SUPREME COURT OF FLORIDA

Case No. SC03-236

On Appeal from Final Orders of
The Florida Public Service Commission

VERIZON FLORIDA INC., ET AL.,

Appellants, Cross Appellees

v.

LILA A. JABER, ET AL.,

Appellees, Cross Appellees

v.

AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC
AND TCG SOUTH FLORIDA,

Cross Appellants

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GLOSSARY

1995 Amendments	Ch. 95-403, Laws of Florida
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
TELRIC	Total Element Long-Run Incremental Cost

PREFACE

Appellants and Cross Appellees, 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." Appellees and Cross Appellees, the Florida Public Service Commission and its Commissioners, are referred to collectively as "the Commission." Cross Appellants, AT&T Communications of the Southern States, LLC and TCG South Florida, are referred to collectively as "AT&T."

This matter is before the Court pursuant to § 364.381, Florida Statutes (2002), on review of 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,

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

Order No. PSC-03-0059-FOF-TP, issued on January 8, 2003 (R.13:2487-514) (hereinafter referred to as "Order on Reconsideration").[2]

STATEMENT OF THE CASE

Until the mid-1990s, local telephone service within each of Florida's local calling areas — known as "local exchanges" — was provided by a single company operating under an exclusive franchise granted by the State. Such companies are known as incumbent local exchange carriers or "ILECs." By contrast, service *between* local calling areas — generally known as interexchange service or toll service — has been subject to competition for decades. In one common arrangement, one ILEC's customer might originate a call over the ILEC's network facilities; the call would be passed to an "interexchange carrier" or "IXC" (*i.e.*, a long-distance telephone company); and the IXC would in turn pass the call to the ILEC serving the called party for delivery or "termination." In that situation, the IXC would pay "access charges" — a fee set pursuant to Florida statute — to the ILECs serving the customers at each end of the call. The Legislature has established relatively high (above cost) access charges, to ensure that the cost of local telephone service — service *within* the local exchange — would remain relatively low.

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[2] The Order was amended with respect to matters not relevant to the issues raised in this appeal. *See* Order No. PSC-02-1248A-FOF-TP (R.11:2098-99).

In the last decade, state and federal law have opened local markets to competitive entry by alternative local exchange carriers or "ALECs." As a result of this new local competition, a call within a single local exchange may be carried by two companies. For example, an ILEC's customer might call a neighbor who purchases local exchange service from an ALEC, or vice versa. In that circumstance, federal regulations require the carrier serving the calling party to pay a fee — known as "reciprocal compensation" — to the carrier serving the called party for completing or "terminating" the call. Because both carriers involved with carrying the call in this circumstance are providing local exchange service within the same exchange, such payments are intended simply to compensate the terminating carrier for the costs it actually incurs in delivering the call and are substantially lower than the access charges that apply to toll calls.

In the orders on review, the Commission effectively overrode the legislative distinction between access charges and reciprocal compensation by permitting an ALEC to opt out of paying the state-established access charges unilaterally. Under the Commission's orders, an ALEC can avoid payment of access charges for interexchange calls originated by its customers simply by marketing such calls to its retail subscribers as "local service." In this fashion, an ALEC can effectively offer its subscribers a bulk discount on intrastate toll service, at the ILEC's expense.

That result, which is inconsistent with the decision reached by every other state commission to have addressed the issue, is unfair and unlawful for three basic reasons. First, the Legislature has specifically prohibited the Commission from altering the existing intrastate access charge regime in this fashion, *as the Commission itself has held on two prior occasions*. Second, nothing in state or federal law can be read to eliminate the specific statutory restrictions on the Commission's authority. Third, the orders under review are arbitrary and capricious because they give ALECs an unreasonable and unjustified advantage over competing providers of interexchange service, which remain bound by the law requiring payment of access charges on interexchange calls. For all these reasons, the Court should vacate the orders under review.

STATEMENT OF FACTS

1. Intrastate Access Charges. Until the 1970s, telephone service in the United States — both local and long distance — was provided by regulated monopolies. In that monopoly environment, regulators generally designed telephone rates to ensure that local service would remain affordable to the vast majority of potential subscribers — a goal known as "universal service." Carriers would generally impose a low rate for basic residential service within a local exchange, with unlimited local calling included. By contrast, rates for long-distance calls were kept at an artificially high level.

In the 1970s, the Federal Communications Commission ("FCC") began to authorize competing companies to offer long-distance service in competition with AT&T. Local telephone service remained a monopoly, however. Long-distance companies therefore were not permitted to construct wires reaching all the way to their customers' premises, but instead needed use of the local telephone companies' networks — including AT&T's local affiliates — to provide the first and final legs of all long-distance calls. Following the breakup of the Bell System into separate long-distance and local telephone companies, the FCC and the Commission established charges — known as "access charges" — that AT&T and other long-distance companies would be required to pay to local telephone companies (also known as local exchange carriers or "LECs") for the use of those local network facilities.[3] Generally speaking, authority over access charges is divided between the FCC, which has authority over interstate calls, and the states, which have authority over intrastate calls.

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[3] Local companies continued to provide some interexchange service, particularly in situations where the same company provided service to contiguous exchanges. For example, Verizon provides service in both Tampa and Sarasota, which are in different local calling areas. When a customer placed a long-distance call from Tampa to Sarasota, Verizon could carry the call on an end-to-end basis; relatively high toll charges, like above-cost access charges, were designed to provide universal service support. Customers could also elect to have their long-distance company, rather than their local telephone company, provide that type of toll service. In such a case, the long-distance company pays intrastate access charges. To ensure competitive parity, under current regulations, if Verizon provides such service, it must impute to itself the same access charges that an unaffiliated long-distance company would pay.

In its 1983 order establishing intrastate access charges, the Commission explained that the "primary goal" of its access charge regime was to "adequately compensate the LECs for the use of their local facilities for originating and terminating toll traffic and to provide incentives for competition, while maintaining universal telephone service."[4] In particular, by setting access charges above the actual cost of access services, the Commission ensured that such access charge revenues can help to compensate local carriers for the provision of basic residential service at low rates.[5] (May 8, 2002 Tr., Vol. 1, at 90)

2. 1995 State Telecommunications Reforms. In 1995, the Florida Legislature thoroughly revised the provisions of Chapter 364, Florida Statutes, which govern telecommunications companies. *See* Ch. 95-403, Laws of Fla. ("1995 Amendments"); *Florida Interexchange Carriers Ass'n v. Clark*, 678 So. 2d 1267, 1269 n.2 (Fla. 1996). Most fundamentally, the 1995 Amendments introduced competition into the provision of local telephone service by establishing procedures for the certification of ALECs to provide local service. The 1995 Amendments

[4] *In re Intrastate Telephone Access Charges for Toll Use of Local Exchange Services*, 83 F.P.S.C. 100, 1983 Fla. PUC LEXIS 71, at *9 (1983) ("*Intrastate Access Charge Order*").

[5] *See, e.g., In re Determination of Funding for Universal Service and Carrier of Last Resort Responsibilities*, 95 F.P.S.C. 12:375, 1995 Fla. PUC LEXIS 1748, at *56 (1995).

also imposed affirmative duties on ILECs that are intended to promote competitive entry. *See* Ch. 95-403, §§ 15-16, 23, Laws of Fla. (codified as amended at §§ 364.161, 364.162, 364.337, Fla. Stat. (2002)).

The 1995 Amendments also included comprehensive provisions addressing intrastate access charges. Before 1995, the Legislature had delegated substantial authority over ILECs' intrastate access rates to the Commission. *See*, *e.g.*, §§ 364.035, 364.05, Fla. Stat. (1994). The 1995 Amendments substantially eliminated that authority by establishing the intrastate access regime as a matter of statutory law. Among other things, the Legislature temporarily capped the ILECs' intrastate access rates and set specific standards for any increases or decreases to those rates after the termination of the caps. *See* Ch. 95-403, § 17, Laws of Fla. (codified as amended at § 364.163, Fla. Stat. (2002)). The rate caps and rate adjustment percentages the Legislature adopted reflect deliberate choices, made after consideration of competing options. *See MCI Order*,[6] 1997 Fla. PUC LEXIS 1430, at *18 ("Legislature . . . was fully apprised of the level of access rates in relation to costs and the significance of access rates for the development of competitive markets").[7] The Legislature also essentially eliminated the Commission's discretion

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[6] *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*").

[7] For example, an amendment that would have required that intrastate access rates be set at cost was proposed, but ultimately withdrawn. *See* Sen. Comm. on Commerce & Econ. Opp., Proposed Am. 35 (Apr. 4,

over access charges, limiting its "continuing regulatory oversight" to "determining the correctness of any rate [change] . . . resulting from the application of" the rate-setting formulas contained in § 364.163. § 364.163(5), (9), Fla. Stat. (2002).[8]

The 1995 Amendments also made clear that the statutory intrastate access charge regime would apply to ALECs just as it applies to IXCs for similar types of calls. In particular, the Legislature provided that no carrier could use an interconnection arrangement to avoid "paying the appropriate charges" for "terminating access service" — that is, the intrastate access charges described above — that "would otherwise apply" to telecommunications traffic in the absence of that arrangement. *See* Ch. 95-403, § 14, Laws of Fla. (codified at § 364.16(3)(a), Fla. Stat. (2002)). Although the Legislature gave the Commission substantial discretion to determine which provisions of Chapter 364 should apply to ALECs, the Legislature expressly withheld the authority from the Commission to waive the applicability of § 364.16. *See* § 364.337(2), Fla. Stat. (2002).

1995) ("network access services shall . . . be offered at cost-based prices").

[8] For example, the Legislature tied rate changes to "the cumulative change in inflation," with inflation "measured by the changes in the Gross Domestic Product Fixed 1987 Weights Price Index." § 364.163(2), Fla. Stat.

The local competition and access charge provisions of the 1995 Amendments have a close, logical connection. As described above, existing rate structures ensure the availability of affordable local service, in part, by authorizing LECs to impose above-cost charges for access to the local exchange used to complete an interexchange call. But this is not the only way in which traditional rate structures were intended to promote universal service. For example, the State has also kept residential rates low by allowing local companies to charge higher rates for services that cost no more than residential service to provide — for example, basic business service — and by requiring local companies to charge the same rates for services that do cost more to provide — for example, service in rural areas. Thus, new entrants can profit by serving only low-cost, high-rate customers — a strategy known as "cream-skimming." This process tends to leave the ILEC with the highest-cost, lowest-revenue customers, thereby threatening the ILEC's financial viability.

In this competitive environment, preservation of access charge revenues thus becomes increasingly important. By establishing direct legislative control over the intrastate access charges, and by making clear that such charges apply to all carriers, including the new ALECs, the Legislature made clear that such charges should continue to be a source of support for basic local residential rates.

3. The Federal Telecommunications Act of 1996. Eight months after the Legislature enacted the 1995 Amendments, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996

Act"). Much like the 1995 Amendments, the 1996 Act was designed to open the local telephone business to real and sustainable competition. To that end, Congress preempted any remaining state laws establishing local telephone franchises, *see* 47 U.S.C. § 253(a), and also established rules to ensure that an ALEC can interconnect its network with that of an ILEC.

The 1996 Act requires interconnecting LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.* § 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. Like intrastate access charges, reciprocal compensation is generally computed on a minutes-of-use basis. Unlike intrastate access rates, however, reciprocal compensation rates are cost-based. *Id.* § 252(d)(2).[9] As a result, those rates are substantially lower than intrastate

[9] Specifically, those rates are set using the FCC's Total Element Long-Run Incremental Cost ("TELRIC") methodology, which sets rates "by reference to a hypothetical [network] instead of an incumbent's actual [network]," *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 518 (2002), assuming "the most efficient telecommunications technology currently available" and, with one exception not relevant here, "the lowest cost network configuration," 47 C.F.R. § 51.505(b)(1) (2002). Thus, the rates are not based on — and are substantially lower than — any ILEC's actual costs.

access charges — for example, while Verizon's terminating intrastate access charge is about five cents per minute, its reciprocal compensation rate is less than four-*tenths* of a cent per minute. (May 8, 2002 Tr., Vol. 1, at 92 & Ex. 15)

The FCC's initial regulations implementing § 251(b)(5) required carriers to provide compensation only for the "transport and termination of local telecommunications traffic," defined as traffic that "originates and terminates within a local service area established by the state commission." 47 C.F.R. §§ 51.701(b)(1), 51.703(a) (1996). In its order promulgating those regulations, the FCC recognized that state commissions "have the authority to determine what geographic areas should be considered 'local areas'" for purposes of § 251(b)(5), "consistent with the state commissions' historical practice of defining local service areas for [incumbent] LECs." *Local Competition Order*,[10] 11 FCC Rcd at 16013, ¶ 1035. The FCC also found that the 1996 Act "preserve[d] the legal distinctions between charges for . . . local traffic and . . . intrastate charges for terminating long-distance traffic" and, therefore, that "the reciprocal compensation provisions of section 251(b)(5) . . . do not apply to . . . intrastate interexchange traffic." *Id.* at 16013, ¶¶ 1033-1034.

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[10] 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).

In 2001, the FCC amended its reciprocal compensation regulations. The currently effective regulations require carriers to pay reciprocal compensation only for telecommunications traffic that is not "interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701(b)(1) (2002). The FCC explained that all of the listed items are "access services," which are used "to connect calls that travel to points — both interstate and intrastate — beyond the local exchange." *Order on Remand*,[11] 16 FCC Rcd at 9168, ¶ 37. Thus, under the current regulations — even though the FCC no longer explicitly defines the reciprocal compensation obligation by reference to local calling areas as established by state commissions — reciprocal compensation still does not apply to interexchange traffic; instead, intrastate or interstate access charges continue to apply. Indeed, the FCC reaffirmed that Congress, in enacting the 1996 Act, did not intend to disrupt existing intrastate access regimes. *See id.* at 9168, ¶ 37 & n.66.

[11] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*Order on Remand*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, No. 02-980, 2003 WL 2011012 (U.S. May 5, 2003).

4. 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.[12] Numerous ALECs and ILECs, including the ILEC Appellants, participated in that proceeding. Among the issues the Commission addressed was the question of how a local calling area should be defined for purposes of reciprocal compensation. (R.2:209-11) 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 compensation, or interexchange and subject to access charges. (May 8, 2002 Tr., Vol. 1, at 88) In other words, if the calling party and the called party were both located within the state-commission-approved local exchange boundaries contained in ILECs' filed tariffs, the calling party's carrier would pay reciprocal compensation to the called party's carrier. If the calling party and the called party were located in different local exchanges, access charges would apply.

The use of the ILECs' tariffed local calling areas to determine whether access charges or reciprocal compensation applies did not prevent carriers from offering their customers calling plans that treated such interexchange calls as "local" for retail billing purposes. For example, a carrier might offer its customers "state-

[12] The Commission stated that it was conducting these proceedings pursuant to its "authority to employ procedures consistent with the [1996] Act" when it acts to "implement[] the Act." Order at 7 (R.11:2040) (citing § 120.80(13)(d), Fla. Stat. (2002) ("Notwithstanding the provisions of this chapter, in implementing the [1996 Act], the Public Service Commission is authorized to employ procedures consistent with that act.")).

wide local calling" — that is, unlimited calling throughout the state for a single, flat monthly charge. But the carrier's retail offering would not alter the application of the Legislature's access charge regime for purposes of intercarrier compensation: the carrier would continue to pay the same access charges for the same access service.

During the proceedings before the Commission, the ILEC Appellants argued that maintenance of the status quo was both compelled by the terms of the 1995 Amendments and consistent with sound policy. ALECs, on the other hand, generally sought a rule that would permit the *ALEC* to determine when the *ILEC's* access charges would apply. Thus, the ALECs claimed that, as long as a call by an ALEC customer was billed as local for purposes of the ALEC's retail billing, the ALEC should not be required to pay access charges — even on interexchange calls. (R.7:1193-94) The Commission staff recommended the rejection of both proposals and the adoption of a "LATA-wide" default rule,[13] which would modify existing access charges by exempting from access charges all calls exchanged by ILECs and ALECs within a given LATA. (R.7:1200)[14] At a December 2001 special

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[13] There are 10 LATAs or "Local Access and Transport Areas" in Florida, each of which contains many exchanges. Before 1996, the Bell operating companies (*e.g.*, BellSouth) and GTE were prohibited from providing "interLATA" toll service — *i.e.*, long-distance service beyond the confines of the LATA in which the customer was located. With the passage of the 1996 Act, this restriction was lifted as to GTE; many Bell operating companies have since gained permission to offer interLATA service as well.

[14] The staff expressed the view that this rule would be more "competitively neutral" than the rules suggested by the ILECs and the ALECs. (R.7:1199) After the staff made its recommendation, most ALECs flipped and

agenda conference, the Commission deferred its decision on this issue, which it set for a further hearing and briefing. After completion of those additional proceedings, the Commission adopted the default rule that most of the ALECs initially urged, which uses the originating carrier's retail local calling areas to determine whether a call between an ILEC and an ALEC customer is local for purposes of intercarrier compensation and, thus, subject to reciprocal compensation rather than access charges.

5. The Orders Under Review. In reaching that determination, the Commission first concluded that "the general grants of authority set forth in Section 364.01 authorize [it] to address" this issue. Order at 39 (R.11:2072). In particular, the Commission pointed to § 364.01(2), which gives it "exclusive jurisdiction in all matters set forth in this chapter . . . in regulating telecommunications companies" and which this Court, in 1993, concluded "gives the Commission authority to determine local routes." § 364.01(2), Fla. Stat. (2002); *Florida Interexchange Carriers Ass'n v. Beard*, 624 So. 2d 248, 251 (Fla. 1993) ("*FIXCA*"). The Commission also relied on § 364.01(4), in which the Legislature directed the Commission to "exercise its exclusive jurisdiction" to achieve certain specified goals,

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advocated the staff's LATA-wide proposal. The Commission eventually adopted the position that the ALECs had preferred all along, ironically characterizing the approach as more "competitively neutral" than the LATA-wide proposal.

among them "ensur[ing] the availability of the widest possible range of consumer choice in the provision of all telecommunications services." § 364.01(4)(b), Fla. Stat. (2002).[15]

The Commission acknowledged that the 1995 Amendments — specifically, §§ 364.16(3)(a) and 364.163 — "restrict [its] authority in the area of access charges." Order at 40 (R.11:2073). However, it claimed that "neither of these provisions address[es] the issue of actually defining the local calling [area]," but that, instead, both provisions "only address [its] authority with regard to access charges once the local calling [area] has been defined." *Id.*[16] Although the Commission "believe[d] that Section 364.01, Florida Statutes, is clear in authorizing [it] to act with regard to this issue," it stated further that, in the event § 364.01 was "considered less than clear," its reading of §§ 364.16(3)(a) and 364.163 was supported by the rule of statutory construction that provisions "should

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[15] The Commission also pointed to § 364.01(4)(g) and (i), but stated that, "[i]n particular, [it] believe[d] that subsection (b) . . . is pertinent in view of the arguments that the definition of what the local calling [area] should be for purposes of intercarrier compensation will directly impact 'the availability of the widest possible range of consumer choice' in the provision of basic local telecommunications services by ALECs." Order at 39 (R.11:2072) (quoting § 364.01(4)(b), Fla. Stat. (2002)).

[16] The Commission also questioned whether § 364.163, in which "the Legislature has reserved for itself the authority to determine access charge rates," also "governs access charge revenues." Order at 41 (R.11:2074). The Commission acknowledged the parties' agreement that its originating carrier default rule "would reduce access charge revenues," but claimed that "revenues and rates are distinct entities" and that establishing a "default local calling area [does not] translate[] into rate-setting." *Id.*

be read in a manner that does not conflict and gives each statutory provision an area of operation." *Id.* at 40 (R.11:2073).

The Commission acknowledged that, in an earlier order resolving an arbitration between Telenet and BellSouth, it had reached the opposite conclusion in interpreting § 364.16(3)(a). *See id.* at 41 (R.11:2074). In that order, the Commission held that, although an ALEC "has the authority to designate its local calling area in whatever way it chooses" and "may have a different local calling area than an incumbent LEC, it is required by [§ 364.16(3)(a)] to pay the applicable access charges" based on the local calling areas contained in the ILECs' state-commission-approved tariffs. *Telenet Order*,[17] 1997 Fla. PUC LEXIS 476, at *21-*22. In the Order, the Commission distinguished the *Telenet Order* in a single sentence: "Given that the Telenet order addressed a specific issue in an arbitration proceeding, we appreciate its conclusions but do not believe that decision has precedential value in the instant proceeding." Order at 41 (R.11:2074).

Finally, the Commission noted that the FCC, in the *Local Competition Order*, "appears unequivocal in granting authority to state commissions to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation obligations under Section 251(b)(5) of the [1996] Act." *Id.*

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[17] *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*").

(citing *Local Competition Order*, 11 FCC Rcd at 16013-14, ¶ 1035). And, the Commission claimed that "no party to this proceeding has provided evidence or testimony based in fact or law that would prohibit [the Commission] from defining a local calling area . . . for purposes of reciprocal compensation." *Id.* at 41-42 (R.11:2074-75).

Having concluded that it had jurisdiction to establish a default rule for the local calling area used to determine whether a call is subject to reciprocal compensation or access charges, the Commission considered three possible rules: the local calling area contained in ILECs' state-commission-approved tariffs, a LATA-wide local calling area,[18] and the originating carrier's local calling area. *See id.* at 42-52 (R.11:2075-85). The Commission rejected the continued use of the ILECs' tariffed local calling area, based on its finding that this rule "appears to effectively preclude an ALEC from offering more expansive [local] calling [areas]." *Id.* at 53 (R.11:2086). The Commission did not depart from its earlier conclusion that "an ALEC may define its retail local calling area as it sees fit," regardless of what the intercarrier compensation rules are, but concluded that an ALEC's ability to adopt a local calling area larger than the ILEC's "is constrained by the cost of intercarrier compensation" because the ALEC would have to pay terminating access charges on some calls that it bills as local calls to its retail customers. *Id.*

[18] ALECs proposed two variations on the LATA-wide local calling area rule. *See* Order at 43 (R.11:2076).

The Commission also rejected the adoption of a default rule using the LATA as the local calling area. The Commission found that such a default rule "appears to discriminate against" IXCs. *Id.* As the Commission explained, the LATA-wide default rule would apply only to traffic exchanged between an ALEC and an ILEC, which "would exchange all traffic in a LATA at reciprocal compensation rates." *Id.* However, an IXC would "pay originating and terminating access charges for carrying traffic over some of the same routes" for which an ALEC or ILEC would pay only the substantially lower reciprocal compensation rates. *Id.*

Instead, the Commission selected the originating carrier's local calling area as the default rule. The Commission stated that this rule would be most likely to result in productive negotiations between ALECs and ILECs, because it is not "in accordance with the ILECs' preference" for the use of their calling areas or "the ALECs' preference for LATA-wide local calling [areas]." *Id.* For this reason, the Commission deemed the default rule it selected as "more competitively neutral than the other[]" rules considered. *Id.* The Commission rejected the ILECs' argument that, in light of the multitude of ALEC retail local calling areas, this rule is too administratively complex, finding that ILECs could rely on ALECs to self-report whether their customers' calls were local or toll. *See id.* at 54 (R.11:2087). Finally, although the Commission recognized that its default rule likely would yield the "anomalous and inequitable" result that intercarrier compensation "var[ies] depending on the direction of the call" — because a call between two individuals could be subject to reciprocal compensation when made by the ALEC's

customer, but subject to access charges when made by the ILEC's customer — it concluded that "it is important to encourage experimentation" in the short term with "different retail local calling areas" and speculated that "more uniformity will emerge" once "market forces . . . determine which plans are most viable." *Id.*

On September 26, 2002, ILEC Appellants Verizon and ALLTEL filed a motion for reconsideration of the default rule the Commission adopted. The motion also sought reconsideration or, in the alternative, clarification with respect to another aspect of the Order. On October 2, 2002, the other ILEC Appellants filed a response in support of the Verizon/ALLTEL motion. Sprint also filed a motion for reconsideration of the default rule. Various ALECs, including Cross Appellant AT&T, filed motions for reconsideration of other decisions the Commission reached in the Order. On January 8, 2003, the Commission issued its Order on Reconsideration, denying all parties' motions for reconsideration, but granting the Verizon/ALLTEL motion for clarification. *See* Order on Reconsideration at 27 (R.13:2513). The ILEC Appellants filed a notice of appeal on February 6, 2003.[19] AT&T filed a notice of cross-appeal on February 20, 2003.[20]

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[19] Sprint filed a separate notice of appeal, Case No. SC03-235, with respect to the default rule the Commission adopted.

[20] AT&T filed a separate notice of cross-appeal on that same date in Case No. SC03-235.

STANDARD OF REVIEW

Although "Commission orders come to this Court clothed with a presumption of validity," *BellSouth Telecomms., Inc. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998) (internal quotation marks omitted), "[s]uch deference may not be accorded where the Commission exceeds its statutory authority," *GTC, Inc. v. Garcia*, 791 So. 2d 452, 457 (Fla. 2000); *see also BellSouth Telecomms., Inc. v. Jacobs*, 834 So. 2d 855, 857 (Fla. 2002) (citing cases). Accordingly, 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 Tel. Co. v. Public Serv. Comm'n*, 496 So. 2d 116, 118 (Fla. 1986). In answering that threshold question, the Court reviews the matter *de novo*, and 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." *Id.* (internal quotation marks omitted).

With respect to the Commission's interpretation of Chapter 364, Florida Statutes, this Court has held that "the *contemporaneous construction* of a statute by the agency charged with its enforcement and interpretation is entitled to great weight" and will be upheld "unless it is clearly unauthorized or erroneous." *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988) (emphasis added); *see Verizon Florida Inc. v. Jacobs*, 810 So. 2d 906, 908-09 (Fla. 2002) (interpretation contrary to plain meaning of statute is clearly erroneous). The deference due to an agency's interpretation of a statute thus depends upon whether it is "consistent with its prior published

opinions." *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994). Although "[a]dministrative agencies are not foreclosed from deviating from their own rules, . . . they must adequately explain their deviation." *E.M. Watkins & Co. v. Board of Regents*, 414 So. 2d 583, 588 (Fla. 1st DCA 1982); *see also Beverly Enters.-Fla., Inc. v. Department of Health & Rehab. Servs.*, 573 So. 2d 19, 23 (Fla. 1st DCA 1990) (an agency that "change[s] its interpretation of the controlling statutes" must "offer[] a reasonable explanation for its abandonment of its announced interpretation"). When an agency "change[s] its administrative interpretation of the statute without any known or readily discernible reason for doing so," courts "give greater weight to the first administrative interpretation, and reject its later . . . revision." *Miller v. Agrico Chem. Co.*, 383 So. 2d 1137, 1139 (Fla. 1st DCA 1980).

SUMMARY OF ARGUMENT

In 1995, the Legislature eliminated the Commission's authority to modify intrastate access charges, limiting the Commission's role to ensuring that the Legislature's rate-setting formulas are applied correctly. Moreover, the Legislature prevented local telephone companies, whether ILECs or ALECs, from using an interconnection arrangement to avoid payment of otherwise applicable intrastate access charges. The Commission previously recognized these limits on its authority, holding that access charges may not be changed in any manner other than that specified by the Legislature and that an ALEC cannot, by defining expansive "local" calling areas for retail

billing purposes, avoid paying statutory intrastate access charges. Because the default rule that the Commission adopted violates both of these prohibitions, the orders under review must be vacated.

Even if there were any doubt about whether the Legislature has affirmatively prohibited the adoption of the Commission's default rule, the orders under review must still be vacated because no statutory provision grants the Commission the authority to override state-authorized access charges. Although the Commission relied on the general grants of authority and statements of legislative goals in Chapter 364, the Legislature has expressly denied agencies the authority "to implement statutory provisions setting forth general legislative intent or policy"; instead, agencies may adopt only those rules that "implement or interpret the specific powers and duties" the Legislature granted. § 120.536(1), Fla. Stat. (2002). The Legislature has not conferred on the Commission any specific powers or duties to establish a default rule for determining whether calls exchanged by ALECs and ILECs are local or toll calls for purposes of intercarrier compensation; to the contrary, the Legislature has established such a rule itself, and the specific provisions of Chapter 364 prohibit the Commission from modifying that rule.

Federal law does not preempt the Legislature's limits on the Commission's authority with respect to application of intrastate access charges. In implementing the reciprocal compensation provisions of the 1996 Act, the FCC has made clear that the Act simply preserves, and does not modify, state commissions' existing state-law authority over such charges.

Finally, even aside from the fact that the Commission has no authority to adopt its default rule, it acted arbitrarily and capriciously in selecting that rule, one that all other state commissions to consider the issue have rejected. The Commission rejected one of the possible rules it considered after concluding that the rule discriminated against long-distance carriers, which would have to pay access charges on calls for which ALECs and ILECs would pay the lower reciprocal compensation rates. Yet, the rule the Commission selected discriminates in the exact same manner against both long-distance carriers and ILECs. The Commission never explained why these greater discriminatory consequences did not similarly require rejection of the rule it selected.

For these reasons, the ILEC Appellants ask this Court to vacate the orders under review and hold that, under Florida law, the local calling areas contained in ILECs' state tariffs determine whether a call exchanged between an ILEC and an ALEC is subject to reciprocal compensation or access charges. In the alternative, the ILEC Appellants ask this Court to reverse and remand the orders under review, because they represent an unexplained departure from the Commission's prior interpretation of Florida law and because the Commission's selection of a default rule was arbitrary and capricious.

ARGUMENT

I. THE LEGISLATURE PROHIBITED THE COMMISSION FROM ADOPTING ITS DEFAULT RULE

A. The 1995 Amendments Preclude the Commission from Altering the Intrastate Access Charge Regime Established by the Legislature

In the Order, the Commission acknowledged that two statutory provisions adopted as part of the 1995 Amendments — §§ 364.16(3)(a) and 364.163 — "restrict [its] authority in the area of access charges." Order at 40 (R.11:2073). In fact, these two provisions prohibit the Commission from modifying the intrastate access charge regime that the Legislature established. That statutory structure reflects the Legislature's considered balancing of the goals of promoting local telephone competition and maintaining universal telephone service. The Commission offered two justifications for its conclusion that these restrictions did not prevent it from adopting its default rule. Neither has merit.

1. The Commission claimed that §§ 364.16(3)(a) and 364.163 did not preclude it from adopting its default rule because those provisions "only address [its] authority with regard to access charges once the local calling [area] has been defined." Order at 40 (R.11:2073). Despite the Commission's claim, neither provision is so limited — as the Commission itself had recognized in prior rulings. Instead, both provisions make clear that, under state

law, the ILEC's tariffed local calling area must be used for purposes of determining whether traffic is subject to reciprocal compensation or access charges and that the Commission has no authority to modify that rule.

a. Section 364.16(3)(a) provides that no ILEC or ALEC "shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service." § 364.16(3)(a), Fla. Stat. (2002). That provision thus prevents carriers from using interconnection arrangements, which serve the same function as the 1996 Act interconnection agreements to which the Commission's default rule applies, to avoid paying the access charges that would otherwise apply to traffic — that is, charges that would apply in the absence of the interconnection arrangement. The Commission's default rule violates this prohibition.[21] By establishing the originating carrier rule as the default for use in interconnection agreements, the Commission enables ALECs, by the simple expedient of redefining their local calling areas, to avoid paying terminating access charges that would normally apply to their customers' interexchange calls.

[21] The prohibition in § 364.16(3)(a) was so important to the Legislature that, as explained above, it is one of very few provisions of Chapter 364 that the Commission is expressly precluded from waiving for any ALEC. *See* § 364.337(2), Fla. Stat. (2002).

The Commission had previously interpreted § 364.16(3)(a) in the same manner as the ILEC Appellants. In the *Telenet Order*, the Commission rejected Telenet's claim that it was not obligated to pay access charges for any calls that stayed within its local calling area, regardless of whether those calls would be subject to access charges, based on BellSouth's local calling areas, if made by BellSouth customers. *See Telenet Order*, 1997 Fla. PUC LEXIS 476, at *19.[22] The Commission concluded that "terminating access charges are applicable" to these calls, and that § 364.16(3)(a) prevented Telenet from using its "authority to designate its local calling area in whatever way it chooses" to avoid paying those access charges. *Id.* at *19, *21. "Therefore, while an ALEC may have a different local calling area than an incumbent LEC, it is required by statute to pay the applicable access charges." *Id.* at *22.

In the orders under review, the only explanation the Commission offered for its departure from this precedent was that the *Telenet Order* "addressed a specific issue in an arbitration proceeding" and "do[es] not . . . ha[ve]

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[22] Telenet resold BellSouth's call forwarding service and used that service to take "what would normally be a long distance . . . call," based on BellSouth's local calling areas, and break it "into a series of local calls" — thus, for "a Telenet customer in the Miami area calling a number in Pompano," Telenet's system in Miami "would call a local number in North Dade, which would call another local number in Hollywood," which "would call a local number in Fort Lauderdale, which would call a local number in . . . Pompano," at which point ("about 10 to 15 seconds") the Telenet customer would have a "local" connection from Miami to Pompano. *Telenet Order*, 1997 Fla. PUC LEXIS 476, at *6-*7.

precedential value in the instant proceeding." Order at 41 (R.11:2074). But, the specific issue in that arbitration proceeding was the same as the legal issue raised in the orders under review — whether an ALEC, by adopting retail local calling areas larger than those of the ILEC, can avoid paying access charges that otherwise would apply. The Commission also notes that the *Telenet Order* "involv[ed] call forwarding," *id.*, but never explains how the meaning of the prohibition in § 364.16(3)(a) could differ depending on whether an ALEC is using call forwarding to achieve its larger local calling area. Nor does the *Telenet Order* suggest that its holding was limited to situations where the ALEC relied on call forwarding. *See* 1997 Fla. PUC LEXIS 476, at *21-*22. Regardless of how an ALEC creates its larger local calling areas, it cannot circumvent the Legislature's access charge regime, nor may the Commission permit it to do so.

b. Section 364.163 sets forth a comprehensive system for the establishment and modification of intrastate access charges. In addition, that section expressly limits the Commission's "continuing regulatory oversight of" intrastate access charges to "determining the correctness of any rate [change] . . . resulting from the application of [§ 364.163]." § 364.163(5), (9), Fla. Stat. (2002). As the Commission itself recognized, "[i]t is clear from the plain language of [§ 364.163] that the Legislature has reserved for itself the authority to determine access charge rates." Order at 41 (R.11:2074). The Commission's role is simply to ensure that the mathematical formulas that the Legislature prescribed are applied correctly.

This section precludes the Commission from reducing or increasing the intrastate access rates that an ALEC pays to an ILEC for toll calls. Among other things, therefore, it prevents the Commission from reducing those rates so that they are equal to the reciprocal compensation rate an ALEC pays for local calls.[23] The default rule the Commission adopted, however, indirectly achieves that same prohibited result, by authorizing an ALEC to reduce the rates 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," *Green v. Galvin*, 114 So. 2d 187, 189 (Fla. 1st DCA 1959), the Commission lacked authority to adopt its default rule.

The Commission acknowledged that its default rule will "reduce access charge revenues," but claimed that its rule does not constitute "rate-setting" because "revenues and rates are distinct entities . . . under the law." Order at 41 (R.11:2074). As an initial matter, however, the Commission *has* reduced the rates that ILECs are permitted to charge ALECs for delivery of interexchange calls to the ILECs' local customers. The Commission's default rule reduces the amount that ALECs must pay ILECs for calls that travel over certain routes — routes that would be toll calls based on the ILEC's tariffed local calling areas. Because the Commission cannot mandate such rate

[23] This is especially true given that, prior to enacting the 1995 Amendments, the Legislature considered, but did not adopt, a provision that would have required cost-based intrastate access rates. *See supra* note 7.

reductions directly, it cannot do so indirectly simply because ALECs have changed the status of some calls for retail billing purposes from toll to local.

Moreover, the Commission has long recognized that intrastate access rates and revenues are inextricably linked. Indeed, this Commission initially set intrastate access rates so that LECs would recover a specific amount of revenue. *See Intrastate Access Charge Order*, 1983 Fla. PUC LEXIS 71, at *10. And, as explained above, the Legislature also has recognized that intrastate access charges provide revenues used to ensure universal service, and has regulated access charges in order to maintain those revenues. For these reasons, the Commission's claim that § 364.163 distinguishes between revenues and rates — permitting the Commission to issue rules with respect to the former, but not the latter — must be rejected.

As with § 364.16(3)(a), the Commission has previously interpreted § 364.163 in the same manner as the ILEC Appellants. In 1997, the Commission dismissed a complaint brought by MCI with respect to Verizon's intrastate access rates.[24] MCI claimed that Verizon's rates were excessive because they were higher than the cost-based reciprocal compensation rate the Commission had adopted for Verizon. *See MCI Order*, 1997 Fla. PUC LEXIS 1430, at *3. MCI further claimed that § 364.163 did not preclude the Commission from resolving its complaint,

[24] Verizon was then known as GTE Florida, Inc.

because that provision "must be read in conjunction with" other provisions, including § 364.01(4)(g), which provides the Commission with "authority over anticompetitive behavior." *Id.* at *8-*9.

The Commission rejected MCI's construction of § 364.163. The Commission explained that this section "presents a specific and detailed process for the capping and reduction of access charges" and that, "when a statute specifies a certain process by which something must be done, it implies that it shall not be done in any other manner." *Id.* at *13-*14. Moreover, applying standard principles of statutory construction, the Commission concluded that "the specific limiting provisions of [§ 364.163] must prevail over the general grant[] of authority in [§ 364.01(4)(g)]." *Id.* at *14-*15. In sum, the Commission held that § 364.163 "is a clear delineation of the process for reducing access charges and of [its] authority in this area," and that § 364.01(4)(g) cannot "be construed as authorizing [the Commission] to reduce access charges *in any other manner for any other reason*." *Id.* at *17 (emphasis added).

The orders under review contain no mention of the *MCI Order*, even though Verizon relied on this order in its post-hearing brief (R.10:1920-21), and Verizon and ALLTEL again brought the decision to the Commission's attention in their petition for reconsideration (R.11:2114). The Commission's failure even to attempt to distinguish the *MCI Order* is telling, because the arguments with respect to § 364.163 that were rejected in that order are the same as those the Commission accepted here.

c. Another provision of Chapter 364, also adopted as part of the 1995 Amendments, confirms the ILEC Appellants' reading of §§ 364.16(3)(a) and 364.163 — which had previously been the Commission's reading as well. Prior to 1995, the Commission had the authority to permit local exchange carriers to offer Extended Calling Service ("ECS") as basic local service. By offering ECS, a local exchange carrier could "expand [its] local calling areas" to include calls that formerly were long-distance calls, thereby avoiding the imputation of access charges on those calls. *FIXCA*, 624 So. 2d at 251; *see Florida Interexchange Carriers*, 678 So. 2d at 1268 n.1; *see also supra* note 3. This gave the local exchange carriers an advantage over IXCs, which could not offer ECS and which, therefore, were required to pay access charges on those same calls.

In 1995, however, the Legislature eliminated the Commission's authority to permit local exchange carriers to offer ECS as basic local service, except for existing areas and pending applications, which were grandfathered. *See* Ch. 95-403, §§ 6, 28, Laws of Fla. (codified at §§ 364.02, 364.385, Fla. Stat. (2002)); *Florida Interexchange Carriers*, 678 So. 2d at 1269-70 nn.3, 5-6. Instead, the Commission could permit those carriers to offer ECS as *non-basic* local service only, and the pricing rules for such services preclude the local exchange carriers from avoiding the imputation of access charges. *See Florida Interexchange Carriers*, 678 So. 2d at 1269 & n.4. What the Commission, in the orders under review, has permitted ALECs to do, therefore, is precisely what the Legislature prohibited it from doing. That is, the Commission's originating carrier default rule permits ALECs not only to

expand their local calling areas for retail billing purposes — which no party disputes that they may do — but also to avoid the payment of access charges by doing so.

From the point of view of access charge avoidance, therefore, the originating carrier rule that the Commission adopted is functionally equivalent to the provision of ECS as basic local service; both have the effect of allowing the originating local exchange carrier unilaterally to avoid applicable access charges. The Legislature prohibited the Commission from approving such access charge avoidance not only with respect to ECS in § 364.02, but also with respect to traffic exchanged between ALECs and ILECs in §§ 364.16(3)(a) and 364.163. The elimination of the Commission's authority to permit local exchange carriers to provide ECS as basic local service thus confirms the ILEC Appellants' reading of the latter two sections.

2. The Commission also relied on the principle of statutory interpretation that §§ 364.01, 364.16(3)(a), and 364.163 should be "read . . . in a manner that would not create conflict between competing provisions." Order at 40 (R.11:2073) (citing *City of Punta Gorda v. McSmith, Inc.*, 294 So. 2d 27 (Fla. 2d DCA 1974)). As explained above, §§ 364.16(3)(a) and 364.163 specifically apply to the question of the Commission's authority over intrastate access charges. In contrast, the general provisions in § 364.01 make no reference to intrastate access charges.

Accordingly, even if these provisions could be understood to conflict (and they do not), it is the specific provisions in §§ 364.16(3)(a) and 364.163 that would control.[25]

Indeed, this Court has recently reaffirmed that "the specific statute controls over the general statute" when a supposed conflict, as here, is between provisions that specifically apply to the question at hand and general provisions that, at best, could be read to include that question, among others. *State v. J.M.*, 824 So. 2d 105, 112 (Fla. 2002) ("[E]ven if we were to find conflict between the [specific] provisions . . . and the [general statute] (which we do not), we would apply the long-recognized principle of statutory construction that where two statutory provisions are in conflict, the specific statute controls over the general statute."). Indeed, it is "well settled . . . that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms." *Adams v. Culver*, 111 So. 2d 665, 667 (Fla. 1959). And, as explained

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[25] The Commission also suggested that its reading of the provisions was necessary to "give[] each statutory provision an area of operation." Order at 40 (R.11:2073). But the various provisions of § 364.01 are extremely general: the provisions the Commission cited direct it to ensure the "availability of the widest possible range of consumer choice in the provision of all telecommunications services" and "that all providers of telecommunications services are treated fairly," and to "[c]ontinue its historical role as a surrogate for competition for monopoly services." §§ 364.01(4)(b), (g), (i), Fla. Stat. (2002), *quoted* in Order at 39. These provisions — which, as explained below (*see infra* Part I.B), do not confer rulemaking authority on the Commission in any event — would retain a wide "area of operation" even if understood to have no application whatsoever to intrastate access charges.

above, this is precisely the conclusion the Commission reached in the *MCI Order* — which is unmentioned in the orders under review — where it relied on *Adams v. Culver* in holding that "the specific limiting provisions of [§ 364.163] must prevail over the general grant[] of authority in [§ 364.01(4)(g)]." *MCI Order*, 1997 Fla. PUC LEXIS 1430, at *14-*15.

In sum, the Commission's claim that §§ 364.16(3)(a) and 364.163 do not preclude it from adopting the default rule not only is contrary to the plain meaning of those sections, but also represents an unexplained departure from the Commission's more contemporaneous interpretations of those sections. Therefore, the Commission's interpretation of these sections in the orders under review is entitled to no deference, and those orders must be vacated.

B. The General Grants of Authority in § 364.01 Do Not Authorize the Commission's Action

Even if there were any doubt about whether §§ 364.16(3)(a) and 364.163 prohibit the adoption of the Commission's default rule (and there is not), the Commission has identified no specific grant of authority from the Legislature that permits it to adopt that rule. In the Order, the Commission relied only on "the general grants of authority set forth in Section 364.01." Order at 39-40 (R.11:2072-73). The Commission claimed that those provisions provide "clear . . . author[ity]" to adopt a default rule, *id.* at 40 (R.11:2073), in light of this Court's 1993

decision in *FIXCA*, which held that, through § 364.01, "the Legislature has provided the Commission with broad authority to regulate telephone companies," including "the authority to determine local routes," 624 So. 2d at 251.

As noted above, the Commission's reliance on these "general grants of authority" constitutes an unexplained departure from its prior interpretation of those provisions in the *MCI Order*. In any event, that reliance cannot be squared with the Legislature's post-*FIXCA* amendments to the Florida Administrative Procedure Act ("APA"), which significantly limit agencies' authority to issue rules.[26] As a result of amendments enacted in 1996 and 1999, the APA currently states that "[s]tatutory language . . . generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute." § 120.536(1), Fla. Stat. (2002). The APA further states that agencies "may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute" and do not "have the authority to implement statutory provisions setting forth general legislative intent or policy." *Id.*[27]

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[26] The APA defines a rule as any "agency statement of general applicability that implements, interprets, or prescribes law or policy," § 120.52(15), Fla. Stat. (2002), which includes the default rule the Commission adopted. As noted above, the Commission need not follow the rule-making procedures in the APA when it adopts rules to implement the 1996 Act. *See id.* § 120.80(13)(d). That exemption, however, does not relieve the Commission from the need to comply with the substantive provisions of the APA.

[27] The language in § 120.536(1) also appears in "an unnumbered paragraph following" § 120.52(8)(g), which is "known as the 'flush left' paragraph." *Board of Trustees v. Day Cruise Ass'n, Inc.*, 794 So. 2d 696, 698 n.1

Although this Court has not had occasion to address the effect of the 1999 amendments to the APA,[28] the First District Court of Appeal has held that, as a result of those amendments, an agency may only adopt rules that "implement[] or interpret[] specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency." *Day Cruise Ass'n*, 794 So. 2d at 700. The fact that a rule "fall[s] within the class of powers and duties delegated to the agency . . . will not make the rule a valid exercise of legislative power"; instead, "the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute." *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 599 (Fla. 1st DCA 2000).[29]

The provisions in § 364.01 on which the Commission relied — § 364.01(2) and § 364.01(4)(b), (g), and (i) — are "general[] descri[ptions of] the powers and functions of [the] agency" and "set[] forth general legislative

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(Fla. 1st DCA), *reh'g denied*, 798 So. 2d 847 (Fla. 1st DCA 2001).

[28] *See Day Cruise Ass'n*, 794 So. 2d at 700 n.4.

[29] As the First District Court of Appeal has explained, the Legislature's 1999 amendments explicitly rejected that court's interpretation of the 1996 amendments in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998), where that court held that an agency rule need only be within the "'range'" or "'class of powers and duties identified in the statute.'" *Day Cruise Ass'n*, 794 So. 2d at 699 & n.3 (quoting *Consolidated-Tomoka*, 717 So. 2d at 80).

intent or policy." § 120.536(1), Fla. Stat. (2002). They are not among the "specific powers and duties granted by" Chapter 364 and, therefore, do not provide the authority necessary for the default rule the Commission adopted, particularly in light of the specific provisions in other sections of Chapter 364 that prohibit the Commission from modifying the access charge regime the Legislature established. *Id.* Section 364.01(2), for example, does not confer any specific powers or duties on the Commission. Instead, it provides only that, "where any conflict of authority may exist" between a Commission action and "any local or special act or municipal charter" with respect to the "matters set forth in [Chapter 364]," the Commission has "exclusive jurisdiction," and its action "shall supersede" the contrary local authority. § 364.01(2), Fla. Stat. (2002). Section 364.01(4) states that the Commission "shall exercise [that] exclusive jurisdiction in order to" achieve a set of nine legislative policies, including "[p]rotect[ing] the public health, safety, and welfare" and "[e]ncourag[ing] competition." *Id.* § 364.01(4)(a)-(c). None of the nine subsections grants a specific power or duty to the Commission; nor does any even mention the establishment of local calling areas.

For these reasons, the Legislature's amendments to the APA have overruled this Court's holding in *FIXCA* that § 364.01 is the statutory provision in which the Legislature provided the Commission with "broad authority" to

adopt rules "regulat[ing] telephone companies." 624 So. 2d at 251.[30] Instead, the authority for the default rule adopted in the Order must be found in other provisions of Chapter 364 or in federal law. As explained above, the Commission identified no provision in Chapter 364 that specifically authorizes it to regulate local calling areas for purposes of the compensation that carriers pay to each other; to the contrary, the other provisions of Chapter 364 preclude the Commission from modifying the Legislature's intrastate access regime. As explained below, federal law does not provide the necessary authority either.

C. Federal Law Does Not Preempt the Limits the Legislature Established on the Commission's Authority to Define Local Calling Areas

The Commission claimed that the FCC's *Local Competition Order*, in which the FCC first promulgated rules to implement the 1996 Act, contains a "clear delegation of authority from the FCC to state commissions to make determinations as to the geographic parameters of a local calling area" "for the purpose of applying reciprocal compensation obligations under Section 251(b)(5)." Order at 41 (R.11:2074) (citing *Local Competition Order*, 11 FCC Rcd at 16013-14, ¶ 1035). Whether the Commission intended to rely on the *Local Competition Order* as an independent source of authority — that would preempt any limits imposed under state law — is not apparent from

[30] As explained above, in 1995, the Legislature overruled the specific holding in *FIXCA* — that the Commission has authority to transform toll calls into local calls through the approval of an extended calling service arrangement. *See supra* Part I.A.1.c.

the Order, which contains no further discussion of the FCC's order.[31] Such reliance, however, would be misplaced.[32] As an initial matter, the 1996 Act contains a savings provision providing that nothing in the Act shall be "construed to modify, impair, or supersede . . . State . . . law unless *expressly* so provided." 1996 Act § 601(c)(1) (codified at 47 U.S.C. § 152 note) (emphasis added). The paragraph of the *Local Competition Order* cited by the Commission identifies no such express modification of state law in the 1996 Act; to the contrary, that paragraph merely recognizes and preserves state commissions' existing authority under state law to define local calling areas. Because the 1996 Act does not expressly expand that authority or preclude state legislatures from

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[31] In its Order on Reconsideration, the Commission cited the *Local Competition Order* only in rejecting the ILEC Appellants' claims that the default rule the Commission adopted violates federal law; it did not suggest that the FCC's order provided a source of authority for the adoption of its default rule. *See* Order on Reconsideration at 11-12 (R.13:2497-98). The ILEC Appellants do not agree with the Commission's conclusion that the default rule complies with federal law, but do not raise those arguments here. Instead, the ILEC Appellants reserve the right to raise those arguments in a federal court action, brought pursuant to 47 U.S.C. § 252(e)(6), challenging any arbitrated interconnection agreement that the Commission approves that contains the originating carrier rule.

[32] A "court should review *de novo*, without deference to a state commission, issues regarding the meaning and import of the [1996] Act." *MCI Telecomms. Corp. v. Sprint-Florida, Inc.*, 139 F. Supp. 2d 1342, 1345 (N.D. Fla. 2001); *see also MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 112 F. Supp. 2d 1286, 1291 (N.D. Fla. 2000) ("[A]lthough judicial review of a federal agency's interpretation of a federal statute it is charged with administering is . . . deferential, federal courts generally do not similarly defer to interpretations of federal law by state agencies."), *aff'd*, 298 F.3d 1269 (11th Cir. 2002).

limiting state commissions' authority in this respect, it cannot be read to do so implicitly, consistent with the savings clause.

Furthermore, the intent of the FCC to preserve, rather than to attempt to modify, state commissions' existing authority over local calling areas is evident from the text of the *Local Competition Order* and the regulations the FCC adopted. *First*, the paragraph of the *Local Competition Order* cited by the Commission provides that state commissions' "authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation obligations under section 251(b)(5)" is "*consistent with the state commissions' historical practice* of defining local service areas for [incumbent] LECs." *Local Competition Order*, 11 FCC Rcd at 16013, ¶ 1035 (emphasis added). The FCC did not suggest that it sought to confer authority on state commissions to *depart from* that historical practice by defining local calling areas in a manner prohibited by state law. To the contrary, the FCC made clear that the 1996 Act "*preserves* the legal distinctions between charges for . . . local traffic and . . . intrastate charges for terminating long-distance traffic." *Id.* at 16013, ¶ 1033 (emphasis added).

Second, the reciprocal compensation regulations the FCC adopted in the *Local Competition Order* similarly do not suggest that state commissions are to look to federal law for their authority to set local calling areas for

purposes of reciprocal compensation.[33] Instead, the only mention of state commissions in those regulations appeared in the definition of local traffic that is subject to reciprocal compensation: traffic is local if it "originates and terminates within a local service area established by the state commission." 47 C.F.R. § 51.701(b)(1) (1996). The FCC's regulations thus took as a given the local calling areas that state commissions had established under state law. They did not confer authority on state commissions to act in a manner inconsistent with state law.[34]

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[33] *See, e.g.*, Entry on Rehearing, *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 7 (Ohio PUC Oct. 31, 2002) ("[W]hen, in our arbitration award in this case, we relied upon . . . *our Local Service Guidelines* [in concluding that the ILEC's local calling area should be used for purposes of reciprocal compensation], *we acted consistent with Ohio law as contemplated by Congress and the FCC*.") (emphases added).

[34] As explained above, in 2001 the FCC amended its reciprocal compensation regulations. *See supra* p. 11. The currently effective regulations make no mention of state commissions at all and, thus, could not support an argument that a state commission has authority under federal law to establish local calling areas for purposes of reciprocal compensation that exceed its authority under state law. Indeed, in the order adopting the amended rules, the FCC reaffirmed that Congress, in enacting the 1996 Act, did not intend to disrupt the existing intrastate access regimes. *See Order on Remand*, 16 FCC Rcd at 9168, ¶ 37 & n.66.

II. THE COMMISSION'S SELECTION OF THE ORIGINATING CARRIER DEFAULT RULE WAS ARBITRARY AND CAPRICIOUS

Even if the Commission had authority to adopt a default rule for determining whether traffic exchanged between an ALEC and an ILEC is subject to reciprocal compensation or access charges — and it does not — it acted arbitrarily and capriciously in selecting the default rule. *See General Tel. Co. v. Marks*, 500 So. 2d 142, 145 (Fla. 1986) (arbitrary and capricious Commission rule is invalid); *General Tel. Co. v. Florida Pub. Serv. Comm'n*, 446 So. 2d 1063, 1067 (Fla. 1984) (same). At least ten other state commissions have rejected the originating local

calling area rule;[35] the ILEC Appellants are aware of no other state commission that has adopted that rule, which, as the Rhode Island commission explained, is "more likely [to] promote rate arbitrage than competition."[36]

The arbitrariness of the Commission's action is evident from its inconsistent application of the criteria it used for selecting a default rule. The reason the Commission gave for rejecting the LATA-wide local calling area rule was that it "discriminate[s] against IXCs." Order at 53 (R.11:2086). As the Commission explained, "[w]hile ALECs and ILECs would exchange all traffic in a LATA at reciprocal compensation rates, IXCs would continue to

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[35] State commissions in California, Delaware, Illinois, Massachusetts, New Hampshire, New York, Ohio, Pennsylvania, Rhode Island, and Vermont have all rejected the use of the originating carrier local calling area. *See* Opinion Adopting Final Arbitrator's Report with Modification, Dec. 02-06-076 (Cal. PUC June 27, 2002), *aff'g* Final Arbitrator's Report, Application Nos. 01-11-045 & 01-12-026 (Cal. PUC May 15, 2002); Order Adopting Arbitration Award with Modification, Docket No. 02-235, Order No. 6124 (Del. PSC Mar. 18, 2003), *aff'g* Arbitration Award, Docket No. 02-235 (Del. PSC Dec. 18, 2002); Arbitration Decision, Docket No. 02-0253 (Ill. Com. Comm'n Oct. 1, 2002), *reh'g denied* (Ill. Com. Comm'n Nov. 11, 2002); Arbitration Order, D.T.E. 02-45 (Mass. DTE Dec. 12, 2002); Final Order (Order No. 24,080), Docket Nos. DT 00-223 & DT 00-054 (N.H. PUC Oct. 28, 2002); Order Resolving Arbitration Issues, Case 02-C-0006 (N.Y. PSC May 24, 2002); Arbitration Award, Case No. 02-876-TP-ARB (Ohio PUC Sept. 5, 2002), *reh'g denied* (Ohio PUC Oct. 31, 2002), *aff'g* Arbitration Panel Report, Case No. 02-876-TP-ARB (Ohio PUC July 22, 2002); Opinion and Order, Docket No. A-310771F7000 (Pa. PUC Apr. 17, 2003); Final Arbitration Decision and Order No. 17,350, Docket No. 3437 (R.I. PUC Jan. 24, 2003), *aff'g* Arbitration Decision, Docket No. 3437 (R.I. PUC Oct. 16, 2002); Arbitration Order, Docket No. 6742 (Vt. PSB Dec. 26, 2002).

[36] R.I. Arbitration Decision, Docket No. 3437, at 30; *see* R.I. Final Arbitration Decision, Docket No. 3437, at 6 ("unanimously affirming" arbitrator's decision).

pay originating and terminating access charges for carrying traffic over some of the same routes." *Id.* In an earlier order, the Commission had relied on this same concern about discrimination against IXCs in rejecting the claim that reciprocal compensation rates, rather than access charges, should apply to certain extended calling service routes. The Commission held that, "because the IXCs currently competing on these routes are charged [intrastate] access rates," "it is only appropriate that LECs be charged the same rate in order to avoid discriminatory treatment."[37]

This same discrimination against IXCs, however, is also a necessary consequence of the originating carrier local calling area default rule that the Commission adopted. As with the LATA-wide rule, under an originating carrier rule, IXCs will continue to pay access charges on calls for which an ALEC would pay reciprocal compensation. To see this, consider the call between Sarasota and Tampa discussed above.[38] The two cities are in the same LATA, but in different Verizon local calling areas. Thus, when an IXC carries a call from Sarasota to Tampa, the IXC pays intrastate access charges to the LEC — whether an ILEC or an ALEC — that terminates the call. Under the Commission's originating carrier rule, if that same call were made by an ALEC's customer, where the ALEC had defined its retail local calling area to include both Sarasota and Tampa, that ALEC would pay

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[37] *In re Resolution by Holmes County Board of County Commissioners for Extended Area Service in Holmes County*, 99 F.P.S.C. 8:244, 1999 Fla. PUC LEXIS 1398, at *20 (1999).

[38] *See supra* note 3.

Verizon the reciprocal compensation rate rather than the intrastate access charge. Thus, as with the LATA-wide rule, under the originating carrier rule, "[w]hile ALECs and ILECs [will] exchange . . . traffic . . . at reciprocal compensation rates, IXCs would continue to pay . . . terminating access charges for carrying traffic over . . . the same routes." Order at 53 (R.11:2086).

The Commission offers no explanation for why this discrimination, which was sufficient to disqualify the LATA-wide rule, did not similarly disqualify the originating carrier rule.[39] In fact, the discrimination is worse under the originating carrier rule, because it will also result, as the Commission itself admitted, in "anomalous and inequitable" "directional differences in compensation" that discriminate against ILECs. Order at 54 (R.11:2087).[40] Thus, in the example discussed above, the ALEC would pay the ILEC reciprocal compensation for calls from

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[39] Although Verizon and ALLTEL made this argument in their petition for reconsideration (R.11:2124), the Commission's Order on Reconsideration does not address it.

[40] In addition, unlike the other default rules the Commission considered, the originating carrier 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. *See, e.g.*, *Cassady v. Consolidated Naval Stores Co.*, 119 So. 2d 35, 37 (Fla. 1960) ("[A]s in the case of any . . . statute, . . . the exercise of . . . powers thereby granted cannot be made to depend upon the unbridled discretion or whim of a[n] . . . individual or group of individuals."); *Florida Nutrition Counselors Ass'n v. Department of Bus. & Prof'l Regulation, Bd. of Med., Dietetics & Nutrition Practice Council*, 667 So. 2d 218, 222 (Fla. 1st DCA 1995); *Amara v. Town of Daytona Beach Shores*, 181 So. 2d 722, 725 (Fla. 1st DCA 1966).

Sarasota to Tampa, but the ILEC would pay the ALEC intrastate access charges for calls from Tampa to Sarasota. Even if the Commission were correct in speculating that such discrimination between ALECs and ILECs will be reduced over time, as they adopt "more uniform[]" local calling areas (and there is no reason to believe that this is true), Order at 54 (R.11:2087), the originating carrier rule would still discriminate against IXCs and in favor of ALECs and ILECs.[41] Only using the state-commission-approved, tariffed, ILEC 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 or in which direction they travel — avoids this discrimination. The Commission's decision to adopt the originating carrier default rule was thus arbitrary and capricious, even assuming the Commission had authority to adopt a default rule.

CONCLUSION

The Commission has no authority to adopt a default rule governing whether traffic exchanged between an ALEC and an ILEC is subject to reciprocal compensation or intrastate access charges. The Legislature has prohibited the Commission from regulating in this area, and federal law does not provide the Commission with the

[41] Because the originating carrier rule, like the LATA-wide rule, thus discriminates in favor of ALECs, there is no basis to the Commission's speculation that ALECs and ILECs would be most likely to negotiate terms that differ from the default rule if the Commission adopted the originating carrier rule. *See* Order at 53 (R.11:2086).

necessary authority. Instead, under Florida law, the ILEC's local calling area must be used for that purpose. Accordingly, the orders under review must be vacated.

Additionally, and alternatively, this Court must reverse and remand the orders under review because the Commission, in those orders, departed without explanation from its prior interpretation of the relevant statutory provisions. Furthermore, the Commission's selection of a default rule was arbitrary and capricious because the rule it selected has the same discriminatory effects that led it to reject another of the rules it considered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of ILEC Appellants has been furnished, **by U.S. Mail, to** the parties on the attached service list on May 19, 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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