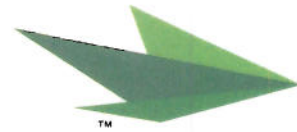


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**EMBARQ**<sup>TM</sup>

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March 16, 2009

**FILED ELECTRONICALLY**

Ms. Ann Cole, Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Re: Docket No. 090084-TP

Dear Ms. Cole:

Enclosed please find Embarq Florida, Inc.'s Motion to Dismiss, or in the Alternative Deny, Joint Petition in the above referenced docket matter.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions regarding this electronic filing, please do not hesitate to call me at (850) 599-1560.

Sincerely,

/s/ Susan S. Masterton  
Susan S. Masterton

Enclosure

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**CERTIFICATE OF SERVICE  
DOCKET NO. 090084-TP**

**I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. Mail on this 16<sup>th</sup> day of March, 2009 to the following:**

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/s/ Susan S. Masterton  
Susan S. Masterton

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Joint petition for declaratory statement regarding limitations on third party billing imposed by the Telecommunications Consumer Protection Act and for order prohibiting telecommunications companies from billing for services other than those authorized within the Act, by Attorney General and Office of Public Counsel.	Docket No. 090084-TP  Filed: March 16, 2009
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**EMBARQ FLORIDA, INC.'S MOTION TO DISMISS, OR IN THE ALTERNATIVE DENY, JOINT PETITION**

Embarq Florida, Inc. (“Embarq”) files this Motion to Dismiss, or in the Alternative Deny, the Joint Petition for Declaratory Statement and for Order filed by the Attorney General (“AG”) and the Office of Public Counsel (OPC) on February 17, 2009 (“Joint Petition”).<sup>1</sup> The Joint Petition was served on Embarq by U.S. Mail and was noticed by the Commission in the March 6, 2009 edition of the Florida Administrative Law Weekly. In support of this filing, Embarq states as follows:

**I. Introduction**

The Joint Petition fails to comport with the essential requirements for a declaratory statement, set forth in section 120.565, Florida Statutes, and Rules 28-105.001 through 28-105.004, Florida Administrative Code, and interpreted in several judicial and Commission decisions. Specifically, the Joint Petition improperly and impermissibly requests a declaratory statement to:

- determine the conduct of other persons, namely, telecommunications companies regulated by the Commission, including Embarq, in violation of the statutes, rules and decisions establishing the requirements for declaratory relief;

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<sup>1</sup> Embarq has filed separately its Petition to Intervene, in accordance with Rule 28-105.0027, F.A.C., on this same day.

- determine the legality of Embarq’s (as well as other telecommunications companies’) past conduct, that is, their long standing third-party billing practices, in violation of the statutes, rules and decisions regarding the intent and purpose of declaratory relief; and

- request a prospective ruling by the Commission to prohibit all telecommunications companies from engaging in certain billing practices, in violation of the statutes rules and decisions regarding the scope and purpose of the declaratory statement remedy.

On the basis of these fundamental and material procedural deficiencies alone, the Commission should dismiss (or in the alternative deny) the Joint Petition. However, even if the Commission determines that the Joint Petition is procedurally sufficient, the Joint Petition should be denied on its merits because it misinterprets and misapplies the applicable law and it ignores years of accepted ILEC billing practices and the Commission’s acknowledgement of these practices. Finally, the Joint Petition contains several inaccuracies and misstatements of the facts pertaining to Embarq’s third-party billing practices that undermine the basis and rationale for the requested relief.

**II. Argument**

**A. The Joint Petition is not appropriate for a Declaratory Statement.**

**1. The Joint Petition fails to meet the statutory requirements by failing to focus on the petitioner’s particular set of circumstances and by requesting a ruling regarding the conduct of other persons.**

Section 120.565, Florida Statutes, sets forth the general parameters of a substantially affected person’s right to seek declaratory relief and an agency’s authority to grant it. That statute allows a substantially affected person to seek a declaratory

statement concerning the “applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner’s particular set of circumstances.”<sup>2</sup> The statute further requires that a petition for a declaratory statement must “state with particularity the petitioner’s set of circumstances” and must “specify the statutory provision, rule or order that the petitioner believes apply to the set of circumstances.”

Rules 25-105.001 through 25-105.004, Florida Administrative Code, further delineate the procedure for and scope of declaratory relief. Rule 28-105.001, F.A.C., describes the purpose and use of a declaratory statement:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules or orders may apply to the petitioner’s particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person. (emphasis added)

The Joint Petition provides the following summary of the declaratory relief requested:

Petitioners jointly request the Commission to declare that the Telecommunications Consumer Protection Act, Sections 364.601-364.604, Florida Statutes (hereinafter "the Act"), restricts the entities for whom telecommunications companies subject to its jurisdiction may perform third party billing services to the "originating parties" as defined in Section 364.602(4) of the Act, and limits the services that may be the subject of such third party billing arrangements to "telecommunications services" and to "information services," as that term is defined in Section 364.02(5) of the Act. Petitioners also request the Commission to issue an Order prohibiting telecommunications companies subject to its jurisdiction from performing third party billing for services other than the telecommunications services and information services specified within the Act. (Joint Petition at page 1)

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<sup>2</sup> Since the statute requires that a request for declaratory statement must be based on how laws or rules relate to a “petitioner’s particular set of circumstances” it is arguable whether the Joint Petitioners, two state entities purporting to represent the interest of Florida consumers generally, even have standing to request declaratory relief.

Clearly, this requested relief is outside the scope of the relief available through a declaratory statement proceeding as set forth in section 120.565, Florida Statutes, because it specifically asks the Commission to determine and proscribe the actions of persons other than the Joint Petitioners, i.e., “telecommunications companies subject to [the Commission’s] jurisdiction,” as well as entities for whom such telecommunications companies may provide third-party billing services.

Case law and Commission decisions further explicate the appropriate nature and scope of declaratory relief. The fundamental principles that the relief requested must deal with the application of law or rules to “the Petitioner’s specific set of circumstances” and may not be used to “determine the conduct of third parties” have been upheld in multiple judicial and Commission decisions.<sup>3</sup>

**2. The Joint Petition impermissibly seeks a determination regarding the past conduct of other persons.**

Courts have ruled that a declaratory statement cannot be used for the purpose of determining the validity of past conduct. Rather, the purpose of a declaratory statement is to seek guidance as to future action. This principle is emphasized and explained by the court in *Novick v. Department of Health*, 816 So. 2d 1237 (Fla. 5<sup>th</sup> D.C.A. 2002), involving a challenge to a declaratory statement issued by the Department of Health

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<sup>3</sup> See, for example, the following Commission orders and cases cited therein: *In re: Petition for declaratory statement regarding local exchange telecommunications network emergency 911 service, by Intrado Communications Inc.*, Order No. PSC-08-0374-DS-TP Issued June 4, 2008 in Docket No. 080089-TP (in which the Commission denied a request for a declaratory statement regarding the applicability of ILECs’ 911 tariffs because “Intrado asks us to determine that conduct of ILECs and certain PSAPs in addition to its own interests, which is prohibited by Rule 28-105.001, F.A.C.”; Order at page 15). See, also, *In re: Petition by Board of County Commissioners for Broward County for declaratory statement regarding applicability of BellSouth Telecommunications, Inc. tariff provisions to rent and relocation obligations associated with BellSouth switching equipment building (“Maxihut”) located at Fort Lauderdale-Hollywood International Airport on property leased by BellSouth from Broward County’s Aviation Department*, Order No. PSC-06-0306-DS-TL issued April 19, 2006 in Docket No. 060049-TL (in which the Commission denied portions of Broward County’s request for declaratory statement because a “declaratory statement is not the appropriate means for determining the conduct of another person”; Order at page 6).

regarding the validity of an existing contract between a physician and a management company. In overturning the declaratory statement issued by the Department of Health, the court stated, “a petition for declaratory statement which seeks approval or disapproval of conduct which has already occurred is properly denied.” (*Novick*, 816 So. 2d 1240)<sup>4</sup> A look at the “factual” recitations offered by the Joint Petitioners further clarifies that the basis of relief requested by the AG/OPC impermissibly rests on allegations of Embarq’s and other telecommunications’ companies past conduct. (See, Joint Petition at paragraph 4). The Joint Petition is in direct contravention to the precedent expressed in the *Novick* decision, in that it asks the Commission to declare that Embarq’s (and other telecommunications companies’) long standing billing practices are in violation of the law.

**3. The Joint Petition inappropriately asks the Commission to render a broad, generally applicable policy statement.**

The Joint Petition also inappropriately asks the Commission to render the type of broad and generally applicable policy statements that apply to entire classes of persons which the courts have held are appropriately addressed through rulemaking rather than declaratory statement proceedings.<sup>5</sup> The nature of the declaratory statement requested in the Joint Petition is very similar in character to the declaratory relief requested in *Lennar Homes v Division of Florida Land Sales, Condominiums and Mobile Homes*, 888 So. 2d 50 (Fla. 1<sup>st</sup> DCA 2004). In that case, the Petitioner sought the Division’s opinion

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<sup>4</sup> Although the *Novick* court also noted that there may be valid exceptions to this principle, there is no basis for the Commission to determine that the Joint Petition, which requests a ruling invalidating the long-standing billing relationships between telecommunications companies and their customers, should be one. See also, a discussion of declaratory statements generally and the import of the *Novick* decision specifically in *The Evolution of Declaratory Statements*, 77 Fla. Bar J. 69 (November 2003).

<sup>5</sup> See, e.g., *Lennar Homes v Division of Florida Land Sales, Condominiums and Mobile Homes*, 888 So. 2d 50 (Fla. 1<sup>st</sup> DCA 2004); *Chiles v. Department of State, Division of Elections*, 711 So. 2d 1151 (Fla. 1<sup>st</sup> D.C.A. 1998); and *Tampa Electric Company v. Florida Department of Community Affairs*, 654 So. 2d 998 (Fla. 1<sup>st</sup> D.C.A. 1995).

regarding the legality of arbitration clauses in condominium leases. In reversing the Division's declaratory statement, the court found that it "announced a broad agency policy that prohibited use of arbitration provisions in condominium purchase and sale agreements."<sup>6</sup> Further, the court ruled that "The Division cannot use the declaratory statement proceeding as a vehicle to announce a broad policy against arbitration." (*Lennar*, 888 So. 2d 54) Similar to the *Lennar* case, the Joint Petition is requesting improperly that the Commission issue a declaratory statement to announce just such a broad policy against telecommunications companies' third-party billing practices.

On its face, the Joint Petition violates the statutes and rules establishing the proper purpose and scope of a declaratory statement proceeding. On these grounds alone, the Commission must dismiss or deny the requested relief.

#### **4. The Joint Petition improperly seeks a prospective prohibition of ILECs' behavior.**

In the Joint Petition, the OPC and the AG ask the Commission to "declare" the meaning of sections 364.602 and 364.604, Florida Statutes. In addition, they ask the Commission to issue an order prohibiting telecommunications companies from engaging in certain third-party billing practices. While it is unclear from the Joint Petitioners' filing exactly what administrative relief they are seeking, it is clear that the Joint Petition is not seeking the type of relief a declaratory statement is designed to provide. As discussed above, a declaratory statement is not appropriate to address the conduct of another person. In addition, as the First District Court made clear in the *Lennar* case, it is

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<sup>6</sup> The *Lennar* Court factually distinguished its decision from prior decisions upholding agency declaratory statements in *Chiles v. Department of State, Division of Elections*, 711 So. 2d 1151 (Fla. 1<sup>st</sup> D.C.A. 1998) and *Florida Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes v. Investment Corp. of Palm Beach*, 747 So. 374 (Fla. 1999). In rejecting the declaratory statement issued by the Division, the court stated "We do not believe that a statement of policy regulating all purchases and sales of condominiums in Florida can be linked to the 'very limited participants engaged in almost identical operations' which the court address in *Investment Corp.*" *Lennar*, 888 So. 2d at 54.



inappropriate to use a declaratory statement to render a broad and generally applicable policy statement. However, that is exactly what the Joint Petition seeks with this request. Because this request for relief is unquestionably outside the scope of relief that a declaratory statement is designed to provide, the request should be dismissed or denied.

**B. The Joint Petition erroneously interprets the applicable law.**

Embarq believes the procedural flaws identified above are fatal to the Joint Petition and for these reasons alone it should be dismissed. The Joint Petition also errs in its interpretation of the meaning and application of sections 364.602 and 364.604, Florida Statutes (part of the Telecommunications Consumer Protection Act or TCPA).

The Joint Petitioners assert that sections 364.602 and 364.604, taken together, restrict the types of entities that may bill their services on a telecommunications company bill to those types of entities defined as “originating parties” in section 364.602(4), Florida Statutes.<sup>7</sup> Under the Joint Petitioners’ interpretation of the law, only entities offering “telecommunication services” or “information services” (narrowly defined in the statute to include only 900 or 976 type services but to exclude Internet services)<sup>8</sup> are allowed to bill their services on telecommunications company bills. However, nowhere does the statute state that telecommunications companies are limited as to the types of

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<sup>7</sup> “Billing party” is defined section 364.602(1), Florida Statutes, to mean: “any telecommunications company that bills an end user consumer on its own behalf or on behalf of an “originating party.” “Originating party” is defined in section 364.602(4), Florida Statutes, to mean: “any person, firm, corporation, or other entity, including a telecommunications company or a billing clearinghouse, that provides any telecommunications service or information service to a customer or bills a customer through a billing party, except the term “originating party” does not include any entity specifically exempted from the definition of “telecommunications company” as provided in section 364.02(14).

<sup>8</sup> This narrow definition conflicts with the broader definition of information services codified at 47 U.S.C. §153(20) of the Federal Telecommunications Act The term “information service” is defined in the Act to mean “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”

services that they may include on their bills.<sup>9</sup> In fact, the definition of “originating party” includes any entity that bills a customer through a billing party, except an entity exempt from the definition of “telecommunications company” in section 364.602(14).

A more reasonable interpretation is that section 364.604 is intended to impose requirements on the defined “originating parties” for the services they bill on telecommunications company bills. The definition of “originating party” explicitly includes only providers of telecommunications and information services and explicitly excludes other entities. Taking all of the provisions of the relevant statutes together, as required by the rules of statutory construction, this exclusion allows the excluded entities to be third-party billers without otherwise meeting the requirements of the statute.<sup>10</sup> There is no legitimate way to read these provisions to prohibit these entities from billing on telecommunications company bills.

The Joint Petitioners’ acknowledge this alternative interpretation of the statute, but argue that it produces an “absurd” result. (Joint Petition at paragraph 7) To the contrary, it is Joint Petitioners’ interpretation of the statutes that produces an absurd result, a result that is completely contrary to the long-standing billing practices implemented by Embarq (and other telecommunications companies) with the knowledge of and without challenge by the Commission.<sup>11</sup> Contrary to the Joint Petitioners’

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<sup>9</sup> Well-recognized rules of statutory construction preclude the Commission from reading words into the statute. See, e.g., *In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1137 (Fla. 1990); *Devin v. Hollywood*, 351 So. 2d 1022, 1025 n. 6 (Fla. 4<sup>th</sup> D.C.A. 1976); *Armstrong v. Edgewater*, 157 So.2d 422, 425 (Fla. 1963); *Pinchowski v. Florida Gas Transmission Company*, 857 So. 2d 219, 221 (Fla. 2d D.C.A. 2003).

<sup>10</sup>See, e.g., *T.R. v. State*, 677 So.2d 270, 271 (Fla. 1996). See also, *Shimkus v. Fla. Dept. of Business and Professional Regulation, Construction Industry Licensing Board*, 932 So. 2d 223, 225 (Fla. 4<sup>th</sup> D.C.A. 2005).

<sup>11</sup> Over the years since the TCPA was enacted in 1998, Embarq has responded to the Commission regarding individual consumer complaints concerning third party charges without challenge to Embarq’s right to bill for these services. In addition, the Commission has conducted proceedings to implement the

implications throughout the Joint Petition that the ILECs' third-party billing practices serve only to cause potential harm to consumers, consumers receive many benefits from the ability to choose to have services billed on their telecommunications bills. Benefits include the convenience of paying for a variety of services through a single bill (at the customer's option), rather than having to keep track of multiple bills with varying due dates and payment mechanisms. This option is often available without stringent credit checks or the need for a credit card or bank account, providing a desired convenience to many consumers who may otherwise have limited payment options.

As an example of the convenience offered through Embarq's third-party billing practices, Embarq provides bundles of services to its end user customers that include the provision of satellite television service through a third-party provider, which is billed on Embarq's customers' bills. Taking the position advanced in the Joint Petition to its logical conclusion (i.e., that telecommunications companies' bills can include only third-party charges for "telecommunications services" or "information services" as defined in section 364.602), Embarq would be required to provide two separate bills to its customers, one reflecting charges for its telecommunications and 900/976 services, and a second bill reflecting charges for the bundled satellite television services it provides

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TCPA (See, *In re: Proposed amendments to 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; 25-24.490,F.A.C., Customer Relations; Rules Incorporated; and 25-24.845, F.A.C., Customer Relations; Rules Incorporated Rules 25-4.003, F.A.C., Docket No. 990994-TP*) and has investigated generally, including through data requests and subpoenas, ILEC third party charges, without concluding that ILECs were prohibited from billing for any particular type of third-party charges (See, e.g. *In re: Joint Petition against BellSouth, Embarq and Verizon for billing charges not authorized by law and request for refunds or credits to consumers, Docket No.: 060650-TL*).

through a third party.<sup>12</sup> Clearly, a requirement for multiple bills based on the nature of the billed services would not serve the best interests of Florida consumers, and it would arbitrarily increase Embarq's costs to compete in the marketplace, which seems unfair since there is nothing to indicate that this result was intended by the Florida Legislature when it enacted the TCPA.<sup>13</sup>

### **C. The Joint Petition misstates the relevant facts.**

While both the procedural deficiencies and the errors in legal interpretation discussed above provide more than adequate grounds to mandate a dismissal or denial of the Joint Petition, there also are several significant factual errors in the Joint Petition that fundamentally undermine the basis and rationale for the requested relief.

Joint Petitioners are incorrect when they imply that all, or even most, of the third-party charges on Embarq's customers' bills are 1) for services that were not ordered and are not desired and 2) incurred unknowingly. First, the greatest amount of third-party charges on Embarq bills are the satellite television and related services that customers clearly have ordered and clearly desire as part of the bundles of services Embarq provides. Second, Embarq's records demonstrate that only a very small portion of the third party charges included on Embarq's customers' bills were charges for third party services the customers claim they didn't order. For example, from January 2007 through January 2008, Embarq refunded \$16M of charges as a result of customer disputes of

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<sup>12</sup> Embarq also directly provides many services to its customers that are neither "telecommunications services" nor "information services" as those terms are defined in chapter 364. Examples of these services include Embarq's voice mail, high speed internet and inside wire services.

<sup>13</sup> In describing the provisions that created the TCPA, the June 2, 1998, Final House Bill Analysis for HB 4785 (which became chapter 98-277, Laws of Florida) says nothing about the Act prohibiting telecommunications companies from billing for any services.

third-party charges, which is just slightly more than 2% of the \$772M of total third-party charges billed during that period.<sup>14</sup>

Joint Petitioners also are incorrect when they imply that Carriers, including Embarq, have not taken steps to protect their customers from unauthorized third-party charges. In fact, Embarq has implemented stringent measures to ensure the legitimacy of its third-party billings. First, Embarq limits the types of services that it will bill for third-party providers to telecommunications or information services (as that term is normally understood in the industry) and related services. Second, Embarq requires third parties to meet certain standards before they are approved to place their charges on Embarq's bills. These standards include a comprehensive pre-billing approval process requiring the third party to provide Embarq with sales, marketing, and fulfillment information, and other materials related to the company's business practices. The third party must provide copies of appropriate registrations or certifications and provide Embarq significant financial deposits designed to protect Embarq's end user customers. In addition, third-party billers must provide a customer service function that includes a dedicated telephone number for customer service, reasonable availability to the end user customers, and regular business hours that meet all regulatory authority guidelines. And, finally, Embarq has processes in place to audit third-party billings and it takes actions, up to and including termination of its third-party billing arrangements, for third-party billers who violate Embarq's standards.<sup>15</sup> Embarq's processes include a monthly review of customer authorizations for recently billed charges, post-billing review of customer complaint and

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<sup>14</sup> In accordance with Commission Rule 25-4.110, F.A.C., Embarq immediately recourses non-toll third-party charges identified by customers as unauthorized. In addition, Embarq offers free blocking of non-toll third-party charges to any customer who requests it.

<sup>15</sup> This process includes the enhanced procedures implemented as part of the 2006 agreement entered into with the AG and OPC to settle Docket No. 060650-TP.

adjustment metrics to validate contract compliance, and verification of the third-party billers' business practices via their authorizations sites by signing up for actual services.

The Joint Petitioners also are wrong when they allege that Carriers' contracts with billing aggregators "provide that a substantial amount of the billed vendor charges will be paid to Carriers as compensation for placement of the charges on the customer telephone bills" (Joint Petition at paragraph 4f), and that Carriers "minimize the protection they provide to their customers and thereby maximize the amount of contractual compensation paid by third party vendors and aggregators that they may keep" (Joint Petition at paragraph 4h). Neither of these allegations is true for Embarq. The compensation Embarq receives through its contracts with billing aggregators is not based on a percentage of the revenues billed, but instead is a flat rate per item and per invoice billed. In addition, if a charge must be recouped because the customer claims the charge was unauthorized, the same flat rate per item and per invoice charge to the billing aggregator will apply to the credit as was applied to the original charge on the customer's bill. In such cases, the third-party biller will be required to reimburse Embarq for the recouped charges, and it must pursue collection of the charges on its own. Additionally, adjustments penalize third-party billers as they are not only charged for each adjustment but they must also increase funding of their financial deposits paid to Embarq to offset the increase in their adjustment activity. Clearly, Embarq's compensation mechanism for third-party billing does not create an incentive for third-party billers or Embarq to impose unauthorized charges, rather Embarq's contracts with its third-party billers provide an economic incentive for them to ensure that their charges are correct.

### **III. Conclusion**

As set forth fully above, the Joint Petition fails to meet the requirements for a declaratory statement set forth in the Florida Statutes and implementing rules and, therefore, should be dismissed or denied. The Joint Petition fails on the merits as well, because it is based on a flawed interpretation of the applicable law and because it contains errors of fact that undermine the basis and rationale for the requested relief. For all of these reasons, the Commission should dismiss, or in the alternative deny, the Joint Petition.

Respectfully submitted this 16<sup>th</sup> day of March 2009.

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