIS 1430, at *15 (emphasis added). Neither the Commission nor AT&T makes any attempt to square this earlier interpretation of these sections with the Commission’s claim, in the orders under review, that its new interpretation is necessary to “give[] each statutory provision an area of operation.” Order at 40 (R.11:2073); *see* ILEC Appellants Init. Br. at 32 & n.25.

In any event, pursuant to the Legislature’s 1999 Amendments to the APA, agencies no longer “have the authority to implement statutory provisions setting forth general legislative intent or policy.” § 120.536(1), Fla. Stat. (2002); *see Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club. Inc.*, 773 So. 2d 594, 599 (Fla. 1st DCA 2000) (“the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute”). Therefore, § 364.01 could not provide the necessary authorization for the

Commission's default rule even if the Commission and AT&T were correct — and they are not — that §§ 364.16(3)(a) and 364.163 do not preclude adoption of that rule. *See* ILEC Appellants Init. Br. at 34-37.

The Commission's sole response (AT&T has none) is to claim that, pursuant to § 120.56(4)(a), this argument "must be taken to the Division of Administrative Hearings." Commission Ans. Br. at 28. But the ILEC Appellants are *not* relying on § 120.56(4)(a) — that is, the ILEC Appellants are *not* claiming that the Commission's default rule was "not adopted . . . by the rulemaking procedure provided by § 120.54." § 120.56(4)(a), Fla. Stat. (2002).[24] Instead, the ILEC Appellants argue — and the Commission does not dispute — that the Legislature's 1999 Amendments, which expressly state that general statutory provisions do not confer rulemaking authority, provide the interpretive rule that any court or administrative body must apply in construing § 364.01. Those amendments overruled this Court's 1993 holding that § 364.01, standing alone, confers broad rulemaking authority on the Commission. *See Florida Interexchange Carriers Ass'n v. Beard*, 624 So. 2d 248, 251 (Fla. 1993); ILEC Appellants Init. Br. at 37.

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[24] To the contrary, the ILEC Appellants noted (Init. Br. at 12 n.12, 34 n.26), and do not dispute here, the Commission's reliance on its statutory exemption from that rulemaking procedure in conducting the proceedings resulting in the orders under review. *See* Order at 7 (R.11:2040) (citing § 120.80(13)(d), Fla. Stat. (2002)). The Commission, however, does not dispute that its default rule is a "rule," as defined in the APA. *See* § 120.52(15), Fla. Stat. (2002).

B. The Commission's Selection of the Originating Carrier Default Rule Was Arbitrary and Capricious

Even if the Commission's default rule did not violate the specific provisions of Chapter 364 — and it does — the Commission acted arbitrarily and capriciously in selecting the default rule. *See*, *e.g.*, *General Tel. Co. v. Marks*, 500 So. 2d 142, 145 (Fla. 1986) (arbitrary and capricious Commission rule is invalid). In rejecting the ALEC-proposed LATA-wide local calling area rule — which would exempt from intrastate access charges all calls exchanged between an ILEC and an ALEC in a given LATA — the Commission found that the rule "discriminate[s] against IXCs." Order at 53 (R.11:2086); *see also* ILEC Appellants Init. Br. at 13 & n.13, 17-18 & n.18 (describing LATA-wide proposal). As the Commission explained, "[w]hile ALECs and ILECs would exchange all traffic in a LATA at reciprocal compensation rates, IXCs would continue to pay originating and terminating access charges for carrying traffic over some of the same routes." Order at 53 (R.11:2086). But the same is true of the originating carrier local calling area default rule. *See* ILEC Appellants Init. Br. at 42-44. Indeed, under the Commission's default rule, *both* IXCs *and* ILECs will be required to pay access charges for carrying calls that an ALEC would pay the reciprocal compensation rate for carrying. Only using the ILECs' state-commission-approved, tariffed local calling areas — under which IXCs, ILECs, and ALECs all pay intrastate access charges on the same set of calls, no matter who carries them — avoids this discrimination.

The Commission did not address this issue in its Order on Reconsideration — even though Verizon and ALLTEL made the same argument before the Commission (R.11:2124) — and neither the Commission nor AT&T addresses it here. The Commission's failure to explain why this discrimination was sufficient to disqualify the LATA-wide rule, but not also the originating carrier rule renders its decision to adopt its default rule arbitrary and capricious.

Instead of addressing the argument that the ILEC Appellants raised, the Commission and AT&T defend the originating carrier rule by claiming that it was the most competitively neutral option available, because it supposedly was not favored by either the ILECs or the ALECs. *See* Commission Ans. Br. at 21-27; AT&T Ans./Init. Br. at 28-29. But this rule is not competitively neutral — as explained above, the rule discriminates against IXCs and ILECs. Indeed, the Commission acknowledged the discrimination against ILECs, finding that the originating carrier rule would have the "anomalous and inequitable" result that compensation would "vary depending on the direction of the call" — with ILECs required to pay access charges and ALECs able to pay the lower reciprocal compensation rate. Order at 54 (R:11.2087).[25] For this reason, the Commission's staff concluded that the originating carrier rule is "not competitively neutral" and

[25] Even if the Commission were correct in speculating that such discrimination in favor of ALECs and against ILECs will be reduced over time, as they adopt "more uniform[]" local calling areas (and the Commission cited no record evidence or other support for its supposition), Order at 54 (R.11:2087), the originating carrier rule would still discriminate against IXCs.

"encourage[s] gaming" by ALECs. (R.7:1343-44, 1346) Given the advantages this default rule confers on ALECs, there is no basis to the Commission's suggestion that the ILEC Appellants are "free to negotiate a definition that best suits each interconnection agreement to which they are a party." Commission Ans. Br. at 27; *accord id.* at 9.[26]

Moreover, the record refutes the Commission's claim that the originating carrier rule was not "in accordance with the ILECs' preference for their existing retail local calling areas or the ALECs' preference for LATA-wide local calling." Order at 53 (R.11:2086). In fact, the ALECs initially supported the originating carrier rule. The main ALEC witness, who testified on behalf of AT&T and other ALECs, argued that the Commission should allow ALECs "to define calling areas that cover as much of a LATA or perhaps even beyond the LATA as they deem appropriate, and [should] not subject the ALEC to access charges for terminating calls beyond the calling areas that the ILEC happens to have historically defined." July 6, 2001 Tr., Vol. 4, at 590, 691. Indeed, when the Commission's staff recommended adoption of a *LATA-wide default rule*, it explained that this rule "is not the ALECs['], not the ILECs['], [and is] . . . by definition *competitively*

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[26] Indeed, as one Commissioner stated in the record, the originating carrier default rule "puts the ALEC in a better negotiating position." Dec. 17, 2002 Tr. at 33. The Commission staff likewise recognized that the originating carrier default rule "in some way[s] is more biased [against] the ILECs." *Id.* at 28.

neutral." (R.7:1344 (emphases added))[27] In adopting the originating carrier rule, therefore, the Commission adopted the rule that the ALECs had preferred all along — there is nothing "competitively neutral" about that decision.

II. THE COMMISSION'S INTERPRETATION OF THE FCC'S TANDEM-RATE RULE IS CONSISTENT WITH FEDERAL LAW[28]

A. The Commission's Minimal Evidentiary Requirements Were Supported by the ALECs and Are Not Burdensome

Under the FCC's rules, reciprocal compensation rates may "vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch." *Local Competition Order*, 11 FCC Rcd at 16042, ¶ 1090. If an ALEC adopts the same tandem/end-office network design as the ILEC Appellants', then the ALEC can charge the higher tandem rate for traffic that an ILEC delivers to the ALEC's tandem switch. However, the FCC also adopted a rule that entitled an ALEC to charge the higher tandem rate even when the ALEC does not use a tandem/end-office network design. Under the tandem-rate rule, "[w]here the switch

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[27] The Commission's staff stated further that, "instead of siding with the ALECs or siding with the ILECs," the LATA-wide default rule was "a third option that [staff did not] . . . believe anybody directly proposed." (R:7:1333) It was only after the Commission sought additional briefing on the staff's recommendation that the ALECs advocated the LATA-wide proposal. *See* ILEC Appellants Init. Br. at 13-14.

[28] The ILEC Appellants note that there is some question whether AT&T's Cross Appeal is properly before this Court. The ILEC Appellants challenge the originating carrier default rule that the Commission adopted on the ground that it violates *state* law in an area that is generally reserved to state authority; the ILEC Appellants have reserved any federal claims for federal court. AT&T's challenge, by contrast, has nothing to do with state law and is exclusively based on the Commission's application of *federal* law.

of a carrier other than an incumbent LEC *serves* a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem [reciprocal compensation] rate." 47 C.F.R. § 51.711(a)(3) (emphasis added).

In the proceedings before the Commission, the ILECs and ALECs disagreed about the evidence that an ALEC would have to provide to demonstrate that it "serves" a particular geographic area. *See* Order at 14 (R.11:2047) (Commission's task is "interpretation of the word 'serves' contained in FCC Rule 51.711(a)(3)"). The Commission — largely agreeing *with the ALECs* and rejecting the ILECs' arguments — interpreted the FCC's tandem-rate rule to require an ALEC to provide three pieces of evidence to show that it served an area roughly the same size as that served by an ILEC's tandem switch. First, an ALEC had to demonstrate that it has "deployed a switch to serve this area." *Id.* at 20 (R.11:2053). Second, an ALEC must have "obtained NPA/NXXs [*i.e.*, telephone numbers] to serve the exchanges [*i.e.*, local calling areas] within this area." *Id.* Third, an ALEC "must show that it is serving this area either through its own facilities, or a combination of its own facilities and leased facilities" from the ILEC. *Id.*

Although far removed from the ILEC Appellants' proposal — under which an ALEC would have been required to have actual customers dispersed throughout that area — these represent the *minimum* amount of evidence necessary to show that an ALEC serves a particular area. If an ALEC has not deployed a switch, has

not obtained telephone numbers, or has no facilities in an area, it cannot be said to be serving that area. As the Commission explained, by way of analogy:

> A particular landscaping company could advertise that it serves Tallahassee and the surrounding area. Of course, this company may not have customers within every neighborhood of this area, but it is *capable and prepared to serve anyone within each of these neighborhoods*. In other words, this company *has invested in the equipment necessary to serve any prospective customer within each of these neighborhoods*. The number and location of customers that actually subscribe to this company's service will vary depending upon marketing success, but that does not change the fact that Tallahassee is the area it serves.

Id. at 17 (R.11:2050) (emphases added). Without a switch, telephone numbers, and facilities, an ALEC has not "invested in the equipment necessary to serve any prospective customer" and is not "capable and prepared to serve anyone" using its own switch. *Id.*

There is no merit to AT&T's claim that being required to provide this evidence places any burdens on ALECs, let alone "onerous" ones. AT&T Ans./Init. Br. at 35. As the Court of Appeals for the D.C. Circuit recognized in rejecting a similar argument with respect to the evidence that the FCC required before ALECs could lease certain network facilities from ILECs, AT&T's burdensomeness claim reduces to a claim that the Commission's interpretation of the tandem-rate rule is arbitrary and capricious. *See Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8, 17-18 (D.C. Cir. 2002) (finding ALECs' "cursory" argument that FCC's evidentiary requirements were "oppressive" insufficient to carry ALECs' burden of showing FCC's interpretation was arbitrary and capricious).

AT&T does not come close to meeting the heavy burden of demonstrating that the Commission failed to meet the "most rudimentary command of rationality." *Adam Smith Enters., Inc. v. State Dep't of Envtl. Regulation*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

First, AT&T takes issue with the Commission's rejection of *Sprint's* — not AT&T's (or any other ALEC's)[29] — claim that an ALEC seeking to charge the tandem rate should be permitted to rely on service provided exclusively through network elements leased from an ILEC, including the ILEC's switching capacity. AT&T, however, offers no explanation of how such service could demonstrate that an area is served by *the ALEC's switch*. As the Commission correctly found, and AT&T does not dispute, when an ALEC "utilize[s] *the ILEC's* local switching" — not its own switch — the ALEC cannot show that "*its switch* serves a geographic area comparable to the area served by the ILEC's tandem switch," as the FCC's tandem-rate rule requires. AT&T Ans./Init. Br. at 36-37 (emphases added).[30]

Second, although AT&T now asserts that it would be burdensome for an ALEC to "provide a list of the NPA/NXXs that it has opened in specific rate

[29] Sprint operates in Florida as an ILEC (in a variety of areas, including Tallahassee) and as an ALEC (in areas where it is not the ILEC).

[30] AT&T suggests that a "new ALEC entrant may wish to utilize" exclusively elements leased from an ILEC (including switching) "to reduce its initial cost of entry into the market," AT&T Ans./Init. Br. at 43, but does not — and cannot — claim that such an ALEC would be using its switch to serve those customers.

centers," *id.* at 35-36, AT&T previously joined in the argument that such information "is readily available," Joint ALEC Post-Hearing Br. at 12 (R.6:1002); AT&T Post-Hearing Br. at 2-3 (R.5:962-63) (adopting position of Joint ALECs). AT&T offers no reason for this reversal of its prior position and, therefore, is barred from arguing that identifying the NPA/NXXs an ALEC has obtained is burdensome.

Third, AT&T's objection to the Commission's requirement that an ALEC "make a showing of its actual capability to serve those customers," AT&T Ans./Init. Br. at 36, is likewise contrary to its prior position. Before the Commission, AT&T joined in the argument that obtaining an NPA/NXX "requires the ALEC to make investments in both switch capacity and network capacity to offer service to the rate center with which the NXX is associated." Joint ALEC Post-Hearing Br. at 12 (R.6:1002). Indeed, an ALEC witness testified that, if an ALEC obtained an NPA/NXX but did *not* "establish [its] network in such a fashion as to actually provide service within that rate center," that NPA/NXX would not be evidence of the area the ALEC's switch was capable of serving because such investment must "take place before you actually are able to . . . seek customers." July 6, 2001 Tr., Vol. 6, at 1030-33. There is nothing burdensome about the requirement that an ALEC demonstrate that it has engaged in this network investment, particularly as the Commission held that an ALEC could "qualify for the tandem rate by serving a particular area through" any "combination of its own switch/facilities and facilities leased from an ILEC." Order at 19 (R.11:2052).

B. The Commission's Decision Is Consistent with the Wireline Competition Bureau's *Virginia Arbitration Order*

In its petition for reconsideration, AT&T argued that the Commission's decision is contrary to federal law, based on AT&T's misinterpretation of the Wireline Competition Bureau's *Virginia Arbitration Order*. In that order, the Bureau concluded that "evidence relating to the capability of [an ALEC's] switch[]" "is sufficient under the tandem rate rule." *Virginia Arbitration Order*, 17 FCC Rcd at 27187, ¶ 309 (internal quotation marks omitted). Although the Bureau did not specify what evidence was necessary to demonstrate the capability of an ALEC's switch, the Bureau stated that AT&T and WorldCom had presented sufficient evidence in that case. *See id.*

Contrary to AT&T's claim, the Commission's order — which specifies the evidence necessary to show the capability of an ALEC's switch — is consistent with the Bureau's decision. Indeed, in the proceeding before the Bureau, AT&T and WorldCom relied on the same evidence that the Commission required in the orders under review. In finding that evidence sufficient, therefore, the Bureau did not hold, as AT&T contends, that the capability of an ALEC's switch must be assessed independent of the NPA/NXXs it has obtained and the facilities it has deployed or leased to serve customers. Indeed, if AT&T's claim were true, it would render the FCC's tandem-rate rule meaningless because every switch is inherently capable of serving a broad geographic area; therefore, the FCC's geographic area test would be no test at all. Finally, even if the Bureau did adopt

the misinterpretation of federal law that AT&T attributes to it, the Bureau's order — which is not an order of the FCC — would not preempt the Commission's decision.

1. In the *Virginia Arbitration Order*, the Bureau held that "the requisite comparison under the tandem rate rule is whether the [ALEC's] switch is capable of serving a geographic area that is comparable to the [area] served by the incumbent LEC's tandem switch." 17 FCC Rcd at 27187, ¶ 309. The Bureau held further that "the evidence provided by [AT&T and WorldCom]" was "sufficient." *Id.* The order, however, does not describe that evidence, as the Commission recognized in rejecting AT&T's petition for reconsideration. *See* Order on Reconsideration at 8 (R.13:2494) ("Bureau's decision . . . does not address the nature of the demonstration that is needed"). Nonetheless, AT&T's and WorldCom's briefs reveal that they relied on the *same evidence* that the Commission, in the orders under review, found that an ALEC must provide.

Specifically, AT&T argued that its network in Virginia satisfied the FCC's tandem-rate rule because it is "able to connect virtually any customer in a LATA to [its] switch serving that LATA either through (1) [its] own facilities built to the customer premises, (2) UNE loops provisioned through collocation in Verizon's end offices, or (3) dedicated high-capacity facilities (special access services or combinations of UNEs purchased from Verizon)."[31] In other words, AT&T

[31] AT&T's Initial Brief at 102-03, CC Docket No. 00-251 (FCC filed Nov. 16, 2001) (Attachment 1 hereto).

provided evidence, as required by the Commission here, that it is serving an area "either through its own facilities, or a combination of its own facilities and leased facilities" from the ILEC. Order at 20 (R.11:2053). WorldCom argued that its switches served the area where it "has established network facilities and opened NPA/NXXs."[32] Again, this is the same evidence that the Commission, in the orders under review, required an ALEC to provide. Accordingly, the Bureau's finding that this evidence is sufficient under the tandem-rate rule does not contradict the Commission's order.

2. AT&T's argument that the area an ALEC's switch is capable of serving must be assessed without regard to the NPA/NXXs it has obtained and the facilities it has deployed or leased is contrary to federal law. Every switch — whether used by an ILEC or an ALEC — has the inherent capability of serving a broad geographic area. The determining factor is not the switch itself, but the length of the wires that are attached to that switch. Indeed, the only thing that would prevent a single switch from serving an entire state, or even the entire country, is the need to attach sufficiently long wires to reach the areas where the ALEC (or the ILEC) intends to provide service. Therefore, if the inquiry were limited to the geographic area that a switch could potentially serve, every switch would satisfy the test, and every ALEC that deployed a switch would be entitled to charge the tandem rate, no matter what other steps it had taken to serve a particular geographic area. This

[32] Brief of WorldCom, Inc. at 95, CC Docket No. 00-218 (FCC filed Nov. 16, 2001) (Attachment 2 hereto).

result is contrary to the rule that the FCC adopted, under which only some ALECs will be entitled to charge the tandem rate — namely, only those with switches that "serve[] a geographic area comparable to the area served by the incumbent LEC's tandem switch." 47 C.F.R. § 51.711(a)(3).

Furthermore, AT&T's argument is contrary to the FCC's justification for its tandem-rate rule. In adopting that rule, the FCC explained that "states shall also consider whether new technologies . . . perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the [ALEC's] network should be priced the same as" calls handled by the ILEC's tandem switch. *Local Competition Order*, 11 FCC Rcd at 16042, ¶ 1090. Although the FCC has since clarified that an ALEC need not demonstrate that its switches perform functions similar to a tandem switch,[33] the reason for allowing the ALEC to charge the higher, tandem rate remained the same: that, by serving a comparable geographic area, the ALEC would incur costs similar to the "'additional costs' incurred by a LEC . . . [when] tandem switching is involved." *Local Competition Order*, 11 FCC Rcd at 16042, ¶ 1090. If the ALEC is not incurring any of these additional costs — if it has not opened the NPA/NXXs and deployed or leased the necessary facilities to provide service using those numbers — then payment of the tandem rate amounts to a pure subsidy. The FCC's tandem-rate rule does not require ILECs to make such uneconomic transfers to ALECs.

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[33] *See Intercarrier Compensation NPRM*, 16 FCC Rcd at 9648, ¶ 105.

3. Even aside from the fact that AT&T has mischaracterized the Bureau's decision, AT&T's claim that the *Virginia Arbitration Order* preempts the Commission's order is incorrect. *See* AT&T Ans./Init. Br. at 39-41. As noted above, the Bureau is a unit of the FCC's staff. *See* 47 C.F.R. § 0.5(a)(11). Its decision is thus subject to review by the full Commission, *see id.* § 1.115(a); indeed, Verizon Virginia has sought reconsideration with respect to a number of the Bureau's decisions, including its tandem-rate decision.[34] Moreover, the Bureau's interpretation of federal law is not entitled to the deference normally accorded to a federal agency's interpretation of a statute that it administers. *See Caiola v. Carroll*, 851 F.2d 395, 399 (D.C. Cir. 1988) (refusing to defer when interpretation rendered by official who was "*not* the head of the agency").

Equally important is the role played by the Bureau in issuing the *Virginia Arbitration Order*. As the Bureau explained, it expected its order to "provide a workable framework to guide the commercial relationships *between the interconnecting carriers before us in Virginia*," not to establish rules applicable nationwide. 17 FCC Rcd at 27042, ¶ 1 (emphasis added); *see also id.* (Bureau, in issuing order, "stands in the stead of the Virginia State Corporation Commission"). Although state commissions necessarily determine questions of federal law in

[34] In its petition for reconsideration, Verizon Virginia argued, as the ILEC Appellants argued before the Commission, that the FCC's tandem-rate rule requires an ALEC to demonstrate that it is actually serving customers throughout an area comparable in size to that served by an ILEC's tandem switch. That petition for reconsideration is still pending.

resolving arbitrations under the 1996 Act, *see* 47 U.S.C. § 252(c), those determinations are not binding on commissions in other states. The *Virginia Arbitration Order* is entitled to no greater impact merely because it happened to be decided by a bureau of the FCC, which was standing in the shoes of the Virginia state commission and not acting as a federal regulator.

For these reasons, the Commission correctly found that the "Wireline Bureau's decision does not appear to be binding on this Commission because the Bureau's decision was limited to the commercial parties included in that arbitration proceeding" and "is not recognized as an FCC order or rule." Order on Reconsideration at 8 (R.13:2494). Other state commissions have reached that same conclusion, finding that the *Virginia Arbitration Order* is neither a "final decision nor a legally binding precedent"[35] and is "not conclusive upon this Commission."[36]

Finally, any possible doubt about the preemptive effect of the Bureau's order has been eliminated by a recent court filing, in which the FCC itself described the Bureau's order as an "interlocutory staff ruling" that is not binding on the FCC.[37]

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[35] Arbitration Award, *Petition of Global NAPs Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North Inc.*, Case No. 02-876-TP-ARB, at 10 (Ohio PUC Sept. 5, 2002).

[36] Opinion and Order, *Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. A-310814F7000, at 17 (Pa. PUC Apr. 17, 2003).

[37] Brief of Federal Communications Commission and United States of America at 30, *Mountain Communications, Inc. v. FCC*, No. 02-1255 (D.C. Cir.

The FCC further confirmed that, with respect to issues (such as the tandem-rate issue) that are subject to a pending petition for reconsideration, the FCC "has not yet ruled on . . . whether the *Virginia Arbitration Order* reflects agency policy."[38]

C. The Commission's Decision Raises No Barriers to Competition

Even though the Commission adopted the ALECs' position in this proceeding, AT&T claims that requiring an ALEC to demonstrate that it has deployed a switch, obtained telephone numbers, and deployed or leased facilities throughout a geographic area comparable to that served by an ILEC's tandem switch "ha[s] the effect of prohibiting the ability of [ALECs] to provide . . . telecommunications service." 47 U.S.C. § 253(a); *see* AT&T Ans./Init. Br. at 41-44. AT&T's claim not only is contradicted by its earlier support for these same requirements, as described above, but also is based on a misunderstanding of the Commission's order and of federal law.

First, AT&T erroneously claims that the Commission's order does not permit ALECs with "a small number of customers" to charge the tandem rate. AT&T Ans./Init. Br. at 44; *accord id.* at 43 ("only established ALECs with . . . existing customers will be able to meet the criteria established by the Commission"); *id.* at 44 ("Commission ruling precludes . . . entrant" with "customer base in a limited geographic area" from "receiving the tandem . . . rate"). The Commission, however, expressly rejected the argument that whether an ALEC

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filed June 19, 2003) ("FCC Br.") (Attachment 3 hereto).

[38] FCC Br. at 30.

may charge the tandem rate is "based upon the number and location of customers served." Order at 16 (R.11:2049); *see id.* ("we do not believe a determination of geographic comparability should be based upon ALEC customer information"); *see id.* at 17 (R.11:2050) (adopting criteria for "how an ALEC is to demonstrate that it serves a particular area without showing customer information"). Instead, as the Commission made clear, an ALEC need only "verify that [it] is in fact capable and prepared to serve a comparable geographic area to that of an ILEC tandem switch." *Id.* at 17 (R.11:2050). Nothing in the Commission's order prevents a new ALEC, or an ALEC with a small number of customers, from demonstrating that it is "capable and prepared" to serve customers in a large geographic area.

Second, AT&T fails to meet its burden of demonstrating, as it alleges, that the Commission's interpretation of the FCC's tandem-rate rule has "the effect of prohibiting the ability of [ALECs] to provide . . . telecommunications service." 47 U.S.C. § 253(a); *see* AT&T Ans./Init. Br. at 41-44. Although AT&T asserts that an ALEC that cannot charge the tandem rate "could not collect the revenue necessary to develop a market and provide service," *id.* at 44, it does not point to any evidence in the record — and there is none — to support its claim. Indeed, AT&T's current reliance on § 253(a) — which it did not address in seeking reconsideration of the Commission's decision — is inconsistent with its prior support for the very requirements that the Commission adopted. In addition, AT&T ignores that an ALEC that is not entitled to charge the tandem rate is still entitled to charge the end-office rate — just as an ILEC is required to charge the

end-office rate when an ALEC delivers a call to the ILEC's end-office switch and the ILEC does not incur "the 'additional costs' . . . when . . . tandem switching is involved." *Local Competition Order*, 11 FCC Rcd at 16042, ¶ 1090.[39] AT&T does not even attempt to explain why an ALEC's ability to recover the end-office rate — a result expressly contemplated by the FCC's tandem-rate rule when an ALEC's switch does not serve a sufficiently large geographic area — could have the effect of prohibiting even one ALEC from providing telecommunications service.

In the end, AT&T's § 253(a) argument is based on its erroneous claim that, under federal law, every ALEC that deploys a switch is entitled to charge the tandem rate merely because all switches are inherently capable of serving a broad geographic area. Indeed, AT&T expressly claims that an ALEC that focuses on serving "a limited geographic area, much smaller than the area served by the ILEC's switch," should nonetheless be entitled to charge the tandem rate. AT&T Ans./Init. Br. at 44. Such an ALEC — which has not taken the steps that the ALECs themselves agreed are necessary for an ALEC's switch to be capable of serving a particular area, *see* July 6, 2001 Tr., Vol. 6, at 1030-33 — cannot be said to be serving a "geographic area comparable to the area served by the incumbent

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[39] Thus, AT&T incorrectly claims that "all ALECs pay ILECs the tandem interconnection rate when ILECs terminate ALECs local traffic." AT&T Ans./Init. Br. at 43 n.17. The FCC expressly found that rates may "vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch." *Local Competition Order*, 11 FCC Rcd at 16042, ¶ 1090.

LEC's tandem switch." 47 C.F.R. § 51.711(a)(3). Moreover, until such an ALEC has taken those steps, it is not incurring any additional costs by using its switch to serve an area comparable to that served by the ILEC's tandem switch, and payment of the tandem rate would amount to an unwarranted subsidy. Section 253(a) was not intended to address a refusal by a state commission to interpret federal law to require ILECs to subsidize their competitors' provision of service. Instead, § 253(a) applies to state rules that prevent ALECs (often by name or class) from providing a particular service.[40]

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[40] *See*, *e.g.*, Memorandum Opinion and Order, *Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460, 3521, ¶ 128 (1997) (provision of Texas law explicitly prohibiting carriers from offering service using their own facilities and reselling ILEC's services violated § 253(a)), *aff'd*, *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999). Indeed, none of the cases on which AT&T relies involved a state commission's interpretation of federal law to prevent an ALEC from charging a rate that was not justified by the costs the ALEC incurred. Instead, those cases involved, for example, state refusals to grant franchises to ALECs or the threat of criminal sanctions for the failure to follow municipal regulations. *See* AT&T Ans./Init. Br. at 42 n.16.

CONCLUSION

For the foregoing reasons, and those set forth in the ILEC Appellants' initial brief, this Court should vacate the Commission's adoption of the originating carrier default rule and should affirm the Commission's interpretation of the FCC's tandem-rate rule.

Respectfully submitted,

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August 11, 2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Consolidated Reply Brief and Answer Brief of ILEC Appellants has been furnished, **by U.S. Mail, to** the parties on the attached service list on August 11, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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