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a. Submitted by : Stephen Rowell, Attorney for Alltel Communications, One Allied Drive, Little Rock, Arkansas, 501 905 8460, Stephen.Rowell@VerizonWireless.com;
b. Docket 08234-TP, In re: Implementation of Florida lifeline program involving bundled service packages and placement of additional enrollment requirements on customers c. Alltel Communications, LLC d. 12 pages e. the post hearing brief establishes that the Commission does not have authority to do what it is being asked to do, i.e. require wireless carriers to reduce their rates on all rate plans for Lifeline eligible customers.

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02943 APR-3 8

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of Florida lifeline program involving bundled service packages and placement of additional enrollment requirements on customers.

DOCKET NO. 080234-TP

FILED: April 3, 2009

POSTHEARING BRIEF OF ALLTEL COMMUNICATIONS, LLC

Alltel Communications, LLC (“Alltel”), pursuant to the Florida Public Service Commission (the “Commission”) Order No. 08-0594-PSC-TP as modified by Order No. PSC-08-0834-PSC-TP (collectively, the “Procedural Order”), submits this Posthearing Brief.

Introduction

Alltel respectfully requests that the Commission’s Notice of Proposed Agency Action Order on Application of the Lifeline Discount to Bundled Service Packages, Order No. PSC-08-0417-PAA-TP, June 23, 2008, (the “Order”) be rescinded and that the docket be closed because the Order violates Florida’s rulemaking requirements, erroneously interprets federal law and inappropriately attempts to regulate commercial mobile radio service providers (CMRS), of which the Commission does not have jurisdiction to regulate under both federal and state law.

More particularly, the Order is procedurally and substantively flawed as it attempts to issue an agency statement of general applicability in violation of section 120.54(1)(a), Florida Statutes. The Commission’s Order proposes to require all Eligible Telecommunications Companies (“ETCs”) “to apply the Lifeline discount to the basic local service rate or the basic local service rate portion of any service offering which combines both basic and nonbasic service.” Order at 12. For wireless ETCs such as Alltel, the effect of the Order is to require a discount on all rate plans.

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02943 APR-3 8

FPSC-COMMISSION CLERK

In addition to violating the rulemaking requirements in the state Administrative Procedure Act (“APA”), the Order is substantively flawed because it erroneously interprets federal rules relating to Lifeline discounts and attempts to regulate rates of a CMRS provider. Because of this erroneous interpretation, the Order impermissibly adopts a statement of general applicability (a “rule”) that is inconsistent with federal rules.

Moreover, Florida statutes provide no authority to this Commission to impose a requirement on CMRS providers to apply the Lifeline discount to bundled service offerings. Therefore, even if the Commission begins the rulemaking process and proposes to adopt the statement of general applicability as expressed in its Order, it does not have statutory authority to adopt the statement as a rule.

Procedural Background

This proceeding was initiated in response to the challenges of various parties, including Alltel, to the Commission’s determination in the Order that Federal Communication Commission Rule 47 C.F.R. § 54.403(b) (the “Rule”) mandates that “ETCs are required to apply the Lifeline discount to the basic local service rate or the basic local service rate portion of any service offering which combines both basic and nonbasic service.” (See Order page 12). In response to the challenges, four (4) issues were identified in the Procedural Order. The issue of whether the Commission is **required** by FCC rule to impose the Lifeline discount on all rate plans of ETCs was not specifically identified as an issue in this proceeding. Rather, the issues are framed as whether the Commission **may** require the Lifeline discount to bundle service offerings (See Procedural Order Issue 2) and whether the Commission “shall” require such result (See Procedural Order Issue 4). As discussed at the hearing, the framed issues are not relevant or applicable to Alltel because it is a CMRS carrier and, therefore, do not charge federal end user common line charges or equivalent federal charges. While Alltel will address Issue 2 as framed

by the Procedural Orders, it does so without waiving the objection stated in its Prehearing Statement that the present proceeding is procedurally defective if the result or attempt is to issue a binding statement requiring Alltel to provide discounts on all rate plans. Issue 4, whether the commission shall do so, is not relevant as a matter of law as demonstrated in this brief.

Issues

1. Failure to Comply with Rulemaking Procedures.

This Commission did not adopt its prior conclusion interpreting 47 C.F.R. § 54.403(b) through rulemaking proceedings as required by Florida law and has not yet proposed a rule in accordance with section 120.54(1)(a), Florida Statutes. Under Florida's Administrative Procedure Act, "[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable." § 120.54(a), Fla. Stat. Section 120.52(16), Florida Statutes, defines "rule" as "each agency statement of general applicability that implements, interprets, or prescribes law or policy". § 120.52(16), Fla. Stat. This proceeding is an attempt to issue or implement a statement of general applicability to implement or prescribe law or policy. Thus, it is irrelevant in this proceeding whether the Commission may or should impose Lifeline discounts on all rate plans or even whether such action is good or bad policy. This proceeding is not a rulemaking proceeding where the Commission may at its conclusion impose such a requirement, assuming it has authority under Florida Statutes to do so.

If the Commission pursues rulemaking through an appropriate rulemaking docket, then a rule citing appropriate Florida statutory authority must be proposed and comments solicited in accordance with the APA before such a requirement can be binding. *See, e.g., Hennessey v.*

Dep't of Business & Prof. Reg., 818 So. 2d 697, 700 (Fla. 1st DCA 2002) (an agency may only adopt rules that implement or interpret specific powers and duties granted by an enabling statute); *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 599 (Fla. 1st DCA 2000) (Legislature has made clear that rules must implement or interpret specific powers and duties granted by an enabling statute); *State, Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n*, 798 So. 2d 847 (Fla. 1st DCA 2001) (on rehearing) (“The question is whether the statute contains a specific grant of legislative authority for the rule . . .”). Thus, the Commission’s Order should be rescinded and the docket should be closed.

2. Neither Federal nor State Law Authorizes the Commission to Require Alltel to Apply the Lifeline Discount to Bundled Service Packages.

From a substantive standpoint, this proceeding flows from the Commission’s erroneous interpretation of a FCC rule. The Commission erred not only by proceeding with no Florida statutory authority for its action, but by ignoring the plain unambiguous language of the federal rule that Lifeline is required to be applied to the “lowest tariffed (or otherwise generally available) rate plan.” Issue 2 is stated as follows:

Issue 2: Under applicable law, may the Commission require Florida ETCs that do not charge federal End User Common Line charges, or equivalent federal charges, to apply the lifeline discount to bundled service offerings ...?

The answer to this question is “no” on several levels as a matter of both federal and state law. First, federal law does not require this result for federally designated ETCs, and, second, as discussed below, the state is prohibited from adopting rules that are inconsistent with federal rules. The Commission is a creature of state statute and its “powers, duties and authority are

those and only those that are conferred expressly or impliedly by statute of the State.” *City of Cape Coral v. GAC Utilities, Inc.* 281 So. 2d 493 (Fla. 1973) (emphasis supplied).

A. Federal Law Requires that Lifeline Discounts be Applied to the Lowest Priced Plan

Pursuant to 47 C.F.R. § 54.405(a) all ETCs shall “make available Lifeline service, as defined in § 54.401, to qualifying low-income consumers.” Lifeline is defined in 47 C.F.R. § 54.401 as “a retail local service offering: (1) that is available only to qualifying low-income consumers; (2) for which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount described in § 54.403; and (3) that includes the services or functionalities enumerated in § 54.101 (a)(1) through (a)(9).” The nine supported services enumerated in § 54.101 are voice grade access to the public switched network, local usage, dual tone multi-frequency signaling, single-party service, access to emergency services, access to operator services, access to interexchange service, access to directory assistance and toll limitation.

FCC Rule 54.403(b) governs the application of the Lifeline discount to qualifying customer’s basic residential rate, which provides in relevant part:

Other eligible telecommunications carriers shall apply the Tier-One federal Lifeline support amount, plus any additional support amount, to reduce their lowest tariffed (or otherwise generally available) residential rate for the services enumerated in § 54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount.¹

The FCC further clarified, through an order issued by the Federal-State Joint Board on Universal Service, that a federal ETC must apply the federal Lifeline support it receives to the carrier’s lowest generally available rate for the supported services:

¹ CMRS providers, like Alltel, do not provide service pursuant to utility tariffs, but rather enter into individual service contracts with subscribers. *See* 47 C.F.R. § 20.15(c). Accordingly, CMRS providers are obligated under Section 54.403(b) of the FCC’s Rules to apply the Lifeline discount to their “lowest ...generally available” residential rate.

Other eligible telecommunications carriers will receive, for each qualifying low income consumer served, support equal to the federal SLC cap for primary residential and single-line business connections, plus \$1.75 in additional federal support conditioned on state approval. The federal support amount must be passed through to the consumer in its entirety. In addition, all carriers providing Lifeline service will be reimbursed from the new universal service support mechanisms for their incremental cost of providing toll-limitation services to Lifeline customers who elect to receive them. The remaining services included in Lifeline must be provided to qualifying low-income consumers at the carrier's lowest tariffed (or otherwise generally available) rate for those services.²

The FCC unambiguously stated its intention in 54.403(b) to only require application of the Lifeline discount to an ETC's lowest cost residential rate. In doing so, the FCC relied on the Joint Board's recommendation that the "Lifeline rate" must be "the carrier's lowest comparable non-Lifeline rate" reduced by the amount of federal support.³ The rule provides that the Lifeline discount shall be applied to the "lowest tariffed (or otherwise generally available) residential rate"- not the many residential rate plans and packages that include the nine supported services listed above. There is no relevant reference to nonbasic service or applying the discount to all service offerings.

In the Order, the Commission relied on an erroneous interpretation of the FCC's rules that was advocated by Commission Staff. In writing the Memorandum to the Commission, Staff basically ignored and then rewrote the key language in order to reach their intended conclusion. The FCC rule provides that the Lifeline discount shall be applied to the "lowest tariffed (or otherwise generally available) residential rate," not the lowest tariffed residential rate or any other generally available rate. The plain meaning of the directive is that the discount is to be applied to the lowest tariffed or generally available residential rate. Staff's interpretation is

² *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, 8971, CC Docket No. 96-45, FCC 97-105, ¶ 368 (1997) (emphasis added)

³ *In the Matter of Federal State Joint Board on Universal Service*, Recommended Decisions, 12 FCC Rcd 87, 303, CC Docket No. 96-45 (1996)

incorrect and the Commission's reliance on that interpretation is inconsistent with FCC Rule 54.403(b).

B. Federal Law Prohibits State Rules that are Inconsistent with FCC Rules

The conclusion sought by Staff would also violate 47 U.S.C. § 254(f). Section 254(f) of the Telecommunications Act of 1996 (the "Act") provides that a state may adopt additional regulations governing the provision of universal service within its jurisdiction, provided that any additional regulations are not inconsistent with the FCC's universal service rules. Thus, even if Florida law gives it any authority (which as discussed later it clearly does not as to federally designated ETCs and wireless carriers in general), the Commission cannot implement a rule that is inconsistent with FCC Rule 54.403(b).

The FCC order *In the Matter of Lifeline and Link-Up*, 19 F.C.C.R. 8302 (April 29, 2004) (Report and Order and Notice of Proposed Rulemaking) also provides the Commission no basis or support for a requirement to apply the Lifeline discount to the basic local service rate or the basic local service rate portion of any service offering which combines both basic and nonbasic service. The Order quotes the FCC order on page 9:

We adopt the Joint Board's recommendation not to adopt rules prohibiting Lifeline/Link-Up customers from purchasing vertical services, such as Caller-ID, Call Waiting, and Three-Way Calling. Like the Joint Board, we believe any restriction on the purchase of vertical services may discourage qualified consumers from enrolling and may serve as a barrier to participation in the program.

In the FCC Order, the FCC expressed support for Lifeline customer access to vertical services. However, permitting Lifeline customers to have access to vertical services as part of the Lifeline service is very different than applying the Lifeline discount to any and all rate plans which could include much more than Caller ID, Call Waiting and Three-Way Calling- the types of vertical services the FCC envisioned.

C. Federal Law Preempts States from Regulating Rates of CMRS Carriers

The answer to Issue 2 is also no because federal law precludes states from the regulation of rates of wireless carriers. See 47 USC § 332(c). Requiring wireless carriers to restructure or split their rates for packages of services and equipment to accommodate an identification and separate treatment of a “basic” component is a clear attempt to alter and dictate the rates and rate structure of wireless carriers. As illustrated at the hearing on cross of Staff witness and in the testimony provided by Sprint, wireless carriers like Alltel offer many rate plans for consumers and no one plan is or can be defined as “basic” in the former wireline sense of the word. Wireline basic service has historically been identified as it was tariffed as dial tone with unlimited local calling in a defined local calling area. Wireless plans on the other hand compensate for equipment purchased, vary by numbers of minutes included in the price and the local calling area differs depending on the customer’s need. Wireless carriers do not simply add vertical features to a local unlimited plan to create bundles. The concept of “basic service” and the ability to distinguish a “basic service” within wireless rate plans make little sense or alternatively, the entire plan is basic.

The rate regulation attempted in this matter is illustrated by the example of a sale of a smart phone. The rate plan for such a device compensates for the ability to send and receive emails and data. The customer’s monthly payment compensates for the instrument, use, and various services depending on the plan selected. If the customer does not pay the entire bill, it is simply not possible to conclude he has or has not paid enough to cover “basic service,” as he did not purchase a basic phone or basic service. If he has not paid enough to cover the pro-rated hand set costs (again not a defined amount), then the company can not be expected to allow the consumer to retain the services or the handset. Simply stated, even if this were a rule making

proceeding, which it is not, the historic wireline concept of “basic service” does not transfer to wireless, and the Staff is attempting to dictate changes in the rates and rate structure of wireless carriers. This action is clearly preempted and unlawful.

The answer to Issue 2, therefore, is no as a matter of federal law. The Commission may not require Alltel to provide Lifeline discounts on all its rate plans.

D. Florida Law does not Empower the Commission to Impose Lifeline Discounts on all Rate Plans of Wireless Providers

The answer to Issue 2 is “no” as a matter of state law and the Commission is clearly not empowered to impose such a requirement on Alltel. Alltel is a federally designated ETC. Its ETC status was not created by this Commission. This Commission draws its authority from the State legislature. *City of Cape Coral v. GAC Utilities, Inc.*, 281 So. 2d at 496-97; *Telco Communications Co. v. Clark*, 695 So. 2d 304, 308 (Fla. 1997). Therefore, even if federal statutes, FCC rules or even designation orders appeared to provide the Commission with jurisdiction to impose such a requirement, which they do not, Florida statutory empowerment must exist to enable Commission jurisdiction.

Florida has well defined statutory limits with respect to Lifeline related authority of this Commission. Florida law provides in clear and relevant part as follows:

...an eligible telecommunications carrier shall provide a Lifeline Assistance Plan to qualified residential subscribers, as defined in a commission-approved tariff or price list, ... For 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 CFR s. 54.201.

§ 364.10(2)(a), Fla. Stat. An eligible telecommunications carrier that is required to provide Lifeline under state law and over which the Commission may have authority to enforce such

must be one designated by the Florida Commission. Alltel was designated by the FCC and no one contends otherwise. Under Florida law, an ETC must be a telecommunications company as defined by section 364.02, Florida Statutes. Subsection (14) (c) of section 364.02 clearly provides that the term telecommunications company “does not include: A commercial mobile radio service provider...” Alltel is a commercial mobile radio service provider and again is therefore not within the scope of the Commission’s Lifeline statutes and empowerment. Alltel also does not have a tariff on file with the Commission as would be required to define the reach of the Lifeline obligation under the Florida Lifeline statute. These statutory jurisdictional limitations are insurmountable in this proceeding and require that the answer to Issue 2 be, “no, it may not.”

The discussion is not complete without also addressing section 364.011, Florida Statutes. This statute provides an overall exemption from Commission jurisdiction of Commercial mobile radio service providers. Notably, there is an exception to the no jurisdiction provision that was the basis for this Commission recently determining it now has authority to designate wireless ETCs. The exception, however, is limited to “except to the extent delineated in this chapter or specifically authorized by federal law.” § 364.011(4), Fla. Stat. Section 364.10(2), Florida Statutes, as discussed above, disposes of the first phrase “delineated in this chapter.” Chapter 364 dictates the opposite result as it provides no authority over an FCC designated wireless ETC with respect to Lifeline. Florida law clearly establishes that a CMRS carrier that was ETC designated -- not by this Commission but by the FCC -- is, with respect to Lifeline, not subject to the jurisdiction of this Commission.

The second excepting phrase of section 364.011(4), Florida Statutes, “specifically authorized by federal law,” also provides no basis for authority. It was demonstrated above in the discussion regarding 47 C.F.R. § 54.403(b) and 47 U.S.C. §§ 254(f) and 332(c) that no

“specific” authorization for this action exists in federal law. To the contrary, the action is prohibited. Therefore, stated quite simply, no provision of federal law has been or can be cited to “specifically” authorize the result that Staff seeks in this proceeding.

Conclusion

The Commission, for all the legal reasons discussed above, should conclude with respect to Issue 2 that it may not as a matter of law impose a requirement that CMRS carriers, and particularly federally designated ETCs like Alltel, provide Lifeline discounts on all their rate plans.

Respectfully submitted,

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of Florida lifeline program involving bundled service packages and placement of additional enrollment requirements on customers.

DOCKET NO. 080234-TP

DATED: NOVEMBER 19, 2008

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and one correct copy of the Post Hearing Brief of Alltel Communications, LLC has been served on the following by US Mail and email this 3rd day of April, 2009:

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