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September 13, 2000
VIA Hand Delivery

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No. 990994-TP

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and 15 copies of:

- The Florida Competitive Carriers Association's, MCI WordCom, Inc.'s, AT&T Communications of the Southern States, Inc.'s and the Association of Communications Enterprises' Post-Hearing Comments

in the above docket.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Yours truly,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed Amendments to Rule 25-4.003, F.A.C., Definitions; 25-4.110, F.A.C., Customer Billing for Local Exchange Telecommunications Companies; 25-4.113, F.A.C. Refusal or Discontinuance of Service by Company; Rule 25-24.490, F.A.C., Customer Relations; Rules Incorporated; And 25-24.845, F.A.C., Customer Relations; Rules Incorporated. _____/	Docket No. 990994-TP Filed: September 13, 2000

The Florida Competitive Carriers Association's, MCI WorldCom, Inc.'s, AT&T Communications of the Southern States, Inc.'s and The Association of Communications Enterprises' Post-Hearing Comments

The Florida Competitive Carriers Association (FCCA), MCI WorldCom, Inc. (WorldCom), AT&T Communications of the Southern States, Inc. (AT&T) and the Association of Communications Enterprises (ASCENT)[1] (collectively, Competitive Carriers) file these Post-Hearing comments on proposed rules 25-4.110(2), (19) as applicable to alternative local exchange companies (ALECs) and interexchange companies (IXCs).

I. Introduction

In Order No. PSC-00-0525-NOR-TP, the Commission amended certain of its billing rules. The majority of the amendments were made applicable to both ILECs and ALECs. However, two subsections, 25-4.110 (2) and (19), were not made applicable to ALECs and IXCs and were set for

[1]ASCENT was formerly known as the Telecommunications Resellers Association (TRA).

hearing separately. That hearing was conducted on August 21, 2000.[2] At the hearing the Commission took testimony as well as statements from representatives of interested parties. FCCA, AT&T, MCI WorldCom and ASCENT appeared at hearing to urge the Commission not to apply the two subsections at issue to the competitive ALEC and IXC industry.

The hearing generated a number of legal, policy and factual issues which Competitive Carriers address in this post-hearing filing.

II. Legal Issues

A. General Legal Issues

1. Additional Statutory Authority Cannot Be Added to Bolster a Proposed Rule After Rulemaking Begins

When the Notice of Rulemaking was issued in regard to the proposed rules at issue in this case, it contained, as Chapter 120 requires, a citation to the law which the proposed rules are to implement. The sections cited in support of the proposed rules are §§364.052, 364.602 and 364.604., Florida Statutes. At hearing, an issue was raised as to whether Staff could add additional statutory support for the rules by citing a statutory section (§364.0252) that was not included in the rulemaking notice.[3]

Reference to §120.54, Florida Statutes, makes it clear that additional authority cannot be

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[2] As a preliminary matter, it was suggested that perhaps the hearing should not go forward at that time due to the fact that there were only three sitting Commissioners. The Commissioners went forward with the hearing but reserved judgment on the issue of whether a decision should be made on the rule amendments in the absence of the full Commission. (Tr. 12).

[3] Chairman Deason expressed discomfort with attempting to add additional authority for the proposed rules this late in the rulemaking process. (Tr. 213).

added "after the fact." Section 120.54(3)(a)1 requires that the Notice of Rulemaking, provide, among other things:

> a reference to the specific rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific.

The Notice of Rulemaking in this case was issued on March 10, 2000 with the above-noted sections included as authority for the rulemaking. To attempt to include a new section at this point in time, after the rules have been proposed and gone to hearing, would be a violation of the Administrative Procedures Act as well as a denial of due process to those participating in the proceeding who would not be on notice of the Commission's alleged authority for the rule proposed.

This issue was addressed in *Save the Manatee Club, Inc. v. Southwest Florida Management District*, 00 ER FALR 061 (Final Order, 12/9/99). In that case, South Shores (the developer) argued that the District's proposed rules were supported by a statutory provision which the District had not cited. The Administrative Law Judge rejected this claim:

> South Shores argues that another statutory provision should be considered as law implemented. To do so, however, runs afoul of the legislative mandate in Section 120.54(3)(a)1., Florida Statutes, that rules contain a citation to each law they implement. See also, Section 120.52(8)(c), Florida Statutes.

Therefore, at this point in the proceeding, the Commission may not use additional authority it failed to include in its Notice of Rulemaking in an attempt to support its proposed rules.[4] If it wanted to use such authority to support the proposed rules, it would have to begin rulemaking again.

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[4]Commissioner Jaber asked whether §364.01 could be used as authority for the bill block. (Tr. 161). For the reasons discussed above, it could not. Further, §364.01 is an expression of legislative intent. Section 120.52(8) expressly provides that an agency has no authority to adopt a rule "to implement provisions setting forth general legislative intent or policy."

2. Any Rules Adopted Can Apply *Only* to Residential Customers

Another legal issue which arose at hearing was to whom the proposed rules would be applicable in the event they are adopted--residential customers *only* or business and residential customers. While Mr. Moses testified that the proposed rules are intended to apply to both business and residential customers (Tr. 100-101), the statute the Commission is attempting to implement makes it clear that the rules can be applicable *only* to residential customers.

The very sections which the proposed rules are supposed to implement are set off in a separate subpart of Chapter 364 called Telecommunications Consumer Protection. The subpart has a definition section separate and apart from the general definitions contained in §364.02, Florida Statutes. The special definitional subsection applicable to this subpart defines a "customer" as "any *residential* subscriber to services provided by a telecommunications company."[5] Therefore, clearly any rule requirements based on this subpart can be applicable *only* to residential customers.

3. The SERC Is Inadequate

The Statement of Estimated Regulatory Costs (SERC), which accompanies the proposed rules, fails to comply with the applicable statute and is therefore inadequate. Section 120.541, Florida Statutes, governs the preparation of the SERC. This section provides that a SERC *shall* include, among other things:

- A good faith estimate of the number of individuals and entities likely to be required to comply with the rule;[6]

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[5] §364.602(3), emphasis added.

[6] §120.541(2)(a).

- A good faith estimate of the transactional costs likely to be incurred by individuals and entities required to comply with the rule.[7]

The SERC prepared for the proposed rules under consideration in this case fails to meet these mandatory provisions and thus is inadequate in light of the above statutory standards.

As a preliminary matter, the SERC upon which Staff intends to rely was prepared on February 25, 2000 and thus predates the current version of the proposed rules that the Commission considered at hearing. Though the rules were revised and numerous changes made, a new SERC was not prepared. (Tr. 22, 33). Therefore, the SERC does not even address the version of the proposed rules which the Commission is considering.

Additionally, the SERC wholly fails to address the requirement that the SERC estimate the number of entities likely to be required to comply with the rule. The SERC identifies the number of certificated IXCs and ALECs in Florida but makes no estimate of the companies who would have to comply with the rule.[8] Upon cross-examination, Mr. Hewitt, who prepared the SERC, could not answer the question of how many companies would be required to comply with the proposed rule. (Tr. 23, 24, 29, 31-32). He could only say that it would apply to companies who bill for others, but he did not know how many companies that included. (Tr. 23).

The SERC also fails to contain a good faith estimate of the transactional costs likely to be incurred by entities required to comply with the proposed rule. Transactional costs include "the cost

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[7]§120.541(2)(c)

[8]The SERC notes that there are 10 ILECs, 600 IXCs and 200 ALECs certified in Florida. (SERC at 1-2). This does not address which of those over 800 companies would be required to comply with the rule. In fact the SERC states, in contravention of §120.541(2)(a),: "The number [of companies] that bill customers themselves . . . is unknown." (SERC at 2).

of equipment required to be installed or used" in complying with the rule as well as "additional operating costs." No estimate of these costs to the industry is included. All that the SERC contains are a few estimates from a few carriers as to cost.[9] Again, Mr. Hewitt could not provide an estimate of the compliance costs for the industry, though he did note that it would be "very costly to implement." (Tr. 24, 28, 31, 35). All Mr. Hewitt could really provide about transactional costs was the information that companies would save a substantial amount of money if they were not required to institute a bill block. (Tr. 34).

In addition, since the SERC was prepared, the Commission promulgated rule 25-4.110(18) which requires companies to remove charges from a customer's bill if the customer did not order or receive the service. The SERC contains no analysis of any benefit that would accrue to customers from the implementation of a bill block in addition to the requirement of subsection (18). (Tr. 34).

The SERC, as presented at hearing by Mr. Hewitt, does not comply with the requirements of §120.541, Florida Statutes. An inadequate SERC constitutes a material failure to follow the applicable rulemaking requirements of Chapter 120, Florida Statutes, and thus renders any resulting rule an invalid exercise of delegated legislative authority.

B. Bill Formatting Rule

1. A Rule Should Not Merely Parrot the Statute

At hearing it was suggested that the formatting rule (subsection 2) was permissible because it simply reiterated the requirements of §364.604(1), Florida Statutes. (Tr. 151). Competitive Carriers believe that the rule goes beyond the statute in mandating how and where on the bill this

[9]Surprisingly, though these rules are intended to apply to IXCs, no data request was sent to them asking for information on compliance costs. (Tr. 20).

information must be provided. Staff's proposed format is only one possible way to implement the statute, and Staff produced no evidence of any need to prescribe a specific bill format. However, to the extent that it is Staff's view that the rule simply mirrors the statute, the rule is unnecessary, redundant and should not be promulgated.

The Administrative Procedures Committee reviews proposed rules to ensure, among other things, that they do not reiterate or paraphrase existing material.[10] Restatement of statutory requirements is neither necessary or desirable: "It is not necessary to promulgate rules which simply reiterate or paraphrase statutory material. Indeed, such rules are to be discouraged." *Bostic v. Department of Health and Rehabilitative Services*, 1981 Fla. Div. Adm. Hear. LEXIS 454 (Final Order, 8/18/81). *See also, Department of Insurance and Treasurer v. Cottrill*, 1996 Fla. Div. Adm. Hear. LEXIS 48 (Final Order, 3/15/86). To the extent section (2) is intended to parrot the statute, it is unnecessary and should not be adopted.

C. Bill Block

1. The Commission Lacks Statutory Authority to Require a Bill Block

In any rulemaking proceeding, the agency must have specific statutory authority to promulgate the proposed rules. In the instance of the proposed requirement for a bill block, Competitive Carriers assert that the Commission lacks the necessary authority to promulgate such a requirement.

The Commission may adopt rules *only* to implement *specific* statutory powers or duties:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific rule to be implemented is also required. An agency may

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[10]Section 120.545(1)(c), Florida Statutes.

> adopt only rules that implement or interpret the *specific* powers and duties granted by an enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy.[11]

Thus, as to every rule the Commission adopts, it must have *specific* statutory authority to do so. This requirement for specific statutory authority is made even more clear as a result of the 1999 amendments to Chapter 120.

Prior to 1999, the above-quoted language read: "An agency may adopt only rules that implement, interpret or make specific the *particular* powers and duties granted by the enabling statute."[12] In 1999, this language was amended to address *St. Johns River Water Management District v. Consolidated Tomoka*, 717 So.2d 72 (Fla. 1st DCA 1998). The *Consolidated Tomoka* Court used an analysis based on the finding that the use of the word "particular" was ambiguous. The Court found that use of the word "particular" restricted an agency's rulemaking authority to subjects within the "class of powers and duties" in the agency's enabling statute.

The changes to the statutory sentence as a result of the 1999 amendment to the APA are shown below:

> An agency may adopt only rules that implement~~;~~ or interpret the~~, or make~~ specific ~~the particular~~ powers and duties granted by the enabling statute.

Further, the purpose of the 1999 amendment was made absolutely clear by the Legislature:

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[11]Section 120.52(8), emphasis added. This is sometimes referred to as the "flush left language." See also, §120.536(1) ("A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required.")

[12]Emphasis added.

> It is the intent of the Legislature that modifications in sections 2 and 3 of this act which apply to rulemaking are to clarify the limited authority of agencies to adopt rules in accordance with chapter 96-159, Laws of Florida, and are intended to reject the class of powers and duties analysis. However, it is not the intent of the Legislature to reverse the result of any specific judicial decision.[13]

Thus, the Legislature intended to make it quite clear that the power of agencies to promulgate rules is restricted to those areas where "specific" authority has been granted to the agency by the Legislature.

The 1999 amendment has been interpreted in at least two rule challenge cases before the Division of Administrative Hearings (DOAH). In *Save the Manatee Club, Inc. v. Southwest Florida Water Management District*, 00 ER FALR 061 (Final Order, 12/9/99), appl pending, rules of the Southwest Water Management District (the District) were invalidated based on the 1999 amendment to §120.52 discussed above. The Administrative Law Judge (ALJ) explained the effect of the 1999 amendment on an agency's rulemaking authority:

> The statement of legislative intent in Chapter 99-379, Laws of Florida, is interpreted in this order to mean that the "class of powers and duties" analysis conducted by the First District Court of Appeal in Consolidated-Tomoka may not be applied to cases arising after the amendments effectuated through Chapter 99-379. The Legislature made clear that it had no intent to reverse or overrule Consolidated-Tomoka. That decision of the First District Court of Appeal, therefore, remains undisturbed as to its application prior to the effective date of the 1999 amendments. But because the "flush left language" of the statute was amended in 1999 and because of the clear intent behind the 1999 Amendments, the analysis conducted in Consolidated-Tomoka is not of any value in cases arising after the 1999 Amendments. The "class of powers and duties" analysis of the First District Court of Appeal in Consolidated-Tomoka is not applicable to this case.[14]

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[13]Chapter 99-379, §1, Laws of Florida.

[14]*See also, Day Cruise Association, Inc. v. Board of Trustees of the Internal Improvement Trust Fund,* 00 ER FALR 136 (Final Order, 2/17/00), appl pending. In *Day Cruise*, the analysis discussed in *Save the Manatee* was used to invalidate the rules at issue. The ALJ said: "Now

The ALJ, in essence, applied a "strict construction" in his review of the agency's statutory authority under the 1999 statutory amendments and found it lacking. The same analysis, with the same result, is applicable to the proposed bill block rule.

The specific laws which the Commission says the proposed bill block requirement would implement are §§364.052, 364.602 and 364.604. Section 364.052 can be quickly eliminated as authority for a bill block requirement because it addresses the regulation of small local exchange companies and is inapplicable to rules which will apply to IXCs and ALECs. Similarly, §364.602 is simply a definitional section and provides no authority for the Commission to implement rules. The remaining statutory section cited by the Commission as authority for the proposed rule is §364.604 which addresses billing practices. While it specifically mentions bill blocking for 900 and 976 calls, which the Commission has already implemented through rule, there is no other mention of a bill block in §364.604.

At hearing, Staff indicated that it relied on §364.604(2) for its authority for the bill block. (Tr. 98-100). This subsection provides that a customer shall not be liable for charges for services he/she did not order or that were not provided. This subsection does not mention a bill block[15]; further, the Commission has *already* implemented §364.604(2) through its promulgation of subsection (18) of the rule which requires a billing party to credit any charge for an item which a

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[after the 1999 amendments] agencies have limited authority to adopt rules. When agencies do adopt rules, those rules must implement powers and duties that are more detailed than a general class of powers or duties provides."

[15]As Chairman Deason pointed out: "How do you expand that [§18] to say it has to be a billing block if it just says it is not liable? I mean, if there is a requirement that says charges have to be removed from the bill, the customer is not liable, correct?" (Tr. 104).

customer says he/she did not order or was not provided. Therefore, under the 1999 amendments to §120.52, the Commission does not have authority to promulgate rules that require a bill block;[16] to do so would be beyond the powers delegated to the Commission by the Legislature.[17]

III. Policy Issues

The Commission must consider, as a *matter of policy*, whether it should go forward with the proposed rules as they would apply to competitive ALECs and IXCs. Any time the Commission engages in rulemaking, it must balance the activity it is attempting to encourage or discourage with the burden and cost that the proposed regulation will cause. In this instance, it is an easy call. As noted in earlier comments, what the Commission really has before it is a solution in search of a problem.

It is uncontroverted that cramming complaints have declined dramatically. (Tr. 74, 75). Mr. Durbin, Staff witness, attached several graphs to his prefiled testimony. These exhibits illustrate that the number of cramming complaints which the Commission has received have diminished significantly since 1998. (Exh. No. 3, JRD-1).

Even more significantly, Commission Staff itself admits that there have been *no* cramming

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[16]During the rulemaking hearing, BellSouth argued that if the Commission lacks authority to impose the bill block rule on ALECs and IXCs, it similarly lacked the authority to impose the rule on ILECs. The argument is irrelevant; the question of ILEC applicability is not at issue in this docket. The Competitive Carriers note, however, that the ILECs acquiesced in the rule by failing to exercise their procedural opportunity to review the Commission's authority to impose such a requirement.

[17]Nor does the Commission have authority to implement such a requirement under the prior "class of powers and duties" analysis. No authority is given which would support the imposition of restrictions which a bill block imposes. The authority given relates to the ability to *remove* inappropriate charges. As discussed, above the Commission has already implemented this provision through subsection (18).

complaints relating to ALECs either in regard to bill format or inclusion of unauthorized charges on customer bills. (Tr.68, 74). The industry questions why the Commission would even consider imposing significant costs on competitive companies to address a problem that does not exist. As to IXCs, there have been few complaints. For example, in July, 2000 (the most recent month for which data was provided), there were 41 complaints (Exhibit No. 3 (JRD-1))--hardly a significant number in view of the millions of telephone calls made every day--and Mr. Durbin estimates that perhaps half of those (20) were as to IXCs; the other half related to non-regulated companies. (Tr. 75). This is compared to a high of 302 complaints in September 1998.

Further, Staff has shown that it has the ability to resolve any individual complaint it may receive on a case-by-case basis. (Tr. 74). In fact, Staff has been very successful in doing so as illustrated by Exhibit No. 5 (JRD-3). Thus, *in the absence of a rule*, cramming complaints have declined dramatically and Staff has been able to handle those the complaints it has received on an individual basis in a way satisfactory to the complaining consumers. Staff should continue to do so in the future. (Tr. 115).

In addition, the Commission has recently promulgated rule 25-4.110(18), which applies to ILECs, ALECs and IXCs, and which requires a company to remove an unauthorized charge from a customer's bill upon request. Mr. Durbin admitted that this subsection probably would reduce Commission complaints even further. (Tr. 72-74).

This lack of a problem must be compared to the cost to implement the "solution." Though, as discussed above, the SERC is inadequate to appropriately assess the cost to the entire industry to implement sections (2) and (19) of rule 25-4.110, some individual company estimates are available. These estimates demonstrate that requiring companies to adjust their billing formats to comply with

section (2) of the proposed rule would cost millions of dollars. (SERC at 3). This does not take into account the costs to other companies who would have to change billing formats to comply with the proposed rule.

In addition, several witnesses discussed the anticompetitive effects of prescribing a particular bill format. For example, Staff witness Simmons agreed that one of the ways competitive companies differentiate themselves in the market place is through the presentation or formatting of their bill. (Tr. 56). She further agreed that some customers may want a lot of information while others may just want to know the amount due. (Tr. 56). AT&T's Mr. Alexander noted that AT&T's research shows that there is no one bill or one bill format that all customers like. (Tr. 199). Companies, including AT&T, have tried to be responsive to customer demand[18] but need flexibility to deliver to all customers bills in the manner in which they choose to be billed. (Tr. 200).

The requirement of a bill block would also be extremely costly. For example, the SERC states that one company indicated the cost would be between $2.5 and $4.8 million and another company estimated a bill block would cost $2 million initially with an on-going annual cost of $250,000. (SERC at 5-6). Mr. Moses admitted that the requirement for a bill block could impose a cost on a company that wanted to bring new services to market even when its own customers did not want the "protection" of the bill block. (Tr. 107). He also admitted that he was not even sure if there was a product on the market which could accomplish the sweeping block which the proposed rule seems to require (Tr. 108-109); he was not sure how billing systems would have to be reprogrammed to accommodate a bill block (Tr. 117); and he did not know how many customers

[18]AT&T, for example, has instituted online billing. (Tr. 200).

would even choose the option of a bill block if it were required. (Tr. 113). Commissioner Jaber summed it up when she asked Staff:

> If we are not clear on the costs associated with implementing the block option, and we are not sure from a technological standpoint how to do it, and we don't have complaints from customers getting service from ALECs, then how can we be so sure that the block option should apply to ALECs?

(Tr. 118). Her question remains unanswered.[19]

Chapter 120 makes it clear that the agency must weigh cost versus benefit as it contemplates rulemaking. Section 120.54(1)(d) provides:

> In adopting rules, all agencies must, among the alternative approaches to any regulatory objective and to the extent allowed by law, choose the alternative that does not impose regulatory costs on the regulated person . . . which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

Adoption of the rules in question, when no problem has been demonstrated, would certainly not be the least costly approach that could be taken.

Finally, as discussed at hearing, the Legislature has directed the Commission[20] to encourage competition. It has specifically required that less regulation be imposed on competitors than on incumbents in order to encourage new entrants and new technology.[21] Imposing burdensome and expensive regulation on the competitive telecommunications sector of the market, especially in view of the absence of a significant problem to which the proposed rules are addressed, would contravene

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[19]The same concerns are applicable to IXCs.

[20]There was no disagreement among the parties at hearing that the Commission has the authority and the discretion to treat incumbents differently than competitive carriers.

[21]*See*, §364.01(4)(b), (d), (e), (f), (h), Florida Statutes.

the Legislature's express intent.[22]

IV. Conclusion

The Commission should refrain from promulgating rule 25-4.110(2) and (19), Florida Administrative Code, as applicable to ALECs and IXCs. Not only does the Commission lack the requisite rulemaking statutory authority but the rules are not needed to remedy any proven consumer problem.

[22]It would also be in conflict with §364.337(2), Florida Statutes, which requires any rules relating to ALECs to be consistent with §364.01, Florida Statutes. Clearly, the proposed rules fail to meet that requirement.

WHEREFORE, FCCA, WorldCom, AT&T and ASCENT request that the Commission not adopt proposed rules 25-4.110(2) and (19) as applicable to ALECs and IXCs.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Post-Hearing Comments** have been furnished by (*) hand delivery or U.S. mail this 13th day of September 2000 to the following:

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