

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

VCI COMPANY D/B/A VILAIRE
COMMUNICATIONS, INC.,

080065-TX

CASE NO.: 1D08

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Petitioner.

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PETITION FOR WRIT OF PROHIBITION

Pursuant to Rules 9.100 and 9.030(b)(3), Florida Rules of Appellate Procedure, VCI Company d/b/a Vilaire Communications, Inc., a Washington corporation ("VCI"), petitions this court for a writ of prohibition restraining the Florida Public Service Commission's (the "Commission") improper exercise of subject matter jurisdiction over the proceeding below ("Proceeding Below")¹ involving VCI.

I. BASIS FOR INVOKING JURISDICTION

Article V, Section 4 (b) (3), of the Florida Constitution vests this court with jurisdiction to issue writs of prohibition.² "Prohibition is an extraordinary writ by

¹ Captioned *In re: Investigation Of Vilaire Communications, Inc.'s Eligible Telecommunications Carrier Status And Competitive Local Exchange Company Certificate Status In The State Of Florida*, Docket No. 080065-TX.

² This Court, as opposed to the Florida Supreme Court, has original jurisdiction over the Petition and this Motion because the Proceeding Below relates to VCI's certification and does not involve "rates and services" as required for the Supreme Court to exercise jurisdiction under Article V, Section 3(b)(2), Florida Constitution. *See Callard v. Baez*, 934 So. 2d 1184 (Fla. 2006) (transferring to

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which a superior court may prevent an inferior court or tribunal, over which it has appellate and supervisory jurisdiction, from acting outside its jurisdiction." *Mandico v. Taos Const., Inc.*, 605 So. 2d 850, 853 (Fla. 1992). Prohibition is used to challenge the subject matter jurisdiction of Florida agencies, including the Commission. *City of Tallahassee v. Mann*, 411 So. 2d 162, 163 (Fla. 1981). A writ of prohibition directed to the Commission will prevent in advance of the final order the harm that can result by the improper exercise of power by the Commission over a proceeding not within its jurisdiction. *See Miccosukee Tribe of Indians v. Napoleoni*, 890 So. 2d 1152, 1153 (Fla. 1st DCA 1988).

When it is shown that a lower tribunal, such as the Commission, is without jurisdiction or attempting to act in excess of its jurisdiction, prohibition may be granted. *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977). Prohibition will be issued to forestall an impending present injury where the person seeking the writ has no other appropriate and adequate legal remedy. *Id.* at 297.

This case is exactly the type of case for which the writ of prohibition was designed. As explained in this Petition, the Commission is acting without jurisdiction. The Federal Communications Commission (FCC) has a current

district court an appeal of dispute relating to overcharges to an individual residence); § 350.128(1) ("[T]he Supreme Court shall, upon petition, review any action of the commission relating to rates or services of utilities providing electric, gas, or telephone service. The District Court of Appeal, First District, shall, upon petition, review any other action of the commission.").

proceeding pending against VCI. This Petition seeks to prevent the Commission from proceeding forward with imposing sanctions and exercising jurisdiction in this case because jurisdiction over the matters at issue lies exclusively with the FCC. This Petition also seeks to forestall an impending present injury to VCI: (1) Dual prosecution by the FCC and the Commission when only the FCC has jurisdiction; and (2) the imposition of sanctions—including revocation of VCI's Certificate—by the Commission when it has no jurisdiction over the issues in this case. VCI has no other appropriate or adequate legal remedy to avoid dual prosecution and the imposition of sanctions, including the loss of its Certificate.

Courts have issued writs of prohibition in similar circumstances. *See, e.g., Florida Public Service Com'n v. Bryson*, 569 So. 2d 1253, 1254 (Fla. 1990) (writ of prohibition issued to circuit court to bar further proceedings in a suit involving gas and electricity overcharges where exclusive jurisdiction fell to Florida Public Service Commission, not circuit court); *Town of Ponce Inlet v. Dragomirecky*, 884 So. 2d 408, 410 (Fla. 1st DCA 2004) (where property owner appealed demolition order issued by town and Building Commission referred matter to Division of Administrative Hearings (DOAH), writ of prohibition issued to restrain DOAH from exercising authority over owner's petition for administrative hearing and proceeding with the hearing); *Utilities, Inc. of Florida v. Corso*, 846 So. 2d 1159, 1160 (Fla. 5th DCA 2003) (prohibition is the proper remedy when a circuit court

has wrongly taken jurisdiction of matters properly within the province of the Public Service Commission). A writ of prohibition should be issued to the Commission to prevent its inappropriate exercise of jurisdiction in this case.

II. STATEMENT OF FACTS

A. Regulatory Background.

In 1996 Congress sought to introduce competition into once monopolized telecommunications markets through the passage of the Telecommunications Act of 1996 (the "Act"). In so doing, Congress expressed its commitment to preserving universal service³ by adding section 254 to the Act, which directed the FCC to establish "Federal universal service support mechanisms," 47 U.S.C. § 254(a)(2), that are "explicit and sufficient to achieve the purposes" of preserving universal service. *Id.* § 254(e).

Congress delegated to the FCC the authority to "execute and enforce" the provisions of the Act. *Id.* § 151. It authorized the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act. *Id.* § 201(b). Congress also granted the FCC broad authority to enforce compliance with its rules through various administrative sanctions. *See id.* §§ 154(i), 159(c), 214(d), 401(b), 503(b).

The FCC established the Federal Universal Service Fund (the "Fund") to

³ The goal of universal service is to insure that customers throughout the nation have access to an evolving range of telecommunications services.

support federal universal services programs, including three programs — the Lifeline Assistance ("Lifeline"), Lifeline Connection Assistance ("Link Up") and Toll Limitation Service ("TLS") — that provide financial support to Eligible Telecommunications Carriers ("ETCs") serving low-income consumers. 45 C.F.R. §§ 54.400-418.⁴ Support from the Fund to provide service for low-income customers is available only to a common carrier that is designated as an ETC in the service area for which the designation is received. *See* 47 U.S.C. §§ 214(e), 254(e). Common carriers subject to the jurisdiction of a state commission are designated as ETCs by that commission. *See id.* § 214(e)(2). Carriers not subject to regulation by a state commission are designated as ETCs by the FCC. *See id.* § 214(e)(6).

Congress also provided that states may adopt state universal service programs so long as the state program is not inconsistent with the FCC's goal of preserving and advancing universal service. *See id.* § 254(f). State universal service programs must be funded through state funding mechanisms. Florida has not adopted a permanent state program. At this time, all ETCs in Florida, including VCI, are funded through the federal Fund.

⁴ The Lifeline program provides certain discounts on monthly service to qualifying low-income consumers. *See id.* § 54.401. The Link Up program reduces their initial connection charges. *See id.* § 54.411. The TLS program gives eligible low-income consumers the option of having toll blocking or toll control services to be included as part of Lifeline service at no extra charge. *See id.* § 54.401(a)(3).

The Florida Legislature authorized the Commission to designate an ETC as a federal universal service provider § 364.10(3)(j), Fla. Stat. This designation is permitted under section 214(e)(2) of the Act. The Legislature also authorized the Commission to adopt rules to administer the Lifeline service provisions of section 364.10. § 364.10(3)(j), Fla. Stat. The Commission implemented section 364.10, in part, by promulgating Rule 25-4.0665, Fla. Admin. Code. This rule regulates only the manner in which ETCs provide Lifeline and Link Up services to subscribers. Consistent with this, the Legislature has empowered the Commission to investigate interstate rules of practice for or in relation to the transmission of messages or conversations taking place within Florida which in the Commission's opinion violate the Act or the FCC's orders and regulations. *See* § 364.27. The Commission's power with respect to such interstate matters is limited to referring the violations to the FCC by petition. *See id.* The Legislature has not granted the Commission the authority to impose a penalty for violations of the Act or the FCC's rules.

B. Facts Related to Proceeding Below.

VCI holds a certificate ("Certificate") to provide local exchange service as a competitive local telecommunications carrier that was issued by the Commission

on January 10, 2006. [AI T1]⁵ On May 22, 2006, the Commission designated VCI as an ETC in AT&T's service area. [AI T2] VCI is funded through the federal Fund, and its conduct is governed by the Act and FCC rules.

The Proceeding Below arose from a Lifeline audit conducted by the Commission's staff ("Staff") between September and November 2007, culminating in an auditor's report issued November 19, 2007. [AI T3] VCI questioned Staff regarding the Commission's authority to audit the Lifeline program as early as September 2007, but it did not pursue the issue at that time in the interest of maintaining an amicable working relationship with Staff. [AI T4] Based on the audit findings—rather than forwarding information to the FCC to allow the FCC to determine compliance within its regulatory authority and administration of the programs—Staff formally presented its allegations and recommended penalties to the Commission, asking the Commission to initiate compliance proceedings against VCI. The Commission accepted Staff's recommendation and memorialized its decision in Order No. PSC-08-0090-PAA-TX, issued February 13, 2008.⁶ [AI T5, T6] VCI timely filed its Protest of Proposed Agency Action and Petition for Formal Hearing on March 5, 2008, pursuant to which this matter has been set for a

⁵ References to the Appendix filed with this Petition are cited as "A" following by appropriate tab and page number.

⁶ Among the rules and statutes cited in the Commission's order are: 47 C.F.R. § 54.201(d)(1), 47 C.F.R. § 54.201(i), § 364.10(2)(b), Fla. Stat., 47 C.F.R. § 54.201(c) and Section 214(e) of the Act.

hearing on June 4, 2008. [AI T7]

Subsequently, Staff served VCI with Interrogatories and Requests for Production of Documents on March 31, 2008, to which VCI filed timely objections and responses on grounds that included the Commission's lack of subject matter jurisdiction. [AI T8] VCI also put the Commission on notice that it intended to file a complaint in the United States District Court for the Northern District of Florida requesting that court to adjudicate this issue.⁷ [AI T8]

Staff filed a Motion to Compel on April 22, 2008, seeking to have discovery compelled by April 30. [AI T9] The Prehearing Officer issued an order to compel discovery (without hearing from VCI) on April 25, 2008, in which he stated that the Commission would decide its jurisdiction **subsequent** to the evidentiary hearing. [AI T10]

VCI challenged the Commission's jurisdiction again in a petition for reconsideration of the discovery order, which the Commission denied on May 8, 2008. [AI T11, T12] Noting VCI's intent to seek a judicial decision on its jurisdiction prior to the June 2008 hearing, the Commission nevertheless declined to reach the issue of its jurisdiction. [AI T13]

In the interim, VCI filed a motion to dismiss the proceeding for lack of subject matter jurisdiction or, in the alternative, abate the proceeding. [AI T14]

⁷ VCI filed a Complaint for Injunctive and Declaratory Relief with the United States District Court Northern District of Florida on May 15, 2008.

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That motion is pending before the Commission. VCI has no reasonable grounds on which to expect that the Commission will grant the motion either before or after the hearing. [AI T17, T18] On May 9, 2008, VCI notified the Commission that it declined to comply with its discovery order because it was issued without delegated legislative authority. [AI T15] Staff moved to impose sanctions on May 13, 2008. [AI T16]

IV. ARGUMENT

"Jurisdiction" is the power of a court or tribunal to act. *State Dept. of Highway Safety and Motor Vehicles v. Scott*, 583 So. 2d 785, 787 (Fla. 2d DCA 1991). Subject matter jurisdiction is the power of the court or tribunal to consider a particular kind of claim. *Chase Bank of Tex. Nat. Ass'n v. State, Dept. of Insurance*, 860 So. 2d 472, 475 (Fla. 1st DCA 2003). An administrative agency has only such power as expressly or by necessary implication is granted by legislative enactment. *Charlotte County v. General Development Utilities, Inc.*, 653 So. 2d 1081, 1085 (Fla. 1st DCA 1995); *State, Dept. of Environmental Regulation v. Falls Chase Special Taxing Dist.*, 424 So. 2d 787, 793 (Fla. 1st DCA 1982). Any reasonable doubt as to a power that is being exercised by the Commission must be resolved against exercise of that power. *Fla. Bridge Co. v. Bevis*, 363 So. 2d 799, 802 (Fla. 1978).

The Commission lacks subject matter jurisdiction over the Proceeding Below. The United States Congress has not and cannot confer jurisdiction on or require the Commission to adjudicate federal law pertaining to the federal universal service program. The Commission has no authority with respect to the federal universal service program other than designating ETCs and authorizing the relinquishment of such designation. The Commission is attempting to enforce federal rules which it has not and could not adopt. The Commission only would be able to enforce properly adopted state universal service program rules if such a program had been created by the Florida Legislature. The Commission is acting without jurisdiction and exceeding its delegated legislative authority in attempting to enforce unadopted rules against VCI, which violates the Florida Administrative Procedures Act ("APA") and VCI's constitutional rights to due process.

- A. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION BECAUSE NEITHER THE UNITED STATES CONGRESS NOR THE FCC CAN CONFER JURISDICTION UPON THE COMMISSION TO ADMINISTER THE FEDERAL UNIVERSAL SERVICE PROGRAM.

The United States Congress has not and cannot confer jurisdiction on the Commission to adjudicate federal law pertaining to the federal universal service program. The Commission obtains its powers and duties solely from the Florida Legislature pursuant to statute. Further, the FCC has no authority to *subdelegate* duties and obligations conferred to it by Congress to any state commission; and it

has not done so. The Commission has no jurisdiction pursuant to the Act or FCC Orders to apply federal law as to VCI or the FCC's federal universal service rules against VCI.

1. Congress Did Not Specify A Role For State Commissions With Respect To ETCs Other Than Designation And Relinquishment Of Designation.

Federal law, 47 U.S.C. § 214(e)(2), sets forth a state commission's primary responsibility with respect to universal service, namely designation of ETCs:

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1)....⁸

The Act also provides for a state commission to permit an ETC to relinquish its designation under 47 U.S.C. § 214(e)(4).

⁸ Paragraph (1) merely provides that ETCs:

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

Section 254(f) of the Act permits states to adopt a state universal service program by "adopt[ing] regulations not inconsistent with the [FCC's] rules to preserve and advance universal service," determining the method by which ETCs will contribute to the preservation and enhancement of universal service, and adopting regulations to preserve and advance universal services within that state. 47 U.S.C. § 254(f). Both the FCC and federal courts construe section 254(f) to apply to regulations promulgated by states for state universal service funding mechanisms only. The FCC found that section 254(f) merely imposes an obligation on carriers within a state to contribute if the state establishes universal service programs. *In the Matter of Federal-State Joint Board on Universal Service High-Cost Universal Service Support*, 2005 WL 3369905, 20 FCC Rcd 19,731, 19,739 (F.C.C., Dec 09, 2005). Federal Courts agree with the FCC's interpretation of the language in section 254(f). *See Sprint Spectrum, L.P. v. State Corp. Com'n of State of Kan.*, 149 F.3d 1058, 1061 (10th Cir. 1998) (Section 254(f) empowers states to require ETCs that provide intrastate services to contribute financially to state universal service mechanisms); *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1271 (10th Cir. 2007) (Section 254(f) authorizes a state to create its own universal service standards only to the extent that a state is providing state funding to meet those standards.)

The Act does not provide for or contemplate post-ETC-designation duties for state commissions under the federal program. Congress could have prescribed a larger role for state commissions with respect to the federal universal service program but did not.⁹

b. The FCC Did Not and Cannot Subdelegate Authority Delegated To It By Congress To Third-Parties, Such As State Commissions.

The FCC did not and cannot empower the Commission under the Act. In the Act, Congress delegated to the FCC specific duties and obligations. For example, Congress delegated to the FCC the authority to "execute and enforce" the provisions of the Act, 47 U.S.C. § 151, and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act. *Id.* § 201(b). *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980-81 (2005). Congress also granted the FCC broad authority to enforce compliance with its rules through various administrative sanctions. *See* 47 U.S.C. §§ 154(i), 159(c), 214(d), 225(e), 401(b), 503(b).

However, in the Act, Congress delegated authority solely to the FCC to promulgate rules to implement the new universal service requirements in accordance with universal service principles enumerated in the statute. *See id.* § 254(a),(b). Congress did not delegate to the FCC the authority to *subdelegate* to

⁹ Compare sections 251, 252, and 271 of the Act, in which Congress prescribed a larger role for state commissions.

state commissions its universal service rulemaking or its enforcement authority. Thus, not only has the FCC not subdelegated its section 254(a) authority or power to determine violations of its universal service rules to the Commission, but also any attempt by the FCC to do so would be contrary to federal law.

Federal courts have provided guidance as to what duties may and may not be delegated to third-parties, such as state commissions, as well as the state commission's proper role with respect to federal agency decision-making. In *United States Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004) the court determined that the FCC could not lawfully subdelegate its authority under section 251(d)(2) to "determine which network elements shall be made available to [competitive local telecommunications carriers] on an unbundled basis." The court stated that subdelegations to parties other than federal agencies are presumed to be improper unless expressly authorized by Congress. *See id.* Nowhere in the Act does Congress expressly authorize a non-federal agency to make decisions with respect to the federal universal service fund or ETCs. Any attempt by the FCC to subdelegate its section 254(a) authority or its power to determine violations of its universal service rules to state commissions would be unlawful.

B. THE FLORIDA LEGISLATURE HAS NOT GRANTED AND CANNOT GRANT THE COMMISSION THE AUTHORITY TO ADMINISTER THE FEDERAL FUND OR OVERSEE ETC'S'

OPERATIONS OR RESCIND AN ETC UNDER THE FEDERAL PROGRAM.

1. The Commission Does Not Have Subject Matter Jurisdiction As To Federal Universal Service Issues. Nothing In Chapter 364 Authorizes The Commission To Enforce Federal Law Pertaining To ETCs or the FCC's Universal Service Rules.

"State agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they were created." *Supra Telecommunications v. BellSouth Telecommunications, Inc.*, 2003 WL 22964278, at *2 (Fla. P.S.C. 2003). The Commission may not *presume* legislative grants of authority. The Legislature has never conferred upon the Commission any general authority to regulate public utilities, including telephone companies. *City of Cape Coral v. GAC Utilities, Inc. of Florida*, 281 So. 2d 493, 496 (Fla. 1973). Because the Commission derives its power from the Legislature, jurisdiction requires a grant of legislature authority. *Sprint-Florida, Inc. v. Jaber*, 885 So. 2d 286, 290 (Fla. 2004). The Commission concedes this point. *See, e.g., Supra Telecommunications*, 2003 WL 22964278 at *2 ("State agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they were created"); *In re AT&T Communications*, 213 P.U.R.4th 383, 387 (Fla. P.S.C. 2001).

The Commission must have statutory authority in Chapter 364 to enforce federal law or the FCC's universal service rules against VCI. Because no such

statute exists in Chapter 364, the Commission does not have subject matter jurisdiction to enforce federal law or the FCC's universal service rules.

2. No Statute In Chapter 364 Expressly Or Impliedly Grants The Commission Authority To Enforce Federal Law Or Rules Against VCI.

a. Section 364.10(2) Does Not Vest The Commission With Authority To Enforce Federal Law Or The FCC's Rules

The Commission is vested with authority under section 364.10(2) only to *designate* ETCs for purposes of the federal Fund.

(2) (a) ... an eligible telecommunications carrier shall provide a Lifeline Assistance Plan to qualified residential subscribers, as defined in a commission-approved tariff or price list, and a preferential rate to eligible facilities as provided for in part II. *For the purposes of this section, the term "eligible telecommunications carrier" means a telecommunications company, as defined by s. 364.02, which is designated as an eligible telecommunications carrier by the commission pursuant to 47 C.F.R. s. 54.201.*

(Emphasis added). The Commission attempts to base subject matter jurisdiction to enforce federal law and rules on the above reference to 47 C.F.R § 54.201. Section 364.10 does not specify the Commission's authority to enforce federal law and rules. It is clear from the plain language of the statute that the Legislature only authorized the Commission to designate ETCs, not enforce federal law and rules — that responsibility rests with the FCC, not the Commission. The remainder of section 364.10 also does not vest the Commission with authority to enforce federal laws or the FCC's rules.

The Florida Legislature knew and desired to limit the Commission's duties and obligations with respect to ETCs, evidenced by other instances where the Legislature explicitly directed state agencies to comply with federal law. For example, section 421.55 requires compliance with the federal Surface Transportation and Uniform Relocation Assistance Act of 1987, and section 403.061 explicitly authorizes the Florida Department of Environmental Regulation to adopt rules and regulations consistent with federal law.¹⁰ The Legislature attached no similar requirement to section 364.10.

b. Section 364.012(1) Does Not Vest The Commission With Authority To Enforce Federal Law Or The FCC's Rules.

Section 364.012(1) directs the Commission to maintain liaisons with federal agencies whose policies and rulemaking affect Florida jurisdictional telecommunications companies and encourages the Commission to participate in federal agency authority proceedings. This statute permits the Commission to keep abreast of developments in federal law and federal regulations and to file comments in federal proceedings affecting Floridian ETCs. It does not, however, authorize the Commission to expend state funds to administer the federal universal service program, enforce federal law, or enforce the FCC's universal service rules.

¹⁰ Pursuant to section 403.061, the "department [of public health] shall have the power and duty to control and prohibit pollution. . . (7) . . . Any rule adopted pursuant to this act shall be consistent with the provisions of federal law. . . ." § 403.061(7).

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c. Sections 120.80 And 364.025 Do Not Vest The Commission With Authority To Enforce Federal Law Or The FCC's Rules.

The Commission's reliance on sections 120.80(13)(d) and 364.025 for the Commission's jurisdiction to enforce federal law or the FCC's rules is similarly misplaced. Section 364.025 is precisely the sort of state law mechanism that Congress contemplated in section 254 of the Act when it authorized states to adopt state universal service programs. It instructs the Commission in the establishment of an interim state universal service mechanism and allows for the possibility of a permanent mechanism to be established by the Legislature.¹¹ This mechanism is, however, entirely separate and apart from the federal program.¹² It also allows the Commission to designate competitive carriers as "carriers of last resort" under the

¹¹ The Legislature contemplated the possibility of a permanent mechanism to be established by January 1, 2009. Notably, the 2008 Legislative session concluded without the establishment of a permanent state funding mechanism.

¹² In Docket No. 950696-TP, *In Re: Determination of funding for universal service and carrier of last resort responsibilities*, the Commission established an interim mechanism for maintaining and funding universal service objectives and carrier of last resort obligations for a transitional period not to exceed January 1, 2000, in accordance with the new section 364.025. By Order No. PSC-95-1592-FOF-TP, issued December 27, 1995, the Commission took final action, which included, in part, the establishment of an interim state universal service funding mechanism that provided carriers should fund universal service objectives through markups on the services they offer. This mechanism, and the contemplated permanent mechanism that has not come to pass, were intended to fund the additional obligations it was anticipated that incumbent carriers would incur as the carriers of last resort.

state law, a designation that shares similarities with, but is not identical to ETC designation.

Nor does the APA grant such authority. Section 120.80(13)(d) authorizes the Commission to employ "procedures" consistent with the Act when it is "implementing" provisions of the Act that it is authorized to implement. Clearly, section 120.80(13)(d) is not a jurisdictional grant. It simply allows the Commission to use procedures similar to those employed by the FCC under the Act when it is authorized and obligated "to give practical effect to" the Act.

- d. The Legislature Has Not Enacted A Law With The Same Provisions As 47 U.S.C. § 214(e) Pertaining To Eligible ETCs That It Seeks To Enforce Here.

The Legislature has not enacted a law with provisions that are the same as or even similar to section 214(e) of the Act that the Commission seeks to enforce against VCI. Neither has the Legislature authorized the Commission to regulate ETCs or administer the universal service program "as authorized by federal law." The term "federal law" is mentioned in three (3) statutes found in Chapter 364. Two of the three statutes provide that certain types of services are either exempt from oversight by the Commission,¹³ or free of state regulation altogether,¹⁴ *except*

¹³ § 364.011.

¹⁴ § 364.013, Fla. Stat.

as specifically authorized by federal law. In the third statute, the Legislature addresses Lifeline providers, not the Commission. § 364.10(3)(a), Fla. Stat.

- e. Sections 364.01(1)(2) And (4) Do Not Grant The Commission The Authority To Enforce Federal Law Or The FCC's Universal Service Rules Against VCI.

Sections 364.01(1) and (2) give the Commission authority to exercise powers conferred by Chapter 364 and exclusive jurisdiction to regulate telecommunications companies pertaining to matters set forth in Chapter 364. Sections 364.01(1) and (2) must be read with in conjunction with subsection (4). Section 364.01(4) enumerates the reasons for the Commission to exercise jurisdiction conferred in Chapter 364.¹⁵ However, the Legislature adopted at least one statute governing competitive telecommunication carriers (of which ETCs are a subset) that implements a less stringent regulatory scheme than that developed for incumbent local exchange carriers. Specifically, section 364.337(5) provides that the Commission has continuing jurisdiction over competitive

¹⁵ In sum: (a) to protect the public health, safety and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices; (b) encourage competition; (c) ensure that monopoly services continue to be subject to price, rate and service regulation; (d) promote competition; (e) encourage providers to introduce new services; (f) eliminate rules or regulations that delay or impair competition; (g) ensure the fair treatment of all providers; (h) recognize the continuing emergency of a competitive telecommunications environment through flexible regulatory treatment of competitive local telecommunications services; and (i) continue to act as a surrogate for competition for monopoly services. § 364.337(4), Fla. Stat.

telecommunication carriers *only* for the purposes of (1) establishing reasonable service quality criteria; (2) assuring resolution of service complaints, and (3) ensuring the fair treatment of all telecommunications providers in the telecommunications marketplace. Section 364.337 also exempts competitive telecommunication carriers from many other provisions of Chapter 364. The Commission, then, can exercise its exclusive jurisdiction over matters in Chapter 364, with respect to competitive telecommunication carriers, only for the limited purposes set forth in section 354.337.

The Commission also cannot rely on section 364.01 for authority to enforce federal law and FCC rules against VCI because it is impossible for the Commission to exercise *exclusive* jurisdiction over ETCs. The federal universal service program administered by the FCC under section 254 of the Act cannot be within the exclusive purview of the Commission, and the Legislature has not enacted a state universal service program.

The law favors a reasonable interpretation of statutes and one which avoids an absurd result. *See, e.g., Goehring v. Broward Builders Exchange, Inc.*, 222 So. 2d 801, 802 (Fla. 4th DCA), *aff'd in part, rev'd in part*, 222 So. 2d 801 (Fla. 1969). Because the Commission cannot exercise exclusive jurisdiction over a federal program and has no specific authority elsewhere in Chapter 364 to regulate ETCs,

it would be absurd to imply that section 364.01 grants the Commission authority to enforce federal law pertaining to ETCs or the FCC's universal service rules.

C. THE COMMISSION DOES NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE THE LEGISLATURE HAS NOT ENACTED A STATUTE PERMITTING THE COMMISSION TO ADOPT THE FCC UNIVERSAL SERVICE RULES IT SEEKS TO ENFORCE AGAINST VCI AND NO SUCH RULES HAVE BEEN ADOPTED.

1. The Florida Legislature Did Not¹⁶ Enact A Statute Authorizing The Commission To Adopt The Federal Rules It Seeks To Enforce Against VCI And No Such Rules Were Adopted.

The Legislature granted the Commission the authority to adopt rules only to administer the provisions of section 364.10, providing: "The commission shall adopt rules to administer this section." § 364.10(3)(j). The Commission adopted rule 25-4.0665, but it does not seek to enforce this rule against VCI. Indeed neither the Proposed Agency Action Order nor Staff's testimony allege that VCI violated any of the provisions of rule 25-4.0665.¹⁷ Instead, the Commission seeks to enforce against VCI federal universal service rules that the Legislature has not

¹⁶ As stated above, the Legislature could not authorize the Commission to adopt the federal rules. The Legislature is only authorized to adopt a Florida universal service program which is similar to, but separate from, the federal program.

¹⁷ In sum, this rule requires ETCs to (1) provide 60 days' written notice of termination of Lifeline service; (2) reinstate terminated customers who subsequently prove eligibility; (3) participate in the Lifeline service automatic enrollment process; and (4) provide current Lifeline service company information to the Universal Service Administrative Company for posting on its website. Rule 25-4.0665, Fla. Admin. Code.

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granted the Commission the authority to adopt and that the Commission has not adopted.

2. The Commission Cannot Enforce Unadopted Rules Or Law Not Enacted By the Legislature Against VCI. The Commission's Attempt To Do So Violates The APA.

The APA provides: "Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by § 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practical." § 120.54(1)(a). The APA "places an affirmative duty on the part of all state agencies to codify their policies in rules adopted in the formal rulemaking process." *Florida Dept. of Business and Professional Regulation, Div. of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374, 380 (Fla. 1999) (quoting *St. Johns River Water Management Dist. v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72, 80 (Fla. 1st DCA 1998)). A clear purpose of the rulemaking provisions of the APA "is to force or require agencies into the rule adoption process." *Osceola Fish Farmers Ass'n, Inc. v. Division of Administrative Hearings*, 830 So. 2d 932, 934 (Fla. 4th DCA 2002).

The Commission has not adopted the FCC's universal service rules it seeks to enforce against VCI, and it is without authority to do so. Yet the Commission, by the Proceeding Below, persists in attempting to enforce the unadopted rules despite the APA's clear requirements. The Commission cannot eschew the

requisite rulemaking in favor of simply enforcing FCC rules against VCI in an adjudication. These FCC rules are agency statements of general applicability, falling within the meaning of the term "rule" defined in section 120.52(15). The Commission's attempt to enforce the FCC's universal service rules on an ad hoc basis constitutes an invalid agency action taken without rulemaking, in violation of section 120.56(4).¹⁸ *See Kerper v. Department of Environmental Protection*, 894 So. 2d 1006, 1010 (Fla. 5th DCA 2005).

3. The Enforcement Of The FCC's Rules Violates Section 364.27 And Constitutes An Invalid Exercise Of Delegated Legislative Authority.

Under section 364.27, the Commission only is empowered to investigate interstate rules of practice for or in relation to the transmission of messages or conversations taking place within Florida which in the Commission's opinion violate the Act or the FCC's orders and regulations. *See* § 364.27. The Commission's power with respect to such interstate matters is limited to referring the violations to the FCC by petition. *See id.* The Legislature has not granted the Commission the authority to impose a penalty for violations of the Act or the FCC's rules. *See id.* That limitation on the Commission's authority clearly expresses the Legislature's intent that the Commission not enforce the Act or the FCC's rules, and that it not impose a penalty for carrier practices that violate federal law.

¹⁸ VCI does not waive its right to bring a complaint under section 120.56(4).
{TL158579;1}

The Commission's belief that VCI may have violated the FCC's rules should have led it to do no more than file a complaint with the FCC under Section 208(a) of the Act. The Commission has clearly exceeded the limit on its jurisdiction imposed by section 364.27 by attempting to penalize VCI for alleged violations of section 214(e) of the Act and the FCC's rules. If it wanted to enforce the FCC's rules—assuming for the sake of argument that the Commission had authority to do so—the Commission should have adopted those rules in the rulemaking process required by the APA. *See* § 120.54(6). Having failed to do so, the Commission is left without any authority beyond the specific powers given it by section 364.27. It grossly exceeded those powers by attempting to penalize VCI for its alleged violations of federal law instead of referring the matter to the FCC as required by law.

4. By Seeking To Enforce Unadopted Rules And Law Not Enacted By The Legislature, The Commission Is Violating VCI's Due Process Rights.

The Commission's attempt to enforce against VCI the provisions of federal law not enacted by the Legislature and enforce rules it has not adopted constitutes a violation of VCI's due process rights under the Fourteenth Amendment of the United States Constitution and Section 9 of the Florida Constitution. The Commission's ETC designation confers upon VCI the right to obtain reimbursement from the Fund and, as such, constitutes a property right. The

Commission cannot deprive VCI of property without due process of law, which includes notice and an opportunity to be heard. To deprive VCI of its property rights, the Legislature and the Commission must provide VCI with notice of the circumstances under which VCI can be deprived of this property right. Florida law fails to provide VCI with this notice.

V. CONCLUSIONS

For the reasons expressed, the Commission does not have subject matter jurisdiction over the Proceeding Below, may not enforce federal laws and FCC Rules against VCI. Accordingly, VCI requests this Court to issue a writ of prohibition requiring the Commission from proceeding with the Proceeding Below.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Writ of Prohibition, ~~along with redacted copies of the referenced materials,~~ have been served via hand delivery to the Commission via its Clerk: Ms. Ann Cole, Commission Clerk, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32309; and the persons listed below this 15th day of May, 2008:


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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this Petition complies with the font standards, i.e., Times New Roman 14-point font, as set forth in Rule 9.100 Florida Appellate Rules of Procedure.



KATHERINE E. GIDDINGS