IN THE SUPREME COURT OF FLORIDA

On Appeal from Final Orders of the Florida Public Service Commission

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Sprint-Florida, Inc., et al., Appellants,
v.
Lila A. Jaber, et al., Appellees.
Case No. SC03-235

and

Verizon Florida, Inc., et al., Appellants,
v.
Lila A. Jaber, et al., Appellees.
Case No. SC03-236

CONSOLIDATED ANSWER BRIEF AND INITIAL BRIEF OF APPELLEE/CROSS-APPELLANT AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC AND TCG SOUTH FLORIDA

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PREFACE

In this Answer Brief and Initial Brief on Cross-Appeal:

1) Appellants 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., GTC Inc. d/b/a GT Com [Case No. SC03-236] and Sprint-Florida, Incorporated and Sprint Communications Limited Partnership (collectively "Sprint") [Case No. SC03-235] will be referred to, at times, collectively as "Appellants."

2) Appellee Florida Public Service Commission will be referred to as "Commission" or "PSC."

3) Appellee/Cross-Appellant AT&T Communications of the Southern States, LLC and TCG South Florida will be referred to as "AT&T."

4) The Federal Communications Commission will be referred to as the "FCC."

5) Incumbent local exchange telecommunications companies as defined by Section 364.02(6), Florida Statutes, such as Verizon and Sprint, will be referred to as "ILECs."

6) Alternative local exchange telecommunications companies as defined by Section 364.02(1), Florida Statutes, such as AT&T, will be referred to as "ALECs."[1]

7) Citations to the record on appeal will be designated by Volume and Page Numbers are (R. __:_____).

8) Citations to the transcript of the proceedings below will be designated by the date of the hearing, volume and page number: (Date of Hearing, Tr. Vol. __, at __).

9) The Order on appeal, Order No. PSC-02-1248-FOF-TP issued September 10, 2002 (V. 11:2034-2097), will be referred to as the "Order."

10) All citations and references to the Florida Statutes refer to the 2002 version of the Florida Statutes unless otherwise referenced.

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[1]As a result of the 2003 amendments to Section 364.02, Florida Statutes, (CS/SB 654), the term alternative local exchange telecommunications company ("ALEC") has been changed to competitive local exchange telecommunications company ("CLEC").

STATEMENT OF THE CASE

In the proceedings below, the Commission addressed the appropriate methods to compensate telecommunications carriers for the exchange of telecommunications traffic subject to the requirements of the federal Telecommunications Act of 1996 (the "Act"). Numerous parties participated in the proceeding, including ILECs and ALECs.

In the Order the Commission decided many of the issues that will determine intercarrier compensation obligations where carriers are unable to reach an agreement. Two of the decisions are now before the court.

In the first decision, the Commission established the originating carrier's retail local calling area as the default local calling area for purposes of intercarrier compensation obligations. This is the so-called "local calling area" determination. That portion of the Order has been appealed by the Appellants. Reconsideration of the Commission's local calling area decision was sought and denied. (Order No. PSC-03-0059-FOF-TP issued January 8, 2003 (R. 13:2487-2514). ("*Order on Reconsideration*").

In the second decision, the Commission demanded that ALECs, including AT&T, meet certain criteria beyond that required by the FCC to be entitled to reciprocal compensation at the tandem interconnection rate. This decision is the so-

called "tandem interconnection rate" determination. The Commission rejected AT&T's and other parties' motions for reconsideration of this issue in the *Order on Reconsideration*. AT&T, as a Cross-Appellant, challenges the Commission's decision regarding the tandem interconnection rate issue.

STATEMENT OF THE FACTS

Before 1995, ILECs in Florida enjoyed a regulated monopoly in the provision of local telecommunications services to business and residential customers within their designated service areas. In exchange for this legislatively approved monopoly, the ILECs ensured the universal provision of telecommunications service. To meet their regulated service obligations, the ILECs constructed extensive networks in their service areas.

In 1995, the Florida Legislature amended Chapter 364 based upon a legislative finding that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest. See Ch. 95-403, Laws of Florida, codified as amendment at Fla. Stat. §364.01(3). The Legislature intended to provide customers with freedom of choice, encourage the introduction of new telecommunications services, encourage technological innovation, and encourage investment in telecommunications infrastructure. Fla. Stat. §364.01(3). Additionally, the Legislature expressly granted exclusive jurisdiction over the regulatory transition to local competitive markets to the PSC. Fla. Stat. §364.01(2). The Legislature granted the Commission broad authority to encourage competition through flexible regulatory treatment among providers to: (a) to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services;

(b) protect the public health, safety and welfare by insuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate and service regulation; and (c) promote competition by encouraging new entrants into the market and allowing a transitional period in which new entrants are subject to a lesser level of regulatory oversight than ILECs. Fla. Stat. §364.01(4)(b),(c) and (d).

Finally, the Legislature granted the Commission exclusive jurisdiction to encourage all providers of service to introduce new or experimental telecommunications services free of unnecessary regulatory restraint; eliminate any rules and regulations that delay or impair the transition to competition; and insure that all providers of services are treated fairly, by preventing anti-competitive behavior and eliminating unnecessary regulatory restraint. Fla. Stat. §364.01(4)(e),(f) and (g).

The 1995 amendments to Chapter 364 dramatically altered the Florida local telecommunications landscape. The Commission adopted rules and entered orders to carry out its mission of transitioning the local telecommunications markets in Florida to competitive markets. Those rules and orders, in conjunction with the federal law discussed below, influenced, and continue to influence, the business decisions of competing local carriers (the ALECs) in introducing new local calling areas, competitive prices and enhanced services.

In 1996, Congress passed the Act, in part, to end the monopoly of local

telecommunications markets and foster competition in those markets. See *Iowa Utilities Board v. FCC*, 120 F.3d 753, 791 (8th Cir. 1997), reversed in part, sub nom., *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999). In fact, the United States Supreme Court has recognized that "eliminat[ion of] the [ILECs] monopolies" is "an end in itself" of the Act, and that the Act is "designed to give aspiring competitors every possible incentive to enter local telephone markets, short of confiscating the incumbents' property." *Verizon Communications v. FCC*, 535 US 467, 476, 489 (2002). Because the ILECs had become so entrenched over time through their construction of extensive facilities, Congress opted "not to simply issue a proclamation opening the markets," but instead constructed a detailed regulatory scheme to enable new competitors to enter local telecommunications markets on a more equal footing. *AT&T Communications of the Southern States v. BellSouth Telecommunications, Inc.*, 7 F.Sup.2d 661, 663 (E.D. N.C. 1998).

Three sections of the Act, 47 U.S.C. §§251, 252 and 253, provide the basic structure of the overall scheme for creating competition in the local markets. Section 251 describes the relevant classes of participants affected by the Act (ILECs and ALECs) and establishes the duties and obligations of these carriers. Section 251 requires an ILEC to provide interconnection to ALECs that is at least equal in quality to that provided by the ILEC to itself at any technically feasible point within the

ILEC's network, 47 U.S.C. §251(c)(2); to provide non-discriminatory access to network elements on an unbundled basis at any technically feasible point, 47 U.S.C. §251(c)(3); and to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the ILEC, 47 U.S.C. §251(c) (6).

Section 252 delineates the procedures for the negotiation, arbitration and approval of interconnection agreements that permit new carriers to enter the local telecommunications market. The new entrants can negotiate with an ILEC and enter into a voluntary binding agreement without regard to the majority of the standards set forth in Section 251 of the Act. 47 U.S.C. §251(a). If the parties cannot reach an agreement by means of negotiation, after a set number of days, a party can petition a state commission to arbitrate unresolved issues. 47 U.S.C. §252(b)(1).

Section 253 places limitations on the role of state and local regulatory bodies and prohibits state and local actions or regulations that are contrary to the Act.

Limited Role of State Commissions Pursuant to Section 253 of the Act

Section 253 of the Act states, in pertinent part:

> (a) In general. No state or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

> (b) State regulatory Authority. Nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and consistent with Section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, insure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) State and local government authority. Nothing in this section affects the authority of a state or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for use of public rights-of-way on a non-discriminatory basis, if the compensation required is publicly disclosed by such government.

In *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999) ("*Iowa Utilities Board*"), the court explicitly recognized the limited role of state commissions under the Act.

> States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry.

The court emphasized the limited role of state commissions in developing the policies and "rules of the road" for implementation of the Act:

> Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of the extension to be determined by state commissions, which - -

> within the broad range of lawful policymaking left open to administer agencies - - are beyond federal control.

Id., 525 U.S. at 385, fn. 10.

The court in *Iowa Utilities Board* held that the FCC has general jurisdiction to implement the 1996 Act's local competition provisions. Since Congress expressly directed that the 1996 Act be inserted into the Communications Act of 1934, and since the 1934 Act already provides that the FCC may prescribe such rules and regulations as "may be necessary in the public interest to carry out the provisions of this Act," 47 U.S.C. §201(b), the FCC's rulemaking authority extends to implementation of the Sections of the Act that foster competition in the local markets.

With this state and federal law backdrop, the Commission undertook repeated arbitrations between ILECs and ALECs resolving time and again the same or substantially the same disputes raised by carriers concerning intercarrier compensation obligations arising from the exchange of local telecommunications traffic. Recognizing the need for a generic set of "rules of the road" where agreements could not be reached, the Commission opened the generic docket below to establish "default" provisions for interconnection agreements and thereby, hopefully, put an end to repeated arbitrations over the same disputes. Two of those default determinations are the subject of the appeals and cross-appeal.

Turning first to the local calling area issue, the question before the Commission was whether it should adopt a new default local calling area for reciprocal compensation purposes. The ILECs' local calling area had been the default local calling area for reciprocal compensation purposes since the inception of competition in the local markets. Order at 44 (R. 11:2077). The Commission heard various proposals for establishing a default local calling area from the parties: (1) the ILECs' local calling area; (2) the originating carrier's retail local calling area; and (3) a LATA-wide[2] local calling area. The Commission held that using the ILECs' retail local calling area as the default precludes ALECs from offering more expansive calling scopes and suffers from a lack of competitive neutrality. Order at 49 (R. 11:2082). The Commission also held that a LATA-wide wholesale calling regime appears to discriminate against long distance carriers as those carriers would continue to pay originating and terminating access charges for carrying traffic over some of the same routes that ALECs and ILECs would treat as local calls. Order at 49-50 (R. 11:2082-2083). The Commission considered the fact that ILEC BellSouth Telecommunications, Inc. ("BellSouth") utilizes the originating carrier's local calling area for reciprocal compensation purposes in many of its interconnection agreements, and held that such a plan is administratively manageable and more competitively neutral

[2]See Verizon Initial Brief, p. 13, fn. 13.

than the other proposals offered by the parties.[3] Therefore, consistent with its duties pursuant to Chapter 364, Florida Statutes and the Act, the Commission chose the most competitively neutral alternative to promote competition in the local telecommunications markets, an area where competition in Florida has been lacking. Order at 36-51 (R. 11:2069-2084).

In addressing the tandem interconnection rate issue, the Commission sought to determine the circumstances under which an ALEC would be entitled to the tandem interconnection rate for reciprocal compensation purposes. At the time of the hearing below, the FCC had already stated in Rule 51.711, Code of Federal Regulations ("CFR"), that ALECs are entitled to the tandem interconnection rate if their switch "serves" a comparable geographic area to the ILEC's switch. The Commission's role was to determine what the FCC meant when it used the word "serves." At the time the Commission voted, it did so without the benefit of guidance from the FCC regarding what it meant when it used the word "serves" for tandem rate purposes. The Commission held that in order for an ALEC to be entitled to the tandem interconnection rate, an ALEC must show that it has deployed a switch to serve the area, and has obtained NPA/NXXs to serve the exchanges within the area.

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[3]BellSouth has not appealed the Commission decision regarding the local calling area.

Additionally, the ALEC must show that it is serving the area either through its own facilities, or a combination of its own facilities and leased facilities connected to its collocation arrangements in ILEC central offices. Order, p. 20 (R. 11:2052).

STANDARD OF REVIEW

This Court's standard of review of the Commission orders is dependent upon whether the Commission action exceeded its authority.

A) The 'Local Calling Area' Decision

The Commission acted within the scope of its powers and jurisdiction in determining that the default local calling area will be the originating caller's retail local calling area and therefore, given the agency's special expertise in the area, that determination should only be disturbed if its decision was clearly unauthorized or erroneous.

The Commission's interpretation of a statute that it is charged with enforcing is entitled to great deference. *BellSouth Communications, Inc. v. Johnson*, 708 So.2d 594, 596 (Fla. 1998). Orders of the Commission come to this court "clothed with a statutory presumption that they have been made within the Commission's jurisdiction and powers, and they are reasonable and just and such as ought to have been made." *Gulf Coast Electrical Co-op. v. Johnson*, 727 So.2d 259, 262 (Fla. 1999). This court will not depart from the contemporaneous construction of a statute by a state agency

charged with its enforcement unless the construction is "clearly unauthorized or erroneous." *P.W. Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla. 1988). The party seeking to challenge the Commission's order has the burden of overcoming these presumptions "by showing a departure from the essential requirements of law." *Florida Interexchange Carriers Association v. Clark*, 678 So.2d 1267, 1270 (Fla. 1996).

B) The 'Tandem Interconnection Rate' Decision

However, this court will not give deference to an agency's determination when the agency exceeds its authority. *Tampa Electric Company v. Garcia*, 767 So.2d 428, 433 (Fla. 2000). In determining the requirements that an ALEC must meet in order to be entitled to the tandem interconnection rate, the Commission acted outside the scope of its powers and jurisdiction. The Commission, like any state agency, has only those powers granted to it by the Legislature. Additionally, Congress and the FCC have granted state commissions limited power to determine issues between telecommunications carriers. Where the question raised on appeal is whether the Commission "exceed[ed] its authority," this court "[a]t the threshold... must establish the grant of legislative authority to act." *United Telephone Company v. Public Service Commission*, 496 So.2d 116, 118 (Fla. 1986). In other words, "this [c]ourt will not give deference to an agency's determination when the agency exceeds its

authority." *Tampa Electric Company*, 767 So.2d 433; *Level 3 Communications, LLC v. Jacobs*, 841 So.2d 447, 450 (Fla. 2003). As Verizon readily concedes in its initial brief,[4] the question of whether the Commission has exceeded its authority is to be considered by this court *de novo.* If "there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." *Radio Telephone Communications, Inc. v. Southeastern Telephone* Co., 170 So.2d 577, 582 (Fla. 1964).

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[4]Verizon Brief at 20 (internal quotation marks omitted).

SUMMARY OF ARGUMENT

The PSC's decision that the originating caller's local calling area shall be the default local calling area for reciprocal compensation purposes is within the Commission's authority and expertise, is consistent with state and federal law, and is fully supported by the record.

The Appellants' contention that the Commission decision violates Sections 364.16(3)(a) and 364.163, Florida Statutes, should be rejected. The Appellants' reliance on Section 364.16(3)(a) is predicated on the fiction that the statute is violated when calls are knowingly delivered by an ALEC outside of an ILEC's retail local calling area. But there is no basis for this position in the language of the statute. To the contrary, all traffic delivered by an ALEC within the ALEC's designated local calling area will be local calls subject to local interconnection charges, (not terminating access charges) paid by the ALEC to the ILEC. There will be no violation of Section 364.16(3)(a) as a result of the Commission's local calling area determination.

Ignoring the language of the statute, Appellants claim that local calling area decision may impact their access charge revenues. Even if true, that is no basis for reversal. In any case, no compelling evidence on that impact was ever offered by the ILECs. Further, the ILECs conveniently overlook the anticipated increase in local interconnection revenues that will, to varying degrees, offset the loss of access revenue

or result in a net increase of ILEC revenue should: (a) expanded ALEC local calling areas stimulate increased usage of the network; or (b) ILECs negotiate or arbitrate an increase in local interconnection rates. Moreover, any potential diminution in access charge revenues as a means of supporting below cost local rates is a direction entirely consistent with the Florida Legislature's recently passed comprehensive amendments to Chapter 364, Florida Statutes, which introduce a rate rebalancing mechanism that authorizes ILECs to increase local rates charged to end users to compensate for decreases in access charge rates and revenues. See CS/SB 654 (2003) (Supp. 2003 Fla. Stat. §364.164 and amended Fla. Stat. §364.051(6), (7) and (8)). Moving to the tandem interconnection rate determination, the Commission recorded its vote regarding the requirements that an ALEC must meet to be entitled to the tandem interconnection rate on December 5, 2001. (R. 7:1,283-1,430). Subsequently, on July 17, 2002, the FCC's Wireline Competition Bureau issued an order that clearly sets forth all the requirements that an ALEC must meet to be entitled to the tandem interconnection rate. The FCC Order preempts the Commission's role in determining when an ALEC is entitled to the tandem interconnection rate. The ALECs' entitlement to the rate is governed by 47 C.F.R. 51.711 and the FCC's interpretation thereof, and ALECs are entitled to rely on the FCC's rules and orders regarding the application of the tandem interconnection rate. The Commission is not authorized to hinder competition or place

barriers to entry by mandating obligations on ALECs that exceed the FCC rules and orders regarding an ALEC's entitlement to the tandem interconnection rate and violate Section 253 of the Act.

ARGUMENT

I. The Commission Determination that the Originating Caller's Retail Local Calling Area determines whether a Call is Local for Reciprocal Compensation Purposes Must Not be Disturbed

a) The Commission's decision is Consistent with the Legislature's Intent and Within the Commission's Authority

The Commission's decision to set the calling party's local calling area for reciprocal compensation purposes is well within its authority. Sections 364.01(4)(b) and 364.01(4)(g), Florida Statutes, grant the Commission broad powers to support local competition, and direct the Commission to:

> (b) Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.
>
> . . .
>
> (g) Ensure that all providers of telecommunications services are treated fairly, by preventing anti-competitive behavior and eliminating unnecessary regulatory restraint.

Additionally, the FCC squarely placed the responsibility to determine local

calling areas on state commissions. In its *Local Competition Order* (FCC 96-325) at ¶1035,[5] the FCC stated:

> with the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic area should be considered "local areas" for the purpose of applying reciprocal compensation obligations under Section 251(b)(5), consistent with the state commissions historical practice of defining local service areas for wireline LECs. We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by Section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different.

The Commission clearly has the authority under state and federal law to establish local calling areas for purposes of intercarrier compensation obligations. Appellants do not refute this point.

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[5] *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, First Report and Order, FCC 96-325, CC Dockets 96-98, ¶1035 (1996) ("*Local Competition Order*").

b) The Commission's Decision Does Not Violate Sections 364.16(3)(a) or 364.163, Florida Statutes

Appellants erroneously argue that Sections 364.16(3)(a) and 364.163, F.S., two statutory provisions adopted as part of the 1995 amendments to Chapter 364, preclude the Commission from redefining local routes. Section 364.16(3)(a) states:

> No local exchange telecommunications company or alternative local exchange telecommunications company shall knowingly deliver traffic, for which terminating access charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

Clearly, Section 364.16(3)(a), Florida Statutes precludes any local carrier from delivering access traffic without paying the appropriate terminating access charges to the terminating carrier for such traffic. It is equally clear, however, that Section 364.16(3)(a) does not address and certainly does not impede the Commission's authority to establish local calling areas. The undisputed authority to establish a local calling area carries with it the identification of calls made within that local calling area as local calls - - not long distance calls subject to terminating access charges. Under Section 364.16(3)(a), and under the Commission's decision, an ALEC will knowingly deliver local traffic for which terminating access charges will not apply. There is no violation of the statute. There could only be a violation of the statute if the statute had been written to incorporate an ILEC's local calling area as the measure of when

terminating access charges would otherwise apply. Had the Legislature intended such an anti-competitive result - - a result contrary to the entire framework of the 1995 amendments to Chapter 364 - - it could have easily added the necessary language. See, e.g., *Sumner v. Board of Psychological Examiners*, 555 So.2d 919, 921 (Fla. 1st DCA 1990); *Radio Telephone Communications, Inc. v. Southeastern Telephone Company*, 170 So.2d 577, 582 (Fla. 1964). But the Legislature did not include the language that would beckon the result sought by the Appellants. While the Commission's decision defining a "local calling area" may positively or negatively alter the total revenue streams for particular traffic routes in the state, such speculation does not amount to a violation of Section 364.16(3)(a), Florida Statutes.

Appellants' reliance on Section 364.163, Florida Statutes, to support their position that the Commission does not have the authority to define the local default calling area for purposes of intercarrier compensation obligations is equally misplaced. Section 364.163 addresses the services provided by an ILEC to any certificated carrier that desires to access the ILEC's network to complete a long distance call. Section 364.163 sets forth an access charge ratemaking mechanism that is expressly limited to the ILECs. It essentially authorizes an ILEC to increase local rates after a certain period of years and after it has reduced its intrastate access charges to the level of interstate access charges. It also requires interexchange carriers (long distance

companies) to flow through the benefits of intrastate access charge reductions to its customers. Section 364.163 has no relationship or connection to the issue of local calling areas or intercarrier compensation obligations for the exchange of local traffic. In fact, by its own terms, Section 364.163 expressly excludes local interconnection arrangements from its provisions.

Section 364.16(3)(a), on the other hand, expressly applies to both ILECs and ALECs and expressly references (ILEC and ALEC) interconnection arrangements. The Legislature's intent to put ILECs and ALECs on equal footing under Section 364.16(3)(a) is completely undermined by the notion that the establishment of an ALEC's local calling area carries with it the payment obligations arising from the ILEC's local calling area. Such an absurd result could not have been contemplated by the Legislature[6], as it would vitiate the overarching goals of the Legislature in Section 364.01 to open local markets to competition.

Moreover, the whole notion of the Appellants that Section 364.16(3)(a) must be applied in a manner that ensures no diminution in ILEC access charge revenue is unsupported, speculative and contrary to the Legislature's intent. In opening up local markets to competition, the Legislature offered ILECs the opportunity to elect price

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[6]See, e.g., *Winter v. Playa del Sol, Inc.*, 353 So.2d 598, 599 (Fla. 4th DCA 1977).

cap regulation under Section 364.051, Florida Statutes, and thereby have the opportunity to raise prices for non-basic services as much as 20% per year in competitive markets. The ILECs, including Verizon and Sprint, have made this election and by doing so have relinquished any right to a guaranteed level of revenues under traditional rate base, rate of return regulation.

In any case, Appellants failed to offer any compelling evidence in the proceedings below regarding the amount of alleged lost access charge revenues or the offset from increased local interconnection revenues arising from potentially increased usage of the network by ALEC customers with expanded local calling areas and/or increased local interconnection rates. Not only is the Appellants "lost access revenue" argument unsupported by Sections 364.16(3)(a) or 364.163, it runs directly contrary to the Legislature's recently enacted amendments to Chapter 364 which provide clearly defined procedures for the ILECs to decrease access charge revenues and increase local rates on a revenue neutral basis. <u>See</u> CS/SB 654, Sections 6 and 15 (2003). The Commission's decision is entirely consistent with the Legislature's move to diminish the ILECs' reliance on profit-inflated access charge revenues as a means to support below cost local service rates.

The Appellants' argument that the 1995 amendments to Sections 364.16(3)(a) and 364.163, F.S., eliminated the Commission's authority to redefine local calling

areas for purposes of intercarrier compensation obligations should be rejected. The Commission's determination that the default local calling area for reciprocal compensation purposes is the originating caller's retail local calling area is well within the Commission's authority and should not be disturbed.

c) The Commission's Decision is Fully Supported by the Record and Promotes Competition

The Appellants argue, as they did below, that the originating caller's local calling area should not be used as the default because it is administratively burdensome and not workable. The Appellants' position is based upon mere speculation and is contrary to the actual record. In fact, as the Commission pointed out in the Order, BellSouth, the largest Florida ILEC, currently utilizes the originating carrier's local calling area as the designated local calling area for reciprocal compensation purposes in many negotiated intercarrier agreements. The Commission recognized:

> BellSouth's position is that, for purposes of determining the applicability of reciprocal compensation, a "local calling area" can be defined as mutually agreed to by the parties and pursuant to the terms and conditions contained in the parties' negotiated interconnection agreement with the originating Party's local calling area determining the intercarrier compensation between the parties. BellSouth currently has the arrangement described above in many of its interconnection agreements and is able to implement such arrangement [sic] to the use of billing factors. These factors allow the originating carrier to report to the terminating carrier the percent of usage that is interstate,

intrastate, and local.

Order, p. 43 (R. 11:2077).

The fact that BellSouth currently utilizes the originating caller's local calling area as the pertinent local calling area in interconnection arrangements belies the Appellants' argument that the method is administratively burdensome. In fact, as discussed *infra*, the record shows that using the ILECs' local calling area as the pertinent local calling area for reciprocal compensation purposes (a scheme that Appellants are grasping to retain) hinders competition.

The record below is clear. The continuance of ILEC local calling areas in the telecommunications market is a holdover from the past that is neither required nor appropriate in the modern telecommunications market environment. (July 6, 2001, Tr. Vol. 4 at 683). Distance has ceased to be a basis for pricing in those sectors of the telecommunications industry that have become robustly competitive. (July 6, 2001, Tr. Vol. 4 at 683-684). It is now widely recognized that both the long distance and wireless service markets are characterized by intense competition. Distance has all but disappeared entirely in interstate local distance pricing structures. Wireless carriers have been offering standard calling plans that make no distinction between "local" and "long distance" calls or otherwise charge on the basis of distance. Competitive pressure from those companies has enforced incumbent wireless carriers to adopt

similar pricing plans. (July 6, 2001, Tr. Vol. 4 at 681-684).

In fact, the only segment of the telecommunications industry where distance-based pricing (in the form of local/toll distinctions and/or milage based rates) persists is in the largely non-competitive local telecommunications sector, and the fact that this pricing remnant of a monopoly era persists in the case of local telecommunications services serves to confirm the utter lack of competition in this sector. It is clearly in the public interest to allow ALECs to operate without the constraint of traditional rate centers hampering their ability to offer innovative calling plans. This will allow the marketplace to operate quickly to communicate to service providers what type of calling plan is actually best suited to today's markets, using today's technology. (July 5, 2001, Tr. Vol. 4 at 625-628).

ALECs have been introducing various services to take advantage of the dramatic reductions in the costs of transport and are developing new services and new offerings and prices that are designed to bring these costs advantages to consumers. Prior to the Commission Order, if an ALEC wanted to offer expanded LATA-wide outward calling service, the ILECs agreed that the ALEC had the right to do that, but would charge the ALEC an access charge for termination beyond the ILEC's local calling area. That charge, based on an ILEC geographical boundary that has no relationship to cost, makes it economically impossible for the ALEC to introduce this

type of service. (July 6, 2001, Tr. Vol. 4, pg. 680).

The ILEC tariff rates reflect the fact that there is no competition in the local telecommunications market as the tariffs have been preserved largely intact in the face of no competition. In virtually every other sector of the telecommunications industry where competitive is effective (long distance, wireless, Internet), customers have benefitted through lower prices and a broader range of benefits. (July 6, 2001, Tr. Vol. 4, p. 680).

It is not uncommon for other state commissions to allow ALECs to define their local calling areas in a different geographic configuration than that of the ILEC. An ALEC may wish to use this difference in local calling scope as a way to distinguish its service from that of the ILEC. With the introduction of competition at the local level, carriers will seek to differentiate their service from the ILEC and other ALECs. Such differentiation can take the form of additional features, reduced prices, different pricing schemes, and expanded local calling areas. Depending on calling characteristics, an expanded local calling area could be an important service feature in the minds of discerning consumers. (July 5, 2001, Tr. Vol. 5, pgs. 761-762).

The Commission's decision to redefine the local calling area was justified in the instant case based upon the record before the Commission. The Commission properly exercised its discretion, expertise and authority in rejecting Verizon's request

that the Commission continue to use the ILECs' retail local calling area as the basis for determining reciprocal compensation:

> While Verizon apparently believes the use of an ILEC's retail local calling area as the basis for determining compensation is simple, we conclude that the issue of simplicity appears to be in the eye of the beholder.

Order at 44 (R. 11:2077). In the Order, the Commission also addressed Verizon's competitive neutrality argument:

> A similar conclusion can be reached on the issue of competitive neutrality, in our view. Verizon witness Trimble testifies that the existing system of basing competition on ILEC retail local calling areas treats all parties - ILECs, ALECs and IXCs - the same... We are leary of the competitive neutrality argument advanced by witness Trimble.
>
> . . .
>
> [I]t would seem paradoxical to assume neutrality in a competitive market paradigm will result from the imposition of a compensation structure that is geographically routed in monopoly era regulation.

Id.

The Commission weighed the evidence below and determined that the evidence and the goals of fostering competition supported the use of the originating carrier's local calling area as the default local calling area. The Commission's decision is supported by competent substantial evidence and well within its authority and

expertise[7] and federal law.

d) Appellants' Argument that the PSC's Order is Inconsistent with its Previous Telenet Decision is Erroneous

Appellants argue that the Commission's prior decision in *Petition for Arbitration of Dispute with BellSouth Telecommunications, Inc. regarding Call Forwarding by Telenet of South Florida, Inc.* (*In Re*) 97 FPSC 4:519, 1997 Florida PUC Lexis 476 (1997) (the "*Telenet Order*") is inconsistent with the Order and that the Commission had failed to justify the inconsistency. The Appellants' reliance on the *Telenet Order* is misplaced.

In the *Telenet Order*, the Commission was asked to arbitrate a dispute between BellSouth and Telenet of South Florida, Inc. ("Telenet") concerning the provisioning of call forwarding - - a local service offered by BellSouth to end users. In the *Telenet Order*, Telenet was purchasing and reselling BellSouth's tariffed local call forwarding service to provide a long distance offering to its customers in the tri-county region of Dade, Broward and Palm Beach Counties. Telenet was not paying BellSouth terminating access charges for these calls. Telenet's resale of this local service to provide a long distance service was alleged by BellSouth to be in violation of

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[7]See *Gulf Coast Electrical Co-op. v. Johnson*, 727 So.2d 259 (Fla. 1999), *AmeriSteel v. Clark*, 691 So.2d 473 (Fla. 1997).

BellSouth's retail call forwarding tariff (which prohibited toll bypass) and Section 364.16(3)(a), Florida Statutes. Telenet contended that it was lawfully providing a local service within Telenet's designated tri-county local calling area.

The Commission held that Telenet's resale of BellSouth's call forwarding service violated the toll bypass restriction in the call forwarding tariff. The Commission further held that Telenet's use of the local call forwarding service to avoid payment of terminating access charges violated Section 364.16(3)(a), Florida Statutes. The *Telenet Order*, however, is inapposite for a number of reasons.

First, 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.[8] The Commission had not, as it did in the proceeding below, addressed local calling areas for purposes of intercarrier compensation obligations for the exchange of local traffic. Thus, at the time of the *Telenet Order*, the local calling area for reciprocal compensation purposes remained the BellSouth retail local calling area. This fact was confirmed in the record below and acknowledged by Verizon in its Initial Brief.[9] (See, May 8, 2002 Tr. Vol. 1, at 88).

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[8]In support of its decision, the Commission noted that it had "devoted much attention to the local calling areas of consumers in Florida. *Telenet Order*, at 7.

[9]"Prior to the issuance of the orders under review, the ILEC's local calling areas were used to determine whether a call was local and subject to reciprocal

Thus, the Commission correctly concluded that terminating access charges were due from Telenet.

Second, the *Telenet Order*, involved a tariff specific issue where Telenet was using a BellSouth provisioned local service to provide a long distance service in violation of that local service tariff. In fact, Telenet conceded that it was acting as a long distance carrier.[10] In the instant case, ALECs such as AT&T would not be providing an ILEC local service in violation of an ILEC local service tariff (and no such contention was made by Appellants below). To the contrary, the ALECs would be providing a <u>local</u> service as defined, for intercarrier compensation purposes, by their local calling areas.

In the *Telenet Order*, the Commission properly applied Section 364.016(3)(a) to the facts before it. Likewise, in the instant case, the Commission properly reviewed the record before it and exercised its lawful discretion to define local calling areas for purposes of intercarrier compensation obligations for the exchange of local traffic. The Commission's Order is not inconsistent with the *Telenet Order*.

II. The Commission's Imposition of Additional Requirements for Eligibility for the Tandem Interconnection Rate is

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compensation, or interexchange and subject to access charges." Verizon Initial Brief, at 12.

[10] *Telenet Order*, at 11.

Preempted by and Violates Federal Law

a) Federal Preemption

The Supremacy Clause, U.S. Const. Art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to" federal law. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23 (1824). Within constitutional limits, Congress is empowered to preempt state law in several ways, including by expressly stating its intention to do so. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In this case, there can be no doubt that the Act expressly preempts state law, as it states that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate telecommunications service." 47 U.S.C. §253(a). The question for this court is whether the Commission's tandem interconnection rate decision "interferes with, or is contrary to" the Act and FCC rules and orders thereunder. *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 712 (1985).

The FCC's authority to regulate the local telecommunications sections of the Act by rule was specifically noted in *Iowa Utilities Board*, at 525 U.S. 377-378:

> Section 201(b) of the Communications Act of 1938 provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to

> carry out the provisions of this Act." 52 Stat. 588 , 47 U.S.C. §201(b). Since Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934, 1996 Act, §1(b), 100 Stat. 56, the Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions.

The grant of general rulemaking authority in Section 201(b) authorizes the FCC to carry out the "provisions of the Act," which include Sections 251, 252 and 253 added by the Act. *Id.* at 378. Congress, by extending the Communications Act into local competition, has removed a significant area from the states' exclusive control. *Id.* at 381. Under the Act, the state commissions' participation in the administration of the new federal regime is to be guided by federal agency regulations; a federal scheme of telecommunications regulation administered by 50 independent state commissions would be ripe with conflict and confusion. *Id.* at 378.[11]

Although a state commission may supplement FCC rules and regulations to further competition, it cannot act contrary to FCC rules. *Indiana Bell Telephone Co.*

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[11]Nothing in Section 252 prohibits a state commission from establishing or enforcing other requirements of State law in its review of an interconnection agreement, subject to Section 253, including requiring compliance with intrastate telecommunications service quality standards or requirements. 47 U.S.C. §252(e). States may impose "requirements necessary to preserve and advance universal service, protect the public safety and welfare, and ensure that continued quality of telecommunications services, and safeguard the rights of consumers," but only on a competitively neutral basis and consistent with Section 254 of the Act. 47 U.S.C. §253(b).

v. McCarty, 2002 WL 31803448 at 4 (S.D. Ind.). The *Indiana Bell* court noted "...just as the FCC is not permitted to promulgate rules that violate the Act, a state commission's discretion to 'vary from a specific FCC regulation' does not authorize it to make orders that are inconsistent with or that substantially prevent the implementation of the interconnection and access rules." *Id.* at 7-8, citing *Iowa Utilities Board v. AT&T*, 120 F.3d 753, 806 (8th Cir. 1997).

As discussed below, the Commission's attempt to place additional requirements on ALECs to qualify for the tandem interconnection rate that exceed those required by the FCC is preempted by federal law and must be reversed.

b) The Commission's Imposition of Additional Requirements for the Tandem Interconnection Rate is Preempted by FCC Rule and Order

Rule 47 C.F.R. 51.711 specifically addresses the circumstances under which an ALEC is entitled to the tandem interconnection rate and states, in pertinent part:

> Where 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 interconnection rate. (Rule 51.711(a)(3)).

In the Order below, the Commission noted that:

> the debate [concerning whether a carrier *serves* a geographic

> area comparable to the area served by the ILEC's tandem switch] revolves around whether this word [”serves”] means an ALEC is actually providing service to a particular number of geographically disbursed customers in that area, or simply capable of providing service to customers throughout the area.

Order, p. 14. (R. 11:2047). The Commission held:

> We find that a "comparable geographic area" pursuant to FCC Rule 51.711 is a geographic area that is roughly the same size as that served by an ILEC tandem switch. We find that an ALEC "serves" a comparable geographic area when it has deployed a switch to serve this area, and has obtained NPA/NXXs to serve the exchange within this area. In addition, we find that the ALEC must show that is serving this area either through its own facilities, or a combination of its facilities and leased facilities connected to its collocation arrangements in ILEC central offices.

Order, p. 20 (R. 11:2053).

In reaching this decision, the Commission placed additional onerous burdens on ALECs to establish their right to be paid the tandem interconnection rate that exceed those required by federal law and FCC rules. For example, the Commission stated that an ALEC must provide a list of the NPA/NXXs that it has opened in specific rate centers. Order, p. 18 (R. 11:2051). An ALEC would be required to make a showing of its actual capability to serve those customers in those specific rate centers. Order, p. 18 (R. 11:2051). The Commission also rejected the ALECs'

request that UNE-P[12] be included in the criteria established for demonstrating geographic comparability. In doing so, the Commission held that the UNE-P is a combination of UNEs (ILEC loop/port combination) in which the ALEC would utilize the ILEC's local switching as an unbundled network element; and since an ALEC would not be performing a switching function when providing service via UNE-P, the Commission ruled that an ALEC using UNE-P was ineligible for the tandem rate because it purportedly would not be serving a comparable geographic area pursuant to Rule 51.711. Order, p. 14 (R. 11:2046).

In its 1996 *First Report and Order* on local competition,[13] the FCC recognized that the costs of transport and termination are likely to vary depending on whether traffic is routed through a tandem switch or routed directly to an end-office switch. The FCC authorized the states to establish different transport and termination *rates* for tandem-routed traffic that reflect the additional costs associated with the tandem switching. The FCC recognized, however, that new entrants may employ network architectures or technologies different than those employed by the ILEC. Thus, the FCC adopted Rule 51.711, requiring payment of the tandem interconnection rate to

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[12]UNE-P is an acronym for "unbundled network elements" that ALECs may lease from ILECs pursuant to the Act.

[13]*Local Competition Order*, ¶1090 (1996).

ALECs upon a showing by the ALEC that its switch serves a geographic area comparable to the area served by the ILEC's tandem switch.

In 2001, the FCC clarified that Rule 51.711(a)(3) requires only that an ALEC demonstrate that it serves a geographic area comparable to the ILEC to be entitled to the tandem interconnection rate. *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, 9648, ¶ 105 (2001) (*Intercarrier Compensation NPRM*).

In the Order, the Commission expressed concern with the lack of direction from the FCC regarding the application of Rule 51.711. Order, p. 17(R. 11:2067). The FCC, however, has recently given the state commissions clarifying direction regarding the application of Rule 51.711, and has resolved any ambiguity regarding what is meant by the word "serves" in FCC Rule 51.711.

On July 17, 2002, the FCC issued an Order resolving three petitions for arbitrations of interconnection agreements between Verizon-Virginia, Inc. and AT&T, WorldCom and Cox Telecom. *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,* CC Docket Nos. 00-218 *et. al.*, Memorandum Opinion and Order, DA 02-1731 (2002) ("*Virginia Arbitration*

Order"). In the *Virginia Arbitration Order*, the FCC clarified and confirmed that an ALEC is entitled to the tandem interconnection rate if its switch is capable of serving customers in areas geographically comparable to the area served by the ILEC's tandem switch.

In the *Virginia Arbitration Order*, as in the instant docket, Verizon argued that ALECs must demonstrate that their switches are actually serving, rather than merely capable of serving, a geographic area comparable to that of Verizon's tandem.[14] Verizon also argued that the petitioners in that case failed to offer evidence about the geographic scope of service, and instead merely offered evidence purporting to show that their end-office switches were capable of serving areas comparable to Verizon's tandem switches.[15] The FCC expressly rejected Verizon's demand that its competitors prove the actual geographic scope of their customer bases. The FCC instead adopted AT&T and WorldCom's position that entitlement to the tandem interconnection rate must be based on switch capability alone:

> We agree ... that the determination whether a competitive LEC's switch "serves" a certain geographic area does not require an examination of the competitor's customers base. Indeed, Verizon has not proposed any specific standard for AT&T and WorldCom to prove that they are actually

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[14]Id. at ¶308.

[15]Id. at ¶308.

> serving a geographically dispersed customer base. The tandem rate rule recognizes that new entrants may adopt network architecture different from those deployed by the incumbent; it does not depend on how successful a competitive LEC has been in capturing a "geographically dispersed" share of incumbent LEC's customers, a standard that would penalize new entrants. We agree. . . that *the requisite comparison under the tandem rule is whether the competitive LEC switch is capable of serving a geographic area that is comparable to architecture served by the incumbent LEC's tandem switch.* We find, moreover, that Verizon appears to concede that the AT&T and WorldCom switches satisfy this standard.

Id. at ¶309 (emphasis added).

Importantly, the FCC expressly announced that evidence regarding switch capability was the <u>only</u> evidence necessary to entitle the ALEC to the tandem interconnection rate:

> In its brief Verizon states "at best, [AT&T] has shown that its switches may be capable of serving customers in areas geographically comparable to the area served by Verizon's tandem," and "*([a]s with AT&T [WorldCom] offered only evidence relating to the capability of its switches*." As we explain above, *such evidence is sufficient under the tandem rate rule* and Verizon fails to offer any evidence rebutting the evidence provided by the petitioners.

Id. at ¶309 (emphasis added).

FCC Rule 51.711, as interpreted in the consolidated *Virginia Arbitration Order*, limits the Florida PSC's jurisdiction to determine an ALEC's entitlement to the

tandem interconnection rate. Unless and until an FCC regulation is stayed or overturned by a court of competent jurisdiction, FCC regulations have the force of law and are binding on state commissions and federal district courts. *Anderson Brothers Ford v. Valencia*, 452 U.S. 205, 219-20 (1981).

It should be noted that the *Virginia Arbitration Order* was issued after the Commission voted on the tandem rate issue (Dec. 5, 2001) but before the issuance of the Order (September 10, 2002). The FCC's mandates must be considered part and parcel of the requirements of the Act. They must therefore be given effect even if a commission did not err by failing to apply them at the time of its original decision. *See U.S. West Communications v. Jennings*, 304 F.3d 950 (9th Cir. 2002). This holding is consistent with the United States Supreme Court's general view of a court's duty to apply its new interpretations of law to pending cases:

> When this court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Virginia Department of Taxation, 509 U.S. 86, 97 (1993).

Based on the doctrine of federal preemption, the FCC's recent holding in its *Virginia Arbitration Order* has laid to rest what an ALEC must show under Rule

51.711 to be entitled to the tandem interconnection rate: "[i]n order to qualify for the tandem rate, a competitive LEC need only demonstrate that its switch serves a geographic area comparable to that of the incumbent LEC's switches." "Evidence relating to the capability of [the ALEC's switch" is sufficient to provide entitlement to the tandem rate. Id. at ¶309. The additional requirements for the tandem rate imposed by the Commission are preempted by federal law and must be reversed.

c) The Commission Ruling imposes Unlawful Barriers to Entry on ALECs and Violates the Competitive Neutrality Provision of 47 U.S.C. §253

47 U.S.C. §253(a) provides:

> No state or local statute or regulation may prohibit or have the affect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Section 253(a) prohibits "regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that 'may ... have the effect of prohibiting' the provision of such services." *Bell Atlantic-Maryland v. Prince George's County*, 49 F.Supp. 2d 805, 814 (D.Md. 1999) , *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000). A number of courts have held that certain requirements imposed by local ordinances impose unlawful barriers

to entry within the meaning of §253(a).[16]

The Commission's decision regarding the tandem interconnection rate will prohibit telecommunications companies from being properly compensated for terminating ILEC's traffic. ALECs that are unable to comply with the additional PSC requirements will be saddled with a discriminatory financial anchor that could effectively preclude entry into local markets.

The FCC has specifically rejected the claim that a statute was neutral if it treated all *new* carriers the same. "Neither the language of Section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one

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[16] See, e.g., *Bell Atlantic*, 49 F. Supp. 2d 814 ("[A]ny 'process for entry' that imposes burdensome requirements on telecommunications companies and vests significant discretion in local government decisionmakers to grant or deny permission to use the public rights-of-way 'may ... have the effect of prohibiting' the provision of telecommunications services in violation of the [Act]."); *AT&T Communications v. City of Dallas*, 52 F.Supp.2d 763, 770 (N.D. Tex. 1999) (a representation by the city that "without a new franchise ... AT&T may not offer [services]" is "sufficient proof the requisite prohibitive effect that triggers the preemptive force of §253(a)."), vacated and remanded on other grounds, 243 F.3d 928 (5th Ci r. 2001); *AT&T Communications v. City of Austin*, 975 F.Supp. 928, 939 (W.D. Tex. 1997) (The threat of criminal sanctions and fines for the failure of an entity to obtain municipal consent can undoubtedly only be described as a prohibition.); and *TCG New York, Inc. v. City of White Plains*, 125 F.Supp. 2d 81 (S.D.N.Y. 2000) (regulations coupled with long approval process are a prohibition). These cases persuasively indicate that a regulatory requirement that allows a regulator to unnecessarily burden a telecommunications provider in order to operate in its jurisdiction "prohibit[s] or ha[s] the effect of prohibiting" the company's ability to provide telecommunications services under 47 U.S.C. §253(a).

portion of the local exchange market - - new entrants - - and not to the market as a whole, including the ILEC. *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000) ("*RT*"). Nothing in Section 253 mandates that a barrier be "insurmountable" or "absolute" in order to constitute a barrier to entry. As the court stated in *RT*, the extent to which a law is a "complete" barrier to entry is irrelevant, as Section 253(a) forbids any statute which prohibits or has "the affect of prohibiting" entry.

The Commission decision violates the doctrine of competitive neutrality as the Commission's requirements preclude new entrants to the market from receiving the tandem interconnection rate, as only established ALECs with networks and existing customers will be able to meet the criteria established by the Commission.[17] A new ALEC entrant may wish to utilize its ability to lease UNE-Ps from an ILEC to reduce its initial cost of entry into the market. The Order effectively precludes that new ALEC entrant from being entitled to the tandem interconnection rate. Order, p. 14 (R. 11:2046). Additionally, for marketing purposes, a new ALEC entrant may wish to

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[17]The Commission ruling also violates the doctrine of competitive neutrality because all ALECs pay ILECs the tandem interconnection rate when ILECs terminate ALECs local traffic. Therefore, new ALEC entrants to the market that cannot meet the stringent test the Commission has set for the tandem interconnection rate, are not being treated on a competitively neutral basis with ILECs.

focus its customer base in a limited geographic area, much smaller than the area served by the ILEC's switch. If that new entrant does not provide a list of NPA/NXXs establishing that it "serves" a geographic area comparable to the ILEC switch, the Commission ruling precludes that entrant from receiving the tandem interconnection rate; even if that ALEC meets the FCC criteria that its *switch is capable* of serving a geographic area comparable to the ILEC's switch. Order, p. 18 (R. 11:2051). Ultimately, an ALEC with a switch capable of serving a geographic area comparable to that served by the ILEC switch - - per the FCC standard - - that enters a new market with a small number of customers would be shut out of that market under the Commission's determination. That ALEC could not collect the revenue necessary to develop a market and provide service because it will have been penalized for not having a large pre-existing customer base. This result is not competitively neutral and imposes an unlawful barrier to entry.

This Court should reverse the PSC decision regarding the tandem interconnection rate and direct the Commission to issue an Order consistent with federal law as interpreted in the *Consolidated Virginia Arbitration Order*.

CONCLUSION

The Commission's decision that the originating caller's retail local calling area shall be the default local calling area for reciprocal compensation purposes is clearly within the Commission's authority. In fact, the FCC has expressly granted state commissions the authority to establish local calling areas as part of the overarching goal to establish truly competitive local telecommunications markets. The Florida Legislature has expressly stated the same goals. The Legislature has neither expressly nor impliedly restricted the authority of the Commission to establish local calling areas. The Commission's decision is consistent with federal and state law and policy and fully supported by the record. Accordingly, the decision under review must not be disturbed.

The Commission's decision to place additional anti-competitive burdens on ALECs as preconditions to entitlement to the tandem interconnection rate that exceed the FCC's requirements is preempted by federal law and imposes a competitively disparate barrier to entry. This part of the Commission's Order should be reversed with directions to implement FCC Rule 51.711 as clarified in the *Virginia Arbitration Order*.

Respectfully submitted,

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In compliance with the Court's Administrative Order dated July 13, 1998, the font size used in this Brief is Times New Roman, size 14.

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