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

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

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SUMMARY OF REBUTTAL ARGUMENT
ON CROSS APPEAL

The arguments advanced by the Cross-Appellees (FPSC, Joint ILECs[1] and BellSouth) in support of the FPSC's tandem interconnection rate decision overlook the preemptive authority of the FCC to establish federal interconnection rules by which state commissions must abide.

In the Final Order, the FPSC offered its own interpretation of the FCC's tandem interconnection rule - - 47 C.F.R. §51.711 - - and created "Florida" criteria that purportedly must be met to receive the tandem rate:

> 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 exchanges within this area. In addition, we find that the ALEC must show that it is serving this 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.[2]

The Commission constructed its interpretation of FCC Rule 51.711 even though, as the Commission acknowledges, the FCC had not interpreted or applied the term

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[1]ILEC Appellants Verizon Florida, Inc., ALLTEL Florida, Inc. and Frontier Communications of the South, Inc., filed a Consolidated Reply Brief (on the local calling area issue) and Answer Brief (on the tandem interconnection rate issue on cross appeal). In this Brief, AT&T refers to these parties as the "Joint ILECs."

[2]Final Order, at p. 20, R. 11:2053.

"serves" as used in the Rule.[3]

In 2002, after the record below had been closed, the FCC Wireline Bureau issued the *Virginia Arbitration Order* defining the term "serves" as applied in Rule 51.711.[4] The *Virginia Arbitration Order* preemptively struck the Commission's attempt to apply Rule 51.711 in any manner contrary to the FCC.

AT&T timely moved for reconsideration of the Final Order in light of the *Virginia Arbitration Order*. The Commission denied AT&T's request. (R. 13:2494).

The Cross-Appellees devote their Answer Briefs to the proposition that the FCC's *Virginia Arbitration Order* is not binding precedent. (FPSC Brief, p. 5, Joint ILEC Brief, p. 37-38, BellSouth Brief, p. 4). Their position should be rejected. The refusal by the Commission to comply with the preemptive dictate of the *Virginia Arbitration Order* is reversible error.

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[3]Final Order, at p. 16; R. 11:2049.

[4]*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*").

ARGUMENT

I. The Final Order is Inconsistent with the Virginia Arbitration Order, Preempted by Federal Law and Must be Reversed

A. The Final Order is Inconsistent with the FCC's Interpretation of Rule 51.711 in the Virginia Arbitration Order

In the *Virginia Arbitration Order*, at ¶309, the FCC expressly stated what a CLEC must establish to be entitled to the tandem interconnection rate, and rejected Verizon Virginia's arguments, which essentially mirrored the Joint ILECs' position in the case below. In rejecting Verizon Virginia's arguments and the general ILEC position (as advocated by the Joint ALECs and BellSouth before the Commission below), the FCC **established the sole applicable criterion for eligibility for the tandem rate under Rule 51.711**. The FCC held:

> We agree... that the requisite comparison under the tandem rule is whether the competitive LEC's switch is capable of serving a geographic area that is comparable to the architecture served by the incumbent LEC's tandem switch.

Additionally, the FCC expressly confirmed that evidence regarding switch capability was the only evidence necessary to entitle the CLEC to the tandem interconnection rate. *Id*. at 309.

The Final Order requires a CLEC to: (1) acquire more than one NPA/NXX in

the local calling area; and (2) establish that it is serving (as opposed to being *capable* of serving) the local calling area through its own facilities, or a combination of its own facilities and leased facilities connected to its collocation arrangements - - to qualify for the tandem rate. (Final Order, p. 20, R. 11:2053). These two requirements of the Final Order violate the limited, express dictate of the *Virginia Arbitration Order*.

The Cross-Appellees assert that the Final Order is consistent with the *Virginia Arbitration Order*.[5] They rationalize this conclusion by arguing that the FPSC simply imposed requirements that are supposedly consistent with the *Virginia Arbitration Order*. Their argument lacks merit. The *Virginia Arbitration Order* **says nothing** on the subjects of acquiring NPA/NXXs and establishing service through a carrier's own facilities, leased facilities, or some combination thereof. With the adoption of the *Virginia Arbitration Order*, a carrier is entitled to the tandem rate if it can establish that it has deployed a switch that is capable of serving a geographic area comparable to that served by the ILEC's switch. That evidence alone entitles the CLEC to the tandem interconnection rate.

It is fundamental that the supremacy clause, U.S. Constitution, Article VI, Clause II invalidates state laws that "interfere with, or are contrary to" federal law.

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[5]FPSC Answer Brief on Cross-Appeal, at 8-11; Joint ILECs' Answer Brief on Cross-Appeal, at 34-35; BellSouth Answer Brief on Cross-Appeal, at 5.

Gibbons v. Ogden, 22 U.S. 1, 211, 6 L.Ed. 23 (1824). Because the Commission's tandem interconnection rate decision requires CLECs to establish more than what is required of them pursuant to the *Virginia Arbitration Order*, the decision "interferes with or is contrary to" the Federal Telecommunications Act of 1996 (the "1996 Act") and FCC Rule 51.711 and the *Virginia Arbitration Order* adopted thereunder. See *Hillsborough County v. Automated Med Labs, Inc.*, 471 U.S. 707, 712 (1985).

Any doubt on this point was expressly resolved in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999). In *Iowa Utilities Board*, the Supreme Court held that the state commissions' participation in the administration of the new *federal* regime under the 1996 Act is to be guided by *federal*-agency regulations; as a *federal* program administered by fifty independent state commissions would be "surpassing strange." *Id.*, 526 U.S. at 378. (Emphasis added)

The FCC's rulemaking authority, statutorily granted in Section 201(b) of the Communications Act of 1934 and recognized in the *Iowa Utilities Board* decision, preempts an attempt by a state commission, to either adopt a rule that conflicts with the FCC's local interconnection rules or, as here, interpret an FCC rule in a manner inconsistent with the interpretation of the FCC. The 1996 Act clearly authorizes a state commission to arbitrate open issues in an interconnection agreement. 47 U.S.C. §252(b) and (c). That federal grant of authority to the states in no way undermines the

FCC's preemptive power to establish the "rules of the road" to be employed by state commissions in arbitrating interconnection issues between two carriers.

For example, in *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003), the Seventh Circuit Court of Appeals recently affirmed a lower court order reversing a Wisconsin Public Service Commission Order based on federal preemption. In *Bie*, the state commission ordered ILECs to file tariffs with the commission setting forth the terms and prices available to CLECs that desired interconnection. The federal district court ruled that the state commission's "tariff-filing order is preempted by the provisions of the federal act" requiring the negotiation and, if necessary, arbitration, of interconnection agreements. *Wisconsin Bell*, 340 F.3d at 443. The Seventh Circuit affirmed the district court emphasizing that federal preemption will nullify any attempt by a state commission to create new means, methods or "rules of the road" to implement the federal scheme of carrier to carrier interconnection which is inconsistent with federal law. The court held that the state commission's tariff-filing order was inconsistent with the negotiation and arbitration requirements of Section 251 and 252 of the 1996 Act, and was, therefore, preempted by federal law:

> A conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's supremacy clause to resolve the conflict in favor of federal law.

Id. at 443.

The additional requirements imposed by the Final Order are preempted by the *Virginia Arbitration Order*. Thus, this portion of the Final Order must be reversed.[6]

B. The Virginia Arbitration Order Properly Applied Federal Law and Preempts the Final Order

The Cross-Appellees assert that the *Virginia Arbitration Order* was issued pursuant to 47 U.S.C. §252, and therefore, the FCC "stood in the shoes of the Virginia State Commission."[7] Because the FCC properly assumed this rule, the Cross-Appellees leap to the erroneous conclusion that *Virginia Arbitration Order* was predicated on state law and has no preemptive effect.[8] The Cross-Appellees fail to recognize that 47 U.S.C. §252 and the corresponding FCC rules require the FCC to utilize federal law, not state law, when arbitrating interconnection agreements, **and that**

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[6]BellSouth throws in an argument that applying the *Virginia Arbitration Order* in Florida would "violate BellSouth's due process rights, undermine the regulatory process, and is inconsistent with *res judicata*." BellSouth Answer Brief on Cross-Appeal, at 5. BellSouth's arguments are irrelevant. Even BellSouth should readily admit that it is subject to FCC rules and FCC interpretations of FCC rules. The *Virginia Arbitration Order* is binding precedent. The principle of res judicata, when properly applied, serves as a bar to bringing a previously adjudicated cause of action. Res judicata is irrelevant in this appeal.

[7]FPSC A.B. on Cross-Appeal, at 8; Joint ILECs' A.B. on Cross-Appeal, at 37-38; BellSouth A.B. on Cross-Appeal, at 4-5.

[8]Id.

the FCC properly applied federal law in the *Virginia Arbitration Order*.

47 U.S.C. §252(e)(5) states that the FCC shall issue an order preempting a state commission's jurisdiction if the state commission fails to carry out its responsibilities in arbitrating interconnection agreements. FCC Rule 51.807(f)(1) expressly provides that the FCC, when acting pursuant to §252(e)(5) "... is not bound by state laws and standards that would have applied to the state commission" had the state commission properly exercised its jurisdiction. Instead, the FCC, as it did in the *Virginia Arbitration Order*, may properly and lawfully apply federal law to the interpretation of a federal rule.

The *Virginia Arbitration Order* was decided by the FCC Wireline Bureau as a result of the Virginia State Utility Commission's ("Virginia Commission") refusal to properly arbitrate the matter. Importantly, the Virginia Commission *expressly refused to apply federal law* in the arbitration, citing the uncertainty surrounding the availability of the 11th Amendment immunity from federal appeal under the Act.[9] Because the Virginia Commission did not satisfy its responsibilities under the Act, the FCC

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[9]See *Petition of MCI MetroAccess Transmission Services of Virginia, Inc. and MCI WorldCom Communications of Virginia, Inc., for arbitration of an Interconnection Agreement with Bell Atlantic-Virginia, Inc.*, Case No. Virginia PUC 000225, Order at 1-2.

preempted the Commission pursuant to Section 252(e)(5).[10] Pursuant to its obligations under 47 U.S.C. §252(e)(5), the FCC ruled on the petitions utilizing federal law. The *Virginia Arbitration Order* is a federal interpretation of a federal law which preempts the Final Order and cannot be ignored by the Commission.

C. The Virginia Arbitration Order issued by the FCC's Wireline Competition Bureau has the same force and effect, when final, as any <u>other FCC Order</u>

The Joint ILECs argue that the *Virginia Arbitration Order* does not preempt the Final Order because it was decided by the FCC's Wireline Bureau as opposed to the FCC Commissioners. (Joint ILEC Brief at 37). In support of their position, the Joint ILECs cite *Caiola v. Carroll*, 851 F.2d 395 (D.C. Cir. 1988) ("*Caiola*"). The Joint ILECs' reliance on *Caiola* is grossly misplaced.

In *Caiola*, the court reviewed a decision of the Defense Logistic Agency ("DLA"), an agency of the Department of Defense, to debar the appellant, a businessman who knew or had reason to know of his corporation's misconduct. The DLA's debarring official, appellee William Carroll, concluded that Caiola had reason

[10]Section 252(c) requires the state commission to ensure that its resolution of the outstanding arbitration issues meets the requirements of federal law, including Section 251, and Commission's implementing rules as well as the pricing standards set forth in the Act.

to know of the criminal conduct, although he did not have actual knowledge of the conduct. The court reversed based upon, among other issues, the fact that Carroll was not the head of the Agency. In doing so, however, the court specifically addressed the deference due Mr. Carroll's interpretation:

> While Carroll's interpretation is, of course, entitled to "modicum of respect" in this court, we need not afford it dispositively. (*Id*. at 399). (footnotes omitted).

Pursuant to 47 C.F.R. 51.807(d), the FCC was authorized to delegate the function to the Wireline Competition Bureau to preside over and rule upon WorldCom's petition. More importantly, when the FCC delegates its authority to the Wireline Competition Bureau, or any bureau, the order by the delegee has the following effect pursuant to federal law:

> (3) Any order, decision, report, or action made or taken pursuant to any delegation, unless reviewed as provided in paragraph (4) of this subsection shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the [Federal Communications] Commission.[11]

The "modicum of respect" standard applied in *Caiola* does not apply to the

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[11]47 U.S.C. §155(c)(3). 47 U.S.C. §155(c)(4) authorizes aggrieved parties to timely apply for review by the FCC. The FCC may agree or deny to review any order. Verizon has moved for reconsideration of the *Virginia Arbitration Order* by the FCC. As of the date of the filing of this Brief, Verizon's motion is still pending.

Wireline Competition Bureau's *Virginia Arbitration Order*. The FCC delegated to the Wireline Competition Bureau its obligation to entertain the WorldCom petition for arbitration pursuant to 47 U.S.C. §155 and 47 C.F.R. §51.807. Accordingly, the *Virginia Arbitration Order* is, when final, the legal functional equivalent of an FCC Order.

47 U.S.C. §155(c)(3) mandates that the *Virginia Order*, when final, has the same force and effect as an order of the full FCC.

CONCLUSION

The Commission's creation of additional requirements for eligibility for the tandem interconnection rate under FCC Rule 51.711 is inconsistent with and preempted by the *Virginia Arbitration Order*. This portion of the Final Order must be reversed.

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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