Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling on Issues Contained in *Thorpe v. GTE*	)	
	)	
On Referral by the United States District Court for the Middle District of Florida	)	
	)	CG Docket No. 03-84
Linda Thorpe,	)	
	)	
Representative Plaintiff,	)	
	)	
vs.	)	
	)	
GTE Corporation, GTE Florida Inc., AT&T Corp., Sprint-Florida, Inc., and MCI WorldCom Network Services, Inc.,	)	
	)	
Defendants	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 9, 2008 **Released: April 11, 2008**

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order addresses a petition raising issues that are the subject of litigation in the United States District Court for the Middle District of Florida and which is before us under the doctrine of primary jurisdiction.[1] Linda Thorpe filed a petition for declaratory ruling with this Commission in which she asks whether she was obligated to accept long distance service on her second residential telephone line and pay charges associated with that service.[2] Thorpe further seeks a declaration that the "forced coupling" of long distance with local service constitutes an unjust and

[1] *See* Petition for Declaratory Ruling on Issues Contained in "Thorpe v. GTE", United States District Court for the Middle District of Florida, Case No. 8:00-CV-1231-T-17EAJ (filed Aug. 8, 2002) (Petition); *see also id.,* Ex. B, *Linda Thorpe v. GTE Corp. et al,* Case No. 8:00-CV-1231-T-17EAJ, slip op. at 5-6 (M.D. Fla., Feb. 8, 2002) (*District Court Order*).

[2] *See* Petition at 5, para. II. Thorpe's petition asks whether local service providers may "provide 'local service only' to their customers" or whether they must "in all events and as to all lines, couple local service with 'long distance' service provided by an interexchange carrier, even where the customer has no need for long distance service." *Id*.; *see also District Court Order* at 5-6 (asking whether Thorpe was required under the national framework of the Communications Act to accept long distance service on her second phone line and pay the associated charges).

unreasonable business practice in violation of the Communications Act of 1934, as amended (Act).[3] Finally, Thorpe seeks a declaratory ruling as to whether the state law claims she asserted in her complaint are preempted by the Act.[4]

2. In response to Thorpe's first question, we find that she was not obligated to accept long distance service on her second line, but was obligated to pay certain charges associated with such service. The tariff that governed the relationship between Thorpe and her local telephone service provider, GTE Florida Incorporated (GTE Florida), offered her the option not to presubscribe to a long distance carrier. We also conclude that if GTE Florida did not allow Thorpe to elect not to presubscribe to a long distance carrier, its action would violate section 203(c) of the Act, which requires a carrier to comply with its tariff. Also, if Thorpe elected not to presubscibe to a long distance carrier, she should have been able to avoid some charges associated with long distance service. Under the facts alleged, there was no "forced coupling" of local and long distance services, and we therefore decline to rule on Thorpe's request for declaratory rulings as to the lawfulness of such a practice. Finally, Thorpe's state law claims are preempted because they conflict with terms and conditions set forth in governing tariffs. We explain our conclusions below.

II. BACKGROUND

A. Thorpe's Complaint

3. Thorpe is a telephone subscriber residing in the state of Florida.[5] Her complaint concerns charges associated with a second phone line that she had installed in her home sometime in 1997 or 1998 and used at least until September of 1999.[6] During this period, Thorpe's local telephone company, also called a local exchange carrier or LEC, was GTE Florida, a subsidiary of GTE Corporation (GTE).[7] Thorpe's first long distance company on the second line was AT&T Corp. (AT&T).[8] In 1999, Thorpe discontinued long distance service with AT&T and selected GTE's long distance affiliate, GTE Communications Corporation (GTECC), as her long distance carrier on the line.[9] GTE Florida, AT&T, and GTECC are telecommunications carriers regulated under Title II of the Act.[10]

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[3] Petition at 16; *see also id*. at 6, para. III; 47 U.S.C. § 151 *et seq*.

[4] Petition at 5, para. I.

[5] *See id.*, Ex. A (Complaint) at 3, paras. 8-9.

[6] *See id.* at 2-3.

[7] *See id*. We note that the merger between Bell Atlantic Corporation and GTE Corporation, which was completed on June 30, 2000, created Verizon Communications. *See Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License,* CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000).

[8] Petition at 2.

[9] *Id*. at 3; *see also id.*, Composite Ex. E, GTE Florida Incorporated and AT&T Corp.'s Memorandum of Law in Support of Their Dispositive Motion to Dismiss Pursuant to Federal Civil Procedure Rule 12(b)(6) (Defendants' Memorandum of Law in Support of Motion to Dismiss) at 7 & n.6. Although she did not name GTECC as a defendant in this proceeding or before the district court, Thorpe complains that certain charges that she was assessed by GTE Long Distance were unlawful. Thorpe's complaint appears to confuse GTE and GTECC. *Compare* Petition at 3 *with* Defendants' Memorandum of Law in Support of Motion to Dismiss at 7 & n.6.

[10] *See* Petition, Composite Ex. E, GTE Florida Incorporated and AT&T Corp.'s Dispositive Motion to Dismiss Pursuant to Federal Civil Procedure Rule 12(b)(6) at 1-2, paras. 1, 3; Defendants' Memorandum of Law in Support of Motion to Dismiss at 7 & n.6; *see also* 47 U.S.C. § 201 *et seq*.

4. In a proposed class action filed in Florida state court, Thorpe alleged that, at the time she requested installation of the second line, GTE Florida "without discussion or communication of any kind . . . arbitrarily assigned AT&T" as her long distance service provider.[11] Thorpe claims that she contacted GTE Florida again in January of 1999 and requested termination of long distance service on her second line. She asserts that GTE Florida misrepresented to her that, whether or not she had any use for long distance service on that line, she was required to have it.[12] In March of 1999, Thorpe again contacted GTE Florida, which apparently was the billing agent for AT&T. Thorpe told GTE Florida that, although she had used her second line only for local calls and thus should not have been charged anything for long distance services, AT&T had imposed "Carrier Line" and "Universal Connectivity" charges.[13] Thorpe says that, for a second time, she complained that she did not want long distance service and GTE Florida again told her that long distance service was required on her line. This time, however, Thorpe asserts that GTE Florida indicated that if she switched her long distance provider to its long distance affiliate, GTECC, no minimum monthly service charges would be imposed.[14] Accordingly, in March of 1999, Thorpe switched her long distance carrier to GTECC.[15] Thorpe asserts that, although it did not do so for several months, in September 1999 GTECC began imposing a $3.00 minimum monthly charge for long distance service.[16] Thorpe's complaint sought declaratory and injunctive relief and damages pursuant to the Florida Unfair and Deceptive Trade Practices Act,[17] restitution for void or voidable contracts,[18] and alleged breaches of contract[19] and the duty of good faith and fair dealing.[20]

5. Defendant GTE Florida, with the consent of the other defendants,[21] removed the action to the United States District Court for the Middle District of Florida, arguing that the complaint involved services regulated by this Commission and required resolution of questions entirely federal in nature.[22]

B. Thorpe's Request for Declaratory Ruling

6. The district court determined that Thorpe's complaint concerned a federal statute and

[11] Complaint at 1, 3, paras. 1, 10.

[12] *Id*. at 3-4, para. 12.

[13] *Id*. at 4, para. 13. Thorpe appended to her complaint copies of her consolidated local and long distance bill dated January, March, and September 1999. *See id.*, Composite Exs. A, B, D.

[14] *Id*. at 4, para. 14; *see also* Defendants' Memorandum of Law in Support of Motion to Dismiss at 7 & n.6 (long distance provided through GTECC).

[15] Complaint at 4, para. 15; *id.*, Composite Ex. C (Letter from Rena M. Taguchi, Director, GTE Long Distance to Linda A. Thorpe (Mar. 31, 1999)) (confirming recent change in service).

[16] *Id*. at 4, para. 16; *see id*., Composite Ex. D. Thorpe asserts that, beginning in January 1999, after she acquired a computer system, she intended all usage on her second line to be local only, and thus claims that she should not have been billed long distance charges. *Id*. at 3, 5, paras. 11-12, 18. We note, however, that one of the bills attached to Thorpe's Complaint indicates that she did make some long distance calls after January 1, 1999, on her second line. *See id*., Composite Ex. D at 3.

[17] *Id*. at 8-11, paras. 37-54 (Counts I & II).

[18] *Id*. at 11, paras. 55-59 (Count III).

[19] *Id*. at 12, paras. 60-65 (Count IV).

[20] *Id*. at 12-13, paras. 66-70 (Count VI [sic]).

[21] In addition to GTE, GTE Florida, and AT&T, Thorpe's district court complaint named Sprint-Florida, Incorporated, and MCI WorldCom Network Services, Inc. as defendants. *See id.* at 1.

[22] *See* Petition, Ex. C (Notice of Removal, *Thorpe v. GTE Corp. et al*., Case No. 8:00-CV-1231-T-17C at 2 (filed M.D. Fla. June 21, 2000)).

should be referred to this Commission under the doctrine of primary jurisdiction.[23] Specifically, the court found that the allegations before it "center around the fact that [Thorpe] does not want long distance service on her second phone line, but Defendants contend [she] must accept it under the national framework of the [Communications Act], and pay the associated charges."[24] Accordingly, in August 2002, Thorpe filed a petition for declaratory ruling with this Commission in which she asks whether local service providers may "provide 'local service only' to their customers," or whether they must "in all events and as to all lines, couple local service with 'long distance' service provided by an interexchange carrier, even where the customer has no need for long distance service" on a line.[25] In addition to that question, Thorpe's petition further asks us to find that the "forced coupling" of long distance with local service constitutes an unjust and unreasonable business practice in violation of section 201(b) of the Act.[26] Thorpe also seeks a declaratory ruling from this Commission as to whether her state law claims are preempted by the Act. Comments were filed by numerous providers of local and long distance service, including the defendants in the district court proceeding, as well as the New Jersey Division of the Ratepayer Advocate.[27] Several of the commenters, including Thorpe and Verizon, as well as the California Public Utilities Commission, filed replies.[28]

7. Thorpe asserts that she requested installation of the second phone line sometime in 1997 or 1998, that she asked that long distance service be removed from her account in January and March of 1999, that she changed the long distance provider on her line in March 1999, and that GTECC began charging her a minimum charge for long distance on her line in September 1999.[29] Accordingly, we consider January 1, 1997, through September 30, 1999, to be the relevant period for our analysis of governing law and tariff provisions.

C. Telecommunications Regulation

8. Thorpe complains that she wanted to use her second line only for local service and did

[23] *District Court Order* at 6.

[24] *Id.* at 5-6; *see also* 47 U.S.C. § 151 *et seq.*; Petition at 5-6.

[25] Petition at 5.

[26] *Id*. at 6, 16; *see id.* at 14-15.

[27] Comments of AT&T Corp. (filed June 5, 2003) (AT&T Comments); Comments of CBeyond Communications, LLC, Pac-West Telecomm, Inc. and US LEC Corp. (filed June 5, 2003) (CBeyond Comments); Comments of MCI WORLDCOM Network Services, Inc. (filed June 5, 2003) (MCI Comments); Comments of the New Jersey Division of the Ratepayer Advocate (filed June 5, 2003) (Ratepayer Advocate Comments); Comments of the Promoting Active Competition Everywhere Coalition (filed June 5, 2003)(PACE Coalition Comments); Comments of SBC Communications Inc. (filed June 5, 2003); Comments of Sprint Corporation (filed June 5, 2003) (Sprint Comments); Comments of Verizon Florida (filed June 5, 2003) (Verizon Comments); Comments of WorldNet Telecommunications, Inc. (filed June 5, 2003) (WorldNet Comments); *see also Comment Requested on Petition for Declaratory Ruling Concerning the Bundling of Local Telephone Service with Long Distance Service*, CG Docket No. 03-84, Public Notice, 18 FCC Rcd 5517; (2003) (*Thorpe PN*); 68 Fed. Reg. 19542-01 (Apr. 21, 2003).

[28] Reply Comments of the California Public Utilities Commission and the People of the State of California on the Petition of Linda Thorpe for a Declaratory Ruling Concerning the Bundling of Local Telephone Service with Long Distance Service (filed June 19, 2003) (California PUC Reply); Reply Comments of the New Jersey Division of Ratepayer Advocate (filed June 20, 2003) (Ratepayer Advocate Reply); Reply Comments of Pac-West Telecomm, Inc. and US LEC Corp. (filed June 20, 2003) (Pac-West Reply); Reply Comments of Verizon Florida (filed June 20, 2003); Petitioner's Reply to Comments of AT&T Corp., CBeyond Communications, LLC, Pac-West Telecomm, Inc., and US LEC Corp., (filed Aug. 5, 2003) (Thorpe Reply).

[29] Complaint at 3-4, paras. 9-16.

not need or want to pay for long distance service.[30] Long distance or interexchange service can be either intrastate or interstate.[31] We understand Thorpe to complain about charges associated with interstate long distance service, which is within the FCC's jurisdiction.[32] Thus, the fees that we discuss here are fees associated with interstate service.

9. When the events described in the petition occurred (and continuing to the present day), "presubscription" procedures governed how telephone users in the United States select a long distance carrier. These procedures were established by the FCC as one consequence of an antitrust action brought against AT&T by the Department of Justice.[33] To resolve this lawsuit, AT&T entered into a consent judgment in 1982 called the Modification of Final Judgment (MFJ), which required it to divest itself of its local affiliates, the Bell Operating Companies (BOCs), and required the BOCs to provide to all interexchange carriers (IXCs) access to the local exchange network that was "equal in type, quality, and price to that provided to AT&T and its affiliates."[34] The MFJ and the equal access requirements were designed to serve the public interest by facilitating competition in the long distance telephone market. The MFJ's "equal access" requirements included dialing parity, and subsequently were imposed on GTE through a separate consent decree.[35] In 1985, the Commission adopted equal access requirements for all wireline LECs.[36]

10. Dialing parity is the ability of a telephone subscriber to route a call by dialing a uniform number of digits, regardless of which carrier's network carries the call; in other words, the customer need not dial an access code of additional digits to complete the call. Prior to equal access, only long distance calls carried over AT&T's network could be connected through ten-digit dialing.[37] Thus, callers seeking to use the long distance facilities of a competing provider had to dial a multi-digit access code to reach

[30] *See* Petition at 6. "Local" telephone service – the kind of service that Thorpe wanted – generally refers to service that allows a customer, for a fixed monthly fee, to make an unlimited number of calls within the customers' local service area – a geographic area defined in the LEC's tariff that includes the customer's local exchange and some local exchanges in adjoining areas.

[31] It is something of a misnomer, however, to use the term "interexchange" as a synonym for "long distance" because local calling areas usually contain more than one exchange and thus some calls rated as local are actually between two local exchanges. Since 1984, long distance calls also have been classified as either "intraLATA toll" – between two different telephone exchanges, both located within a single local access and transport area (LATA) – or "interLATA toll." Most intraLATA long distance telephone calls are intrastate calls. *See also infra* note 45.

[32] Historically, state commissions have regulated local and intrastate long distance services. The Telecommunications Act of 1996 enlarged the FCC's jurisdiction over local telephone service. *See generally AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

[33] In 1974, the Department of Justice filed an antitrust action against AT&T in which it asserted that AT&T discriminated against rivals (such as long distance companies) that needed access to the local exchange and that it engaged in activities designed to shut out potential competitors from the telecommunications markets. *See United States v. American Tel. & Tel. Co.*, 461 F. Supp 1314, 1317-18, 1328, 1340-41 (D.D.C. 1978); *see also United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 161 n.125 (D.D.C. 1982) (MFJ), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[34] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 171-72.

[35] *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 197; *see also United States. v. GTE Corp.*, 603 F. Supp. 730, 744-46 (D.D.C. 1984).

[36] *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, Report and Order, 100 FCC2d 860, 873-878, paras. 43-60 (1985) (*Independent Telephone Company Equal Access Order*).

[37] Under the North American Numbering Plan, the dialing system in place in the United States, telephone numbers are ten digits: first, a three-digit area code, followed by a three-digit central office code, and concluding with a four-digit individual number. *See generally People of the State of New York & Pub. Serv. Comm'n of the State of New York v. FCC*, 267 F.3d 91, 95 (2d Cir. 2001).

their chosen carrier, and then dial a multi-digit authorization code before they could dial the ten-digit telephone number of the person with whom they wanted to speak.[38] As discussed above, dialing parity for long distance calls was implemented through presubscription, which is the procedure still used today. Once a telephone subscriber selects a long distance carrier – the customer's Presubscribed Interexhange Carrier or PIC – that PIC carries all outbound "1 plus"[39] long distance traffic for the subscriber until she decides to select a different PIC. The LEC (in Thorpe's case, GTE Florida), rather than the PIC, is the entity that actually implements the PIC choice and thus must be involved in the PIC-choice process. Thorpe had two PICs on her second line, first AT&T and later GTECC. Presubscription also allows subscribers to place long distance calls using IXCs other than a PIC by dialing a multi-digit code plus the ten-digit long distance number. In this way, customers choosing "no-PIC" still can make long distance "dial around" calls, albeit by dialing extra digits. The LECs were required to incorporate presubscription procedures in their interstate access tariffs, and the Commission issued several orders concerning presubscription implementation.[40]

11. The MFJ sought to facilitate competition in the long distance market. In 1996, Congress passed the Telecommunications Act of 1996 (1996 Act) which, among other things, sought to open the local telephone markets to competition.[41] While the MFJ and Commission orders required dialing parity in the interexchange market, in 1996 Congress codified and extended this requirement in section 251(b)(3) of the Act.[42] Specifically, that section provides that all LECs have "[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service."[43] In its 1996 *Local Competition Second Report and Order*, the Commission determined that section 251(b)(3) requires LECs to provide dialing parity with respect to all telecommunications services that require dialing to route a call and encompasses international, interstate, intrastate, local, and toll services.[44] Implementation of section 251(b)(3), the Commission determined, required that end-user subscribers be

[38] Because this substantial disparity in dialing convenience had a significant adverse impact on competition, the MFJ mandated dialing parity. *United States v. Western Elec. Co., Inc.*, 578 F. Supp. 668, 670 (D.D.C. 1983) (citing *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 197).

[39] "1 plus" refers to the ability to make a direct long distance call by dialing the number "1" plus the ten-digit long distance number.

[40] *See United States v. Western Elec. Co., Inc.,* 578 F. Supp. 668; *see also Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 101 FCC2d 911 (1985); *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, 101 FCC2d 935 (Com. Car. Bur. 1985); *Independent Telephone Company Equal Access Order*, 100 FCC2d 860; *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 97 FCC2d 1082, 1304-05, App. D, § 13.3.3 (1984).

[41] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[42] 47 U.S.C. § 251(b)(3). Section 251(g) of the Act preserved the equal access requirements in place prior to the passage of the 1996 Act, including obligations imposed by the MFJ and any Commission rules. *See* 47 U.S.C. § 251(g).

[43] 47 U.S.C. § 251(b)(3).

[44] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *et al*., Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19399-400, para. 4 (1996) (*Local Competition Second Report and Order*) (subsequent history omitted). At the time the facts of this case arose, the Eighth Circuit had set aside the FCC's dialing parity rules but only to the extent that they pertained to intraLATA telecommunications traffic, which is not at issue here. Ultimately the Supreme Court upheld the FCC's intraLATA dialing parity rules and thus the Eighth Circuit's ruling was overturned. *See People of the State of California v. FCC*, 124 F.3d 934, 943 (8th Cir. 1997), *rev'd sub nom. AT&T Corp. v. Iowa Utilities Board*, 525 U.S. at 385.

entitled to choose different presubscribed carriers for both their intraLATA and interLATA toll calls.[45] To carry out this mandate, the Commission required LECs to employ the "full 2-PIC" method, which allows a customer to presubscribe to one telecommunications carrier for all interLATA toll calls and to presubscribe to a separate telecommunications carrier (including but not limited to the customer's LEC) for all intraLATA toll calls.[46] The Commission decided that states were best positioned to determine how consumers should be educated about intraLATA presubscription and to adopt measures consistent with the *Local Competition Second Report and Order* to prevent abuse of customer notification and carrier selection processes.[47] Some states, including Florida where Thorpe resides, already had mandated intraLATA toll dialing parity when the 1996 Act became law.[48] According to reports of the Florida Public Service Commission, GTE completed its conversion to intraLATA presubscription in Florida in February of 1997.[49]

[45] *Local Competition Second Report and Order*, 11 FCC Rcd at 19400, 19414, paras. 5, 37. A single LATA encompasses more than one immediate local calling area. Thus "intraLATA" is not synonymous with "local." A call that is completed outside of the caller's immediate local calling area but within the same LATA is an intraLATA toll call, while a call that is completed outside of both the caller's immediate local calling area and his or her LATA is an interLATA toll call.

[46] *Id*. at 19418, 19419, paras. 47, 49. The Commission codified the intraLATA presubscription requirements in Section 51.209 of its rules. Subsection (c) provides that "[a] LEC may not assign automatically a customer's intraLATA toll traffic to itself, to its subsidiaries or affiliates, to the customer's presubscribed interLATA or interstate toll carrier, or to any other carrier." 47 C.F.R. § 51.209(c). After implementation of intraLATA toll dialing parity, subscribers such as Thorpe could receive service from three different carriers – local "dial tone" service from a LEC, intraLATA toll from a presubscribed intraLATA toll carrier, and long distance service from an interLATA toll carrier – all without having to dial any access codes. Because subscribers such as Thorpe already had a LEC and a PIC, the most significant subscriber impact of the 1996 Act's dialing parity mandate was to enable subscribers to select a presubscribed carrier for intraLATA toll calls.

[47] *Local Competition Second Report and Order*, 11 FCC Rcd at 19435-36, para. 80. Reports of the Florida Public Service Commission issued during the period that carriers transitioned to intraLATA toll concern, *inter alia*, implementation of an intraLATA no-PIC option by GTE Florida and other large incumbent LECs, and customer contact protocols that these carriers should implement, which were designed to inform and educate customers about intraLATA presubscription in a "competitively neutral" fashion. *See Generic Consideration of Incumbent Local Exchange (ILEC) Business Office Practices and Tariff Provisions in the Implementation of IntraLATA Presubscription*, Docket No. 970526-TP, Notice of Proposed Agency Action, Order on Incumbent Local Exchange Company Business Office Practices and Tariff Provisions in the Implementation of IntraLATA Presubscription, Order No. PSC-97-0709-FOF-TP, 1997 WL 370746, at *2-4 (Fla. Pub. Svc. Com'n June 13, 1997), *modified*, Final Order on Incumbent Local Exchange Company Business Office Practices and Tariff Provisions in the Implementation of IntraLATA Presubscription, Order No. PSC-98-0710-FOF-TP, 1998 WL 391674, at *3-5, 11-12 (Fla. Pub. Svc. Com'n May 22, 1998) (*Final Order on Business Office Practices*); *see also Generic Consideration of Incumbent Local Exchange (ILEC) Business Office Practices and Tariff Provisions in the Implementation of IntraLATA Presubscription*, Docket No. 970526-TP, Prehearing Order, Order No. PSC-98-0299-PHO-TP, 1998 WL 242740, at *4-6, 8-9 (Fla. Pub. Svc. Com'n Feb. 18, 1998) (*Prehearing Order*). The *Prehearing Order* indicates that GTE Florida agreed to stipulate that it had implemented a no-PIC option for intraLATA toll. *Id.* at *4, 8; *see also Final Order on Business Office Practices*, 1998 WL 391674, at *11. For a short period, the Florida Commission prohibited GTE Florida from marketing its own intraLATA toll service to customers who contacted its offices for reasons unrelated to intraLATA service, including customers calling to set up second lines. *See Final Order on Business Office Practices*, 1998 WL 391674, at *5.

[48] Specifically, in a 1995 order, the Florida Public Service Commission ordered the four largest LECs in that state, including GTE Florida, to implement intraLATA toll dialing parity pursuant to the full 2-PIC method by December 31, 1997. *IntraLATA Presubscription*, Docket No. 930330-TP, Order, Order No. PSC-95-0203-FOF-TP, 1995 WL 111239 (Fla. Pub. Svc. Com'n Feb. 13, 1995).

[49] *See Final Order on Business Office Practices*, 1998 WL 391674, at *12.

III. DISCUSSION

A. Long Distance as a Mandatory Service Under the Act

1. Arbitrary Assignment of a PIC and the No-PIC Option

12. Against this background, we consider Thorpe's requests for declaratory relief. With respect to the question of whether Thorpe was obligated to accept long distance service on her second residential telephone line, we conclude that Thorpe was not required under the Act or the carrier's governing tariff to accept a long distance carrier, or PIC, on her line. As discussed above, carriers may offer their subscribers a no-PIC option. Customers who select this option cannot make 1-plus long distance telephone calls. These customers must dial a multi-digit access code to reach a long distance provider to complete a long distance call. At the time these events occurred, GTE Florida was a dominant provider of interstate telecommunications access services and, as such, offered its services under a tariff, which it filed with this Commission pursuant to section 203 of the Act.[50] GTE Florida's interstate tariff offered a no-PIC option to its customers and thus, to comply with its tariff, GTE Florida should have granted any request Thorpe made to select that option.

13. Thorpe claims she had three separate conversations with GTE Florida that impacted her long distance PIC. First, Thorpe claims that, when she signed up for a second line in 1997 or 1998, GTE Florida, "without discussion or communication of any kind . . . arbitrarily assigned AT&T" as her long distance service provider.[51] Second, Thorpe claims that, when she contacted GTE Florida in January 1999 and requested termination of long distance service on the second line, she was told "that she was required to have long distance service associated with the subject line, whether or not she had any use for it."[52] Third and finally, Thorpe says she contacted GTE Florida in March of 1999 to again complain about her long distance bill, and GTE Florida again told her that long distance was required and persuaded her to switch her PIC to GTECC.[53] For purposes of our analysis, we assume the veracity of Thorpe's allegations.[54]

14. Thorpe first asserts that GTE Florida did not discuss a long distance carrier with her but arbitrarily assigned her second line to AT&T.[55] If true, such an action by GTE Florida would violate both the Act and its tariff. Under section 251(b)(3), telephone customers have a right to choose their PIC and may select a PIC on a second line that is different from the PIC on their first line.[56] Thus, a random assignment of Thorpe's second line to AT&T – or any carrier – without her consent would violate section 251(b)(3). Furthermore, GTE Florida's tariff required it to ascertain her chosen PIC. On January 1, 1997, the portion of GTE Florida's interstate exchange access tariff that governed the PIC selection process included the following provision regarding presubscription:

> In end offices converted to Equal Access new end users, and agents of Public and Semipublic Pay Telephones, and multi-party end users who

[50] 47 U.S.C. § 203.

[51] Complaint at 3, para. 10.

[52] *Id*. at 3-4, para. 12.

[53] *Id*. at 4, para. 14.

[54] GTE Florida will be entitled to present its own version of events to the district court.

[55] Complaint at 3, para. 10.

[56] *See* 47 U.S.C. § 251(b)(3); *Local Competition Second Report and Order*, 11 FCC Rcd at 19400, 19414, paras. 5, 37; *see also supra* note 46 and accompanying text. As discussed further below, Thorpe also was entitled to select no-PIC.

> upgrade to individual lines must presubscribe to *the PIC of their choice* at the time an order is placed for service. Upon the end user or agent's selection of the PIC, at the time of placing an order, a confirmation notice will be sent identifying the I[nterexchange] C[arrier] selected. From the date of the confirmation notice, they will have 90 days to change their presubscription selection without a charge, on a one-time basis. *If a PIC is not chosen* at the time the order for service is submitted, the end user or agent will be sent a confirmation notice which contains a list of ICs with FGD or BSA-D and will be informed that they have 90 days to contact the *IC of their choice* or the Telephone Company for the PIC arrangement. If notice is received by the Telephone Company within 90 days of the in-service date for local service or upgrade, no charge will be billed to the end user or agent. If notice is received after 90 days, the end user or agent will be billed a nonrecurring charge in 6.5(L). Until the end user or agent receives service from the *selected IC*, it may access the IC of its choice by dialing the appropriate 10XXX or 101XXXX carrier identification code.[57]

Thus any failure of GTE Florida to ascertain Thorpe's choice of PIC (including a choice of no-PIC) also would violate its tariff.[58] Here, we can make no finding as to the lawfulness of GTE Florida's alleged action because the record before this Commission does not reflect GTE Florida's version of its conversation with Thorpe.

15. Thorpe also claims that she later had two conversations with GTE Florida about her long distance service.[59] According to Thorpe, in response to her specific requests that long distance service on her second line be terminated, GTE Florida told her on two occasions, in January and March of 1999, "that she was required to have long distance service associated with the subject line, whether or not she had any use for it."[60] The GTE Florida tariff provision governing PIC selection quoted above permits a subscriber to select a no-PIC option. Specifically, although it begins "end users . . . *must* presubscribe to the PIC of their choice at the time an order is placed for service," it also states that customers who *do not* select a PIC "at the time the order for service is submitted," will be mailed a list of available PICs and that they will be charged a fee if they first select a PIC after 90 days has passed. It also specifies that, until a customer chooses a PIC, she may make long distance calls by dialing a multi-digit access code (10XXX or 101XXXX). Accordingly, this tariff allows a subscriber such as Thorpe to select no-PIC as her long distance selection. Thus, with respect to whether Thorpe was obligated to accept long distance service on her second residential telephone line, Thorpe should not have been required to accept AT&T or any other long distance carrier as a PIC on her line. Moreover, if, as Thorpe claims in her petition, GTE Florida did

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[57] GTE Telephone Operating Companies Tariff FCC No. 1, 20th rev. p. 231.1 (eff. Mar. 29, 1996) (emphasis added) (attachment to Letter from Joseph Mulieri, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC (filed Aug. 26, 2005) (Verizon August 26, 2005 *Ex Parte*)). The Verizon August 26, 2005 *Ex Parte* also contains the amendments made to this language through March 31, 1999, when Thorpe switched her PIC to GTECC.

[58] We do not construe this tariff provision to be limited to end users activating a primary line. We note that GTE Florida's tariff does not address the procedures that GTE Florida uses to educate customers about their long distance options or to ascertain their long distance choices. GTE Florida was completing its implementation of intraLATA equal access in the same time frame and may have been subject to particular state requirements regarding educating Thorpe about her intraLATA choices. *See supra* notes 47-49 and accompanying text.

[59] Complaint at 3-4, paras. 12, 14.

[60] *Id*. at 4, para. 12; *see id*. at para. 14.

not allow Thorpe to make this choice in response to her specific request,[61] that would be contrary to the provision in its tariff that allows no-PIC, and thus a violation of section 203(c) of the Act, which requires a carrier to comply with the terms of its tariff.[62]

2. Mandatory Fees for Long Distance Service

16. Thorpe's petition also raises the issue of whether she was obligated to pay certain charges associated with long distance service.[63] Thorpe asserts that, although she had used her second line only for local calls and thus should not have been charged for any long distance services, AT&T imposed a "Carrier Line Charge" and a "Universal Connectivity" charge.[64] Thorpe also complains that, although GTECC did not charge a minimum fee for long distance service for several months after Thorpe selected it as her PIC, in September 1999 it began imposing a minimum monthly charge for long distance service.[65] The long distance portion of what appears to be Thorpe's consolidated local and long distance telephone bill for September 1999 shows that GTE Florida also charged her a "FCC Primary Carrier Add'l Line" charge.[66] As we discuss in detail below, even if Thorpe elected no-PIC on her second line, she still was obligated to pay some of these charges, which were charges associated with interstate long distance service.

17. Interstate long distance telephone service is regulated in the federal jurisdiction by this Commission pursuant to the Act.[67] Incumbent LECs – like GTE Florida – are dominant providers of local exchange service,[68] which usually is an intrastate service. Nevertheless, some of the rates these carriers charge are regulated in the federal jurisdiction as rates for the provision of interstate services. That is because much of the telephone plant that is used to provide local telephone service is also needed to

[61] As noted, Thorpe claims that she specifically asked GTE Florida to terminate long distance service on her second line. Although GTE Florida would still have been required to provide dial-around service and thus could not completely "terminate" long distance service on the second line, we believe that, as alleged, the request to terminate long distance service on her second line was a request for no-PIC on that line. Further, GTE Florida's alleged response – that Thorpe "was required to have long distance service associated with the subject line, whether or not she had any use for it" – constitutes a denial of no-PIC.

[62] 47 U.S.C. § 203(c); *see also* discussion *infra* para. 31.

[63] *See* Petition at 5; *see also District Court Order* at 5-6 (asking whether Thorpe was required under the national framework of the Act to accept long distance service on her second phone line and pay the associated charges).

[64] Thorpe states that, in January 1999, AT&T charged her "a minimum for long distance service." Petition at 2. Because no minimum charge appears on the copy of the bill appended to her complaint, we understand Thorpe to be complaining about the Carrier Line and Universal Connectivity charges. *Compare id. with* Complaint at 4, para. 13, Composite Exs. A, B.

[65] Petition at 3. Thorpe switched her PIC to GTECC in March. *Id.*; *see also* Complaint, Composite Ex. C. The minimum monthly charge reflected on the September 1999 bill is actually $2.86 because Thorpe placed a call to Alexandria, Virginia that month, which cost 14 cents. According to the September 1999 bill, "[W]hen GTE LD charges are less than $3.00, the Monthly Minimum Charge will be the difference between those charges and $3.00." Complaint, Composite Ex. D. That document also reflects two 75 cent "Automatic Call Return" charges, and a late payment fee of 17 cents. We do not understand Thorpe to complain about the traffic-sensitive fees for long distances services actually rendered to Thorpe. These charges do, however, undercut her claim that she only used or intended to use her second line for local calls. *See* Complaint at 3-4.

[66] *See* Complaint, Composite Ex. D.

[67] *See* 47 U.S.C. § 151, *et seq*.

[68] Under existing common carrier regulation, incumbent LECs are generally treated as dominant carriers, absent a specific finding to the contrary for a particular market. *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22747, para. 5 (2001).

originate and terminate interstate long distance calls. The same local loop that connects a telephone subscriber to the local exchange also connects the subscriber to the interstate network. IXCs such as AT&T use the LECs' loop facilities in order to originate and terminate their customers' long distance calls. Thus, incumbent LECs, such as GTE Florida, traditionally have recovered a portion of the costs that they incur building and maintaining the local telephone plant through interstate access charges imposed on end users and IXCs.[69] At the time the events described in the petition occurred, the Commission regulated the interstate access rates that these carriers charged their customers through a detailed rate-setting process that determined each incumbent LEC's cost of providing service and established specific rates for that incumbent LEC.[70] Commission rules separate the interstate portion from the intrastate portion of loop costs to allocate these costs between the state and federal jurisdictions.[71] Nevertheless, this separations process –

> does not affect the cost of the loop. Local telephone plant costs are real; they are necessarily incurred for each subscriber by virtue of that subscriber's interconnection into the local network, and they must be recovered regardless of how many or how few interstate calls (or local calls for that matter) a subscriber makes.[72]

Thus, if Thorpe avoided all charges associated with interstate long distance service, she would not be paying her full share for the facilities she also needed to make local calls. This fact belies the major premise that underlies Thorpe's complaint – which is that local charges fully compensate LECs for their costs of providing local service.

18. The Commission historically has recognized that, consistent with principles of cost causation, the costs that incumbent LECs incur providing interstate access should be recovered from customers in the same way the costs are incurred.[73] Thus, the traffic-sensitive costs of interstate access services, such as per-minute-of-use charges associated with individual long distance telephone calls, should, when possible, be recovered through per-minute rates.[74] Similarly, non-traffic-sensitive costs –

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[69] *See Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148-50 (1930) (because local telephone plant is used for interstate calls, an appropriate percentage of local plant costs should be placed within the jurisdiction of federal, rather than state, regulators). IXCs recover their costs, including the access charges they pay, from their subscribers.

[70] These rates, as well as the terms and conditions under which the LEC provides service to its customers, are contained in FCC tariffs. *See generally* 47 U.S.C. § 203; 47 C.F.R. Part 61.

[71] *See* 47 C.F.R. Part 36. The Commission uses a multi-step process to identify the cost of providing access service. First, pursuant to the Uniform System of Accounts, contained in Part 32 of the Commission's rules, an incumbent LEC must record all of its expenses, investments, and revenues. Next, rules contained in Part 64 divide these costs between those associated with regulated telecommunications services and those associated with nonregulated activities. Third, the separations rules, contained in Part 36, determine the fraction of the incumbent LEC's regulated expenses and investment that should be allocated to the interstate jurisdiction. After the total amount of interstate cost is identified, the access charge rules translate these interstate costs into charges for the specific interstate access services and rate elements. Part 69 specifies in detail the rate structure for recovering these costs and the precise manner in which incumbent LECs may assess charges on IXCs and subscribers.

[72] *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095, 1114 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985); *see Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 558 (8th Cir. 1998) *cited in* AT&T Comments at 3-4, 12; *see also* CBeyond Comments at 6; Verizon Comments at 8; California PUC Reply at 3; Pac-West Reply at 2.

[73] *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 96-262, *et al.*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 12967, para. 12 (2000) (*CALLS Order*), *aff'd in part, rev'd in part, and remanded in part sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied sub nom. Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002).

[74] *Id.*

such as those associated with use of the local loop facilities – should be recovered through fixed, flat-rated fees.[75] In 1984, the Commission modified the access charge system so that a substantial portion of the non-traffic-sensitive costs of the portion of the local telephone plant allocated to the interstate jurisdiction would be recovered through a non-traffic-sensitive, flat-rated "subscriber line charge," or SLC, imposed on end-user subscribers.[76] Because of issues associated with universal service, however, the subscriber line charge did not at that time generally recover all non-traffic-sensitive interstate local loop costs.[77]

19. Achieving universal service is a principal objective of this Commission. Under section 1 of the Act, the Commission is responsible for "regulating interstate and foreign commerce in communication by wire and radio *so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges*."[78] Before the 1996 Act, universal service was supported by explicit, monetary payments to local carriers and also by a system of implicit subsidies, which included the structuring of long distance rates to subsidize local service.[79] In the 1996 Act, Congress sought to remove the implicit subsidies and to establish specific mechanisms to support universal service, while preserving and advancing the universal service goal.[80] Thus, in the 1997 *Access Charge Reform Order*, the Commission further aligned the access rate structure to reflect the manner in which costs are incurred. There, the Commission observed that incumbent LECs were unable to fully recover their loop costs from local subscribers under the existing SLC ceiling and were recovering the remaining costs through usage-sensitive charges imposed on IXCs which, in turn, passed these costs along to their customers through toll charges.[81] Accordingly, the Commission noted that low-volume toll users – customers like Thorpe who subscribed to service on multiple lines – were not paying the full cost of their loops, while high-volume toll users contributed far more than the total cost of their loops. Thus, high-volume long distance users, who included significant numbers of low-income customers, effectively supported non-primary residential and multi-line business customers.[82] This did not serve the Commission's goal of advancing universal service and improperly shifted costs from customers who caused the costs – customers like Thorpe who could afford to pay for a second line – to lower income customers. To correct this problem, the Commission increased the SLC ceiling for non-primary residential lines – such as Thorpe's second line. This, the Commission reasoned, would –

> permit incumbent LECs to recover costs in a manner that more accurately reflects the

[75] *Id*.

[76] *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC2d 241, 243-44, paras. 3-5, *modified*, 97 FCC2d 682 (1983), *further modified*, 97 FCC2d 834, *aff'd in principal part and remanded in part sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[77] *See id*.; *see also Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 96-262, *et al.*, First Report and Order, 12 FCC Rcd 15982, 15992-93, para. 24 (1997) (*Access Charge Reform Order*), *rev. denied sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523.

[78] 47 U.S.C. § 151 (emphasis added). In the 1996 Act, Congress defined universal service as "an evolving level of telecommunications services . . . taking into account advances in telecommunications and information technologies and services." 47 U.S.C. § 254(c). Universal service comprises, among other things, local telephone service and access to emergency, directory-assistance, and long distance services. *See* 47 C.F.R. § 54.101(a).

[79] *See Access Charge Reform Order*, 12 FCC Rcd at 15994-96, paras. 28-31.

[80] *See* 47 U.S.C. § 254(b)(5). The 1996 Act specifies that federal support for universal service "should be explicit and sufficient to achieve the purposes of" section 254, which is captioned "Universal Service." 47 U.S.C. § 254(e).

[81] *See Access Charge Reform Order*, 12 FCC Rcd at 16013, para 76.

[82] *See id.*

> way those costs are incurred. Because common line costs do not vary with usage, these costs should be recovered on a flat-rated instead of on a per-minute basis. In addition, these costs should be assigned, where possible, to those customers who benefit from the services provided by the local loop. Accordingly, the SLC ceilings for non-primary residential and multi-line business lines will be adjusted . . . .[83]

Adjustment of the SLC for non-primary residential lines began on January 1, 1998.[84]

20. Because the increased SLC still did not allow LECs to fully recover their loop costs, the Commission also introduced a flat-rated presubscribed interexchange carrier charge (PICC). This charge was imposed by LECs (in Thorpe's case, GTE Florida) directly on the end user's PIC (in Thorpe's case, AT&T and later GTECC) to recoup permitted common-line revenues that were not recovered through the SLC.[85] IXCs were permitted to pass this charge through to their end-user customers.[86] Further, the Commission permitted incumbent LECs to collect the PICC directly from any customer who selected no-PIC.[87] This, the Commission reasoned, would eliminate customer incentive to choose dial-around services to avoid paying long distance rates that reflect the PICC.[88]

21. Separately, to further implement the 1996 Act, the Commission adopted rules requiring that all telecommunications carriers that provide interstate telecommunications services – including LECs and IXCs – contribute to universal service support programs.[89] To achieve the goal of local competition while preserving universal service, Congress directed the FCC to replace the existing system of explicit and implicit subsidies with "specific, predictable and sufficient Federal and State mechanisms."[90] Thus, the 1996 Act requires that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."[91] The Commission neither required carriers to recover their universal service contributions through a specific end-user surcharge nor prohibited them from imposing such a surcharge. Rather, it "allow[ed] carriers the flexibility to decide how they should recover their contribution."[92]

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[83] *See id.* at para. 77. The FCC's decision to increase the SLC cap on secondary residential lines and multi-line business lines was upheld by the United States Court of Appeals for the Eighth Circuit. *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d at 537-38.

[84] *See* 47 C.F.R. § 69.152(e) (1997).

[85] *See Access Charge Reform Order*, 12 FCC Rcd at 16019, para. 91; *see id*. at 16022, para. 99 (allowing PICC on non-primary residential lines at a maximum of $1.50 per month for the first year).

[86] *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 96-262, *et al*., Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606, 16610, para. 16 (1997) (*Access Charge Reform Second Reconsideration Order*).

[87] *See Access Charge Reform Order*, 12 FCC Rcd at 16019, para. 92; 47 C.F.R. § 69.153(b) (1997).

[88] *See Access Charge Reform Order*, 12 FCC Rcd at 16019, para. 92.

[89] *See* U.S.C. § 254(d); 47 C.F.R. § 54.706.

[90] 47 U.S.C. § 254(b)(5).

[91] 47 U.S.C. § 254(d).

[92] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9210, para. 853 (1997) (*Universal Service Order*), *aff'd in part, rev'd in part and remanded in part sub nom*. *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000). The Commission expressly prohibited IXCs from shifting more than an equitable share of the contribution to any customer or group of customers. *Id*. at 9199, para. 829; *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd

(continued....)

22. With this background, we turn to the charges that Thorpe was assessed. We consider the individual charges reflected in the bills she appended to her complaint. In bills dated January and March 1999, AT&T imposed a "Carrier Line Charge" and a "Universal Connectivity Charge."[93] Thorpe also complains about a minimum monthly charge that GTECC began imposing in September of that year.[94] The local portion of Thorpe's consolidated local and long distance telephone bill for September also shows that GTE Florida charged an "Interstate non-primary access" charge and the long distance portion of that bill shows a "FCC Primary Carrier Add'l Line" fee imposed by GTECC. As we discuss more fully below, all of these are valid charges for long distance services provided on a non-primary residential line with a PIC, but only some of them would have been imposed on a customer selecting no-PIC.[95]

23. *Long Distance Related Charges Imposed by Thorpe's LEC: Subscriber Line Charge (GTE Florida)*. GTE Florida's bill for September 1999, which is appended to Thorpe's complaint, reflects an "Interstate non-primary access" charge of $6.07.[96] That is the SLC. Thorpe does not complain about the SLC (presumably because it was imposed by her LEC, GTE Florida, rather than by an IXC and thus was not obviously related to long distance). Nevertheless, this was a charge for interstate access service imposed on Thorpe's second line. During the period 1997-1999, the SLC ceiling for non-primary residential lines rose from $3.50 to $6.00 with an adjustment for inflation.[97] GTE Florida's tariff reflects a SLC charge.[98] For reasons explained in detail above, imposition of this charge is consistent with Commission rules. Accordingly, imposition of a SLC on Thorpe's second line was consistent with GTE Florida's tariff and otherwise lawful. Moreover, a SLC would be imposed whether or not a customer elected no-PIC.

24. *Long Distance Related Charges Imposed by Thorpe's PICs*. The remaining long distance charges were imposed on Thorpe's second line by AT&T and GTECC, each of which were, at different times, the PIC on that line. The Commission does not regulate the rates of non-dominant long distance carriers such as AT&T and GTECC, and it did not do so during the period 1997-99 when the facts of this matter arose. Rather, the competitive market controls the rates of these non-dominant

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24952, 24976, para. 45 (2002), *reconsideration granted in part on other grounds*, Order and Second Order on Reconsideration, 18 FCC Rcd 4818 (2003); 47 C.F.R. § 54.712.

[93] *See* Petition at 2. As discussed *supra* note 64, we understand Thorpe to complain about these two charges. The Carrier Line Charge assessed in the January 1999 bill was 85 cents and the Universal Connectivity Charge was 93 cents. Complaint, Composite Ex. A at 9. It appears that, in March of 1999, AT&T began to impose these charges every other month, instead of every month, so in March the charges were $1.70 and $1.86, respectively. *See* Complaint, Composite Ex. B at 5.

[94] Petition at 3. We note that the minimum monthly charge reflected on the September 1999 bill is actually $2.86 because Thorpe placed a call to Alexandria, Virginia that month, which cost 14 cents. According to the bill, "When GTE LD charges are less than $3.00, the Monthly Minimum Charge will be the difference between those charges and $3.00." *See* Complaint, Composite Ex. D at 3-4; *see also supra* note 65.

[95] We understand the action before us to challenge the assessment of the charges imposed on Thorpe's bill in general, rather than the lawfulness of individual rates, and thus we do not judge the lawfulness of the amount of the rates charged. The filed tariff pages, along with the Commission precedent we cite above, support the carriers' assertion that the charges were lawfully assessed.

[96] *See* Complaint, Composite Ex. D at 3.

[97] *See* 47 C.F.R. §§ 69.203(a) (1996); 69.152(e) (1997-1999); *see also* CBeyond Comments at 6; California PUC Reply at 3-4. As noted, *supra* note 71, Part 69 of the FCC's rules specifies the precise manner in which incumbent LECs, such as GTE Florida, may assess interstate access charges on IXCs and subscribers.

[98] *See* Defendants' Memorandum of Law in Support of Motion to Dismiss, Ex. 1 (GTE Telephone Operating Companies, Tariff FCC No. 1) at 74th Revised Page 312 (eff. Apr. 1, 2000).

carriers.[99] Thus, IXCs were permitted to pass through to their customers the PICC charges imposed on them by LECs,[100] and also to pass through their universal service contributions.[101] During this period, IXC rates were contained in tariffs filed with this Commission.[102] Unless specifically subject to investigation under sections 204 or 205 of the Act, or challenged pursuant to a complaint filed under section 207 or 208 of the Act and found to be unjust and unreasonable, the tariffed rates, terms, and conditions upon which a carrier provides service to its customers are enforceable as a matter of law.[103]

25. *PICC (AT&T and GTECC)*. AT&T's "Carrier Line Charge" and GTECC's "Primary Carrier Additional Line Charge" were rates set by these carriers to recover the PICC that GTE Florida, in turn, would have charged them. According to AT&T's interstate tariff, AT&T began imposing this charge in January 1998.[104] GTECC's tariff also reflects a PICC, which that company called a "Primary Carrier Charge" or "PCC."[105] As discussed above, imposition of these charges on Thorpe's second line is consistent with Commission rules. Accordingly, imposition of a PICC on Thorpe's second line was consistent with these carriers' tariffs, and otherwise lawful. Moreover, in the *Access Charge Reform Second Reconsideration Order*, the Commission determined that LECs could impose a PICC directly on no-PIC customers; GTE Florida's tariff permits it to do so.[106] Thus, whether or not Thorpe elected no-PIC, a PICC could lawfully have been imposed on her second line.

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[99] *See generally Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC2d 1 (1980). All carriers providing interstate service – IXCs and LECs alike – are subject to the requirement that the rates, terms, and conditions upon which they provide service to their customers be just, reasonable, and not unreasonably discriminatory. *See* 47 U.S.C. §§ 201, 202.

[100] *See Access Charge Reform Second Reconsideration Order*, 12 FCC Rcd at 16610, para. 16.

[101] *See Universal Service Order*, 12 FCC Rcd at 9199, para. 829.

[102] Interexchange services were further deregulated in 2001 when the Commission mandatorily detariffed the provision of interstate long distance services. *See Common Carrier Bureau Extends Transition Period For Detariffing Consumer Domestic Long Distance Services,* CC Docket No. 96-61, Public Notice, 16 FCC Rcd 2906 (2001); *see also Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 245(g) of the Communications Act of 1934*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20732-33, para. 3 (1996), *reconsideration granted in part*, Order on Reconsideration, 12 FCC 15014 (1997), *further reconsideration granted*, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999), *rev. denied sub nom*. *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C.Cir. 2000). Thus, IXCs currently provide service to customers under contracts, not tariffs.

[103] *See* 47 U.S.C. §§ 204-205, 207-208; *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (cited in *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002); *ICOM Holding Inc. v. MCI WorldCom*, 238 F.3d 219, 221 (2nd Cir. 2001); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir.), *cert. denied*, 524 U.S. 952 (1998)); *see also* discussion *infra* paras. 31-33.

[104] *See* Defendants' Memorandum of Law in Support of Motion to Dismiss, Ex. 2 (AT&T Communications, Tariff FCC No. 27) at 3rd Revised Page 3-19.5 (eff. Nov. 17, 1999). In February 2000, AT&T's carrier line charge was $1.51. *Id*. at 9th Revised Page 24-555 (eff. Feb. 19, 2000). In a separate proceeding before this Commission, the Florida Public Service Commission represented in comments filed in November 1998 that AT&T's PICC was 85 cents – which is what it charged Thorpe in early 1999. *See Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Florida Public Service Commission Comments at Attach. A (filed Nov. 6, 1998); *see also supra* note 93.

[105] *See* Defendants' Memorandum of Law in Support of Motion to Dismiss, Ex. 3 (GTE Communications Corporation, Tariff FCC No. 1) at 7th Revised page 54 (eff. July 22, 1999).

[106] *See Access Charge Reform Second Reconsideration Order*, 12 FCC Rcd at 16610, para. 16; GTE Florida's tariff reflects that it charged a PICC on end users' presubscribed carriers and that "[e]nd user customers who do not select a presubscribed carrier will be billed the PICC." *See* GTE Telephone Operating Companies, Tariff FCC No. 1 at 4th Revised Page 308.3.7.1 (eff. Apr. 29, 1998). The PICC imposed by GTE Florida would not necessarily be the same amount as AT&T's Carrier Line Charge or GTECC's Primary Carrier Additional Line Charge.

26. *Universal Service Recovery Charge (AT&T)*. AT&T imposed a "Universal Connectivity Charge" on Thorpe.[107] This charge was imposed by AT&T to recover its universal service contribution and is reflected in its tariff.[108] The tariff states that AT&T began imposing this charge in July 1998.[109] As discussed above, in the *Universal Service Order*, the Commission "allow[ed] carriers the flexibility to decide how they should recover their contribution."[110] Accordingly, carriers were permitted to impose a separate line item charge, as AT&T did, to recover their contribution.[111] Thus, imposition of a universal service charge on Thorpe's second line was consistent with AT&T's tariff and otherwise lawful.

27. *Minimum Service Charge (GTECC)*. Thorpe complains that, in September 1999, GTECC began imposing a minimum service charge of $3.00 per month on her second line.[112] GTECC's tariff states that, "A Monthly Minimum Charge of $3 will be assessed to new and existing Customers when Customer's actual monthly charges do not meet or exceed the specified amount."[113] At approximately the same time that GTECC began assessing this charge, other IXCs, including AT&T, MCI, and Sprint, also tariffed and began imposing similar monthly minimum usage charges on their customers. At that time, all IXCs were treated as non-dominant, which meant that they were not subject to rate regulation.[114] As a result, as long as it was contained in their tariffs, IXCs lawfully could charge a flat monthly fee, as well as, or as a substitute for, per-minute interstate long distance charges. In 1999, the Commission initiated a proceeding concerning the impact of these minimum fees and other flat charges on consumers who make few or no long distance calls.[115] The *Low-Volume Notice of Inquiry* asked whether imposition of these fees was a reasonable result of competitive market dynamics and the removal of implicit subsidies, or, instead, warranted regulatory intervention.[116] That inquiry was concluded in the May 2000 *CALLS Order*, which responded to proposals of the Coalition for Affordable Local and Long Distance Service (CALLS) – an industry coalition that included AT&T and GTE.[117] In connection with CALLS, AT&T agreed to eliminate monthly minimum usage charges for basic long distance service for at least three years.[118] In the *CALLS Order*, the Commission declined to take further regulatory action with respect to minimum service fees, concluded that it had resolved the issues raised in the low-volume proceeding, and closed that docket.[119] Thus, imposition of a monthly minimum charge by GTECC on Thorpe's second line was in accordance with GTECC's tariff and otherwise lawful.

28. In sum, all of these charges associated with long distance service were lawfully imposed

[107] *See* Complaint, Composite Ex. A at 9, Composite Ex. B at 5.

[108] *See* AT&T Communications, Tariff FCC No. 27 at 6th Revised Page 3-19.6 (eff. Mar. 11, 2000).

[109] *See id*.

[110] *See Universal Service Order*, 12 FCC Rcd at 9210, para. 853.

[111] *Id*.

[112] *See* Petition at 3; *see also* Complaint, Composite Ex. D at 4.

[113] *See* GTE Communications Corporation, Tariff FCC No. 1 at Original Page 19.1 (eff. June 28, 1999).

[114] *See supra* para. 24.

[115] *See Low-Volume Long-Distance Users*, CC Docket No. 99-249, Notice of Inquiry, 15 FCC Rcd 6298 (1999) (*Low-Volume Notice of Inquiry*).

[116] *See id.* at 6303-04, paras. 13-17.

[117] *See CALLS Order,* 15 FCC Rcd at 12964 n.1.

[118] *See id.* at 12976, para. 34. Thus, end users who presubscribed to carriers that did not eliminate minimum fees could switch their PIC to an alternative carrier that did not charge these fees. The Commission also eliminated the residential PICC in the *CALLS Order*. *Id.* at 12991, para. 76.

[119] *See id.* at 13066-67, para. 242.

on Thorpe's non-primary residential line. Nevertheless, Thorpe would not have had to pay all of these charges if she had selected no-PIC successfully on her second line. Specifically, if Thorpe had successfully selected no-PIC in January or March of 1999, as she claims she tried to, she would not have been assessed a universal service charge by AT&T. She also would not have been required to pay a minimum monthly charge for long distance service because she would not have been presubscribed to a long distance carrier.[120]

B. Whether the "Forced Coupling" of Long Distance and Local Service is an Unjust and Unreasonable Practice Under the Act

29. Thorpe's petition further seeks a declaration that the "forced coupling" of long distance with local service constitutes an unjust and unreasonable business practice in violation of the Act.[121] The Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to "terminate a controversy or remove uncertainty."[122] When, as here, a petition for declaratory ruling derives from a primary jurisidiction referral, the Commission also will seek to assist the referring court by resolving issues arising under the Act. Resolution of petitioner's "forced coupling" question would not assist the court in resolving this matter. Consideration of this question would not resolve a controversy or remove any uncertainty. As we discuss above, a no-PIC option was available to customers under GTE Florida's tariff, so GTE Florida did not force the coupling of local and long distance service.[123]

C. Preemption of State Claims

30. Thorpe also seeks a declaratory ruling from this Commission that her state law claims are not preempted by the Act.[124] We deny Thorpe's request because these claims are preempted. In the district court, Thorpe has asserted that, by charging for unnecessary and unwanted long distance service under a negative option or default contract, the carriers have violated the Florida Unfair and Deceptive Trade Practices Act;[125] breached their contracts with Thorpe to provide a local telephone line for modem

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[120] She would, however, have had to pay a subscriber line charge and a PICC to GTE Florida whether or not she had no-PIC on her second line. *See supra* paras. 19-20, 23, 25.

[121] Petition at 6, 16.

[122] 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; *see also* 47 U.S.C. §§ 154(i), (j); *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C.Cir.), *cert denied*, 414 U.S. 914 (1973); *cf.* AT&T Comments at 4 ("the Commission need not, and therefore should not, render advisory opinions" on whether federal law requires or allows LECs to bundle local and long distance services); *see also id*. at 11, 13-14.

[123] *See supra* para. 15. As discussed above, if GTE Florida did not honor its tariff and allow Thorpe to select no-PIC, that would be contrary to its tariff and thus violate section 203(c) of the Act. 47 U.S.C. § 203(c). Because GTE Florida did tariff a no-PIC option, we need not and do not reach the question whether it would be unjust and unreasonable for a LEC to deny its customers such an option. *See* Ratepayer Advocate Comments at 2; Ratepayer Advocate Reply at 2. Were that issue before us, we likely would find such a practice unreasonable. *See* 47 U.S.C. § 251(b)(3); *Local Competition Second Report and Order*, 11 FCC Rcd at 19436, para. 81 (finding that "consistent with current practices in the interLATA toll market," new customers of a telephone exchange provider who do not affirmatively select a toll service provider "should dial a carrier access code to route their intraLATA toll or intrastate toll calls to the carrier of their choice until they make a permanent, affirmative selection"). Thorpe also asks the Commission to declare that LECs may provide "local only service" to their customers. *See* Petition at 5; Thorpe Reply at 9. For the reasons cited above, we also decline to address this issue. Insofar as GTE Florida's tariff offered Thorpe no-PIC, it did offer a local-only option. As discussed, however, not all charges associated with long distance service can be avoided through the choice of no-PIC.

[124] Petition at 5, 6-11.

[125] Complaint at 9-11, paras. 46-54 (citing Fla. Stat. § 501.201, *et seq*.) (Count II).

service;[126] and breached their duty of good faith and fair dealing.[127] She also asserts a claim for restitution, arguing that the carriers failed to form a valid contract to provide her with long distance service.[128] For each of these claims, Thorpe seeks monetary relief.[129] Thorpe also seeks to enjoin the carriers from charging for unnecessary and unwanted long distance service, pursuant to the Florida Unfair and Deceptive Trade Practices Act.[130]

31. As commenters in this proceeding point out, all of Thorpe's claims concern charges for interstate long distance service provided under a filed tariff.[131] Thorpe argues that she never signed up for long distance service or consented to being charged for it.[132] She does, however, acknowledge that she ordered a second telephone line from her LEC, GTE Florida.[133] The tariff that GTE Florida filed with this Commission specified the terms and conditions under which it provided long distance interstate access service to its customers, including Thorpe.[134] Similarly, AT&T and GTECC tariffs explained the terms and conditions under which these carriers provided long distance service to their customers.[135] Each of these tariffs were filed pursuant to section 203(a) of the Act, which requires every common carrier to file with the Commission "schedules," i.e., tariffs, "showing all charges" and "showing the classifications, practices, and regulations affecting such charges."[136] The "filed tariff doctrine," which is also called the "filed rate doctrine," requires carriers, as well as their customers, to abide by the terms of the tariff and precludes them from acting outside it.[137] Under this doctrine, "'[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.'"[138] Thus, each carrier's tariff alone defines the terms and conditions under which it offered and provided long distance service to Thorpe.[139] Thorpe cannot prevail based upon an argument that a carrier owes her a duty inconsistent with the terms of the carrier's filed tariff because carriers may not "'extend to any person any privileges or facilities in [interstate] communication, or employ or enforce any classifications, regulations, or practices affecting such charges' *except those set forth in the tariff*."[140] We consider Thorpe's claims in the context of the

[126] *Id.* at 12, paras. 60-65 (Count IV).

[127] *Id.* at 12-13, paras. 66-70 (Count VI [sic]).

[128] *Id.* at 11-12, paras. 55-59 (Count III).

[129] *See id.* at 9, 11, 12, 13, paras. 47, 56, 61, 67.

[130] *Id.* at 8-9, paras. 37-45 (Count I).

[131] *See* AT&T Comments at 3, 6, 9-11; MCI Comments at 4-6; PACE Coalition Comments at 2-3; Ratepayer Advocate Comments at 2-3; Sprint Comments at 3-6; Verizon Comments at 4-6; WorldNet Comments at 2-3.

[132] *See* Petition at 2, 4.

[133] *Id.* at 2 ("Sometime in 1997 or 1998, at the request of Plaintiff, GTE installed an extra phone line in her home.").

[134] *See supra* paras. 12, 14-15; *see also* GTE Telephone Operating Companies Tariff FCC No. 1 (attachment to Verizon August 26, 2005 *Ex Parte*).

[135] *See supra* para. 24; *see also* AT&T Communications, Tariff FCC No. 27; GTE Communications Corporation, Tariff FCC No. 1.

[136] 47 U.S. C. § 203(a).

[137] *See AT&T v. Central Office Telephone*, 524 U.S. 214, 222-23 (1998).

[138] *Id.* at 227 (quoting *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163 (1922)); *see* AT&T Comments at 5.

[139] Further, the tariff controls the rights and responsibilities of the customer and the carrier as a matter of law. *See supra* note 103 and accompanying text.

[140] *See AT&T v. Central Office Telephone*, 524 U.S. at 223-24 (quoting 47 U.S.C. § 203(c)) (explanation and emphasis added).

carriers' tariffs.[141]

32. Thorpe asserts that, "[t]he actions of Defendants in charging for . . . unnecessary and unwanted long distance service pursuant to 'negative option' or 'default' contracts constitute[ ] an unfair method of competition, an unconscionable act or practice, and/or an unfair or deceptive act or practice in the conduct of any trade or commerce in violation of" the Florida Unfair and Deceptive Trade Practices Act.[142] She further argues that by "creating purported 'negative option' or 'default' contracts for . . . unnecessary and unwanted long distance service," the carriers breached their duty of good faith and fair dealing.[143] Similarly, in her claim for restitution, Thorpe asserts that, in charging for "unnecessary and unwanted long distance service," the carriers "treated silence and inaction as 'acceptance'" and thus that any contract for long distance service is "void *ab initio* or voidable."[144] Finally, in her breach of contract claim, Thorpe asserts that the parties entered into "contracts or at least 'quasi contracts' with Defendants for a local modem phone line," which the defendants breached "by charging and collecting for their unnecessary and unwanted long distance service."[145] All of these claims are preempted. All five counts of Thorpe's complaint turn upon her assertion that, in connection with the provision of her second line, GTE Florida, AT&T, and GTECC owed her a duty *not* to provide or charge for long distance service. But the provision of long distance and the charges about which Thorpe complains are "subjects that are *specifically addressed* by the filed tariff[s]."[146] GTE Florida's tariff provided that Thorpe was required either to choose a long distance carrier or to select the no-PIC option. AT&T and GTECC's tariffs specified the rates, terms, and conditions under which these carriers actually provided long distance service. Thorpe cannot make a claim that is inconsistent with these carriers' tariff provisions, but if any carrier did not comply with its tariff, Thorpe has a claim under section 203(c).[147] Either way, Thorpe's claims about whether and how long distance service was provided on her second line rise or fall based upon the carriers' compliance with their tariffs. Accordingly, Thorpe's state law claims based upon duties not specified in the tariffs are preempted.

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[141] Thorpe relies upon cases involving wireless carriers in support of her argument that her state claims are not preempted. *E.g., Petition for Declaratory Ruling on Issues Contained in Count I of White v. GTE*, WT Docket No. 00-164, Memorandum Opinion and Order, 16 FCC Rcd 11558 (2001), *cited in* Petition at 6; *Sommerman v. Dallas SMSA Limited Partnership*, No. 3:96-CV-1129-J, slip op. (N.D. Tex. Aug. 27, 1996), *cited in* Petition at 7. Wireless services are not provided pursuant to filed tariffs. *See* 47 C.F.R. § 20.15 (c); *see also Wireless Consumers Alliance Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws*, WT Docket No. 99-263, Memorandum Opinion and Order, 15 FCC Rcd 17021, 17029-31, paras. 15-18 (2000). Accordingly, the wireless cases cited by Thorpe are not controlling precedent for her case, which concerns tariffed services. Interstate wireline long distance services were detariffed in 2001 and, accordingly, these services are now also no longer subject to the filed tariff doctrine. *See supra* note 102. Because Thorpe's claims arose before 2001, her long distance service was provided pursuant to rates, terms, and conditions contained in filed tariffs and her claims are governed by the filed tariff doctrine.

[142] Complaint at 8-9, 10, paras. 43, 52 (citing Fla. Stat. § 501.201, *et seq.*) (Counts I and II).

[143] *Id*. at 13, para. 69 (Count V).

[144] *See id*. at 11, paras. 57–58 (Count III).

[145] *See id*. at 12, paras. 62–63 (Count IV).

[146] *AT&T v. Central Office Telephone*, 524 U.S. at 225 (emphasis in original); *see also* GTE Telephone Operating Companies, Tariff FCC No. 1; AT&T Communications, Tariff FCC No. 27; GTE Communications Corporation, Tariff FCC No. 1.

[147] *See* 47 U.S.C. § 203(c) ("[n]o carrier shall . . . employ or enforce any classifications, regulations, or practices affecting [the] charges [specified in its tariff], except as specified" in the tariff).

33. We note also that Thorpe's complaint before the court seeks damages for claims that are not based on the reasonableness of the rates charged. Courts have held that actions seeking damages violate the filed tariff doctrine by infringing upon the principle of nondiscrimination, which prevents carriers from engaging in price discrimination among ratepayers.[148] That is, because the rate set forth in a filed tariff is the legal rate, the only rate the carrier may lawfully charge all ratepayers is that tariffed rate.[149] Each of Counts II through V of Thorpe's complaint is an "action for damages which exceed $15,000.00," based on claims other than the reasonableness of the rates charged.[150] A court-imposed damage award on these bases would modify the tariffed rate and, in so doing, contravene the nondiscrimination principle.[151] Thus, Thorpe's claims in this regard are preempted.

34. Although Thorpe argues that her claims are preserved by section 414, the Act's savings clause,[152] that section preserves only those rights that are not inconsistent with the filed tariff doctrine. "A claim for services that constitute unlawful preferences or that directly conflict with the tariff . . . cannot be 'saved' under § 414."[153] That is because "'[t]h[e saving] clause . . . cannot in reason be construed as continuing in [customers] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'"[154] In this case, the gravamen of each of Thorpe's five counts is that she was "charg[ed] for . . . unnecessary and unwanted long distance service."[155] But the carriers' tariffs, filed pursuant to the provisions of the Act, govern how the carriers provide and charge for long distance service. Thus Thorpe's claims, each of which challenges the legality of these practices, are preempted.[156]

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[148] *See Hill v. BellSouth Telecommunications, Inc.*, 364 F.3d 1308, 1316 (11th Cir. 2004) (citing *Marcus v AT&T*, 138 F.3d 46, 58, 59 (2d Cir. 1998)). Section 202(a) of the Act expressly prohibits carriers from unjustly or unreasonably discriminating among customers in furnishing service or giving any undue preference or advantage to a particular customer with respect to payment of tariffed charges. Section 201(b) of the Act directs that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate] communication service, shall be just and reasonable," and declares "unlawful" any unjust or unreasonable charge, practice, classification or regulation.

[149] *See AT&T v. Central Office Telephone*, 524 U.S. at 222.

[150] *See* Complaint at 9, para. 47 (Count II); *see also id*. at 11, para. 56 (Count III); *id.* at 12, para. 61 (Count IV); *id* at 13, para. 67 (Count V).

[151] Although Thorpe argues that she can circumvent discrimination by seeking to certify a nationwide class, *see* Thorpe Reply at 5, the Supreme Court has rejected that view. *Marcus v. AT&T*, 138 F.3d at 61 (citing *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 423 (1986)).

[152] Petition at 7, 9; Thorpe Reply at 6-7.

[153] *AT&T v. Central Office Telephone, Inc.*, 524 U.S. at 227, *cited in* AT&T Comments at 11 n.7.

[154] *AT&T v. Central Office Telephone, Inc.*, 524 U.S. at 227-28 (quoting *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (alteration in original)).

[155] Complaint at 8-9, para. 43 (Count I), 10, para. 52 (Count II); *see also id.* at 11, para. 57 (Count III), 12, para. 63 (Count IV), 13, para. 69 (Count V).

[156] Even if we consider Thorpe's state claims to turn upon her allegation that the carriers failed to disclose their practice of charging customers for long distance service, rather than upon their practice of charging for the service, *see Long Distance Telecommunications Litigation*, 831 F.2d 627, 633-34 (6th Cir. 1987) (state actions for fraud and deceit, based upon carriers' failure to notify customers of the practice of charging for uncompleted calls, were preserved where practice in question was "a failure to inform customers of a practice, not an attack on the practice itself"), *cited in* Petition at 8, her claims are deficient because they are inconsistent with the terms of the filed tariffs, which specify that customers could choose a long distance carrier or select no-PIC and the applicable charges under either option. *Hill v. BellSouth Telecommunications*, 364 F.3d at 1316-17 (permitting recovery on claims that carrier had disclosure obligations beyond those made in its filed tariffs would violate the filed tariff doctrine). Moreover, under the filed tariff doctrine, customers are charged with knowledge of the terms and conditions of the

(continued....)

35. We note that Thorpe has named AT&T – the original PIC on her second line – as a defendant in the district court proceeding. Thorpe did not name GTECC, the second PIC on her line, as a party to this proceeding but it appears to be similarly situated to AT&T.[157] There is no record evidence in this matter that either of these carriers acted unlawfully. Thorpe does not claim that she had any direct contact with AT&T or GTECC. Moreover, she does not refute AT&T's assertion that it began providing long distance service to Thorpe only after GTE Florida informed it that it had been chosen as Thorpe's PIC.[158] Under existing industry practice, the LEC, not the IXC, actually implements the PIC installation or change.[159] Accordingly, there is neither allegation nor evidence that AT&T participated in its alleged arbitrary assignment as the PIC on Thorpe's second line.[160] Nor is there evidence that either AT&T or GTECC participated in the denial of no-PIC to Thorpe.[161] As discussed above, the charges imposed by AT&T and GTECC appear to be consistent with these carriers' tariffs, and thus are binding under the filed tariff doctrine.[162]

IV. PROCEDURAL MATTERS

36. On June 17, 2003, Thorpe filed a motion requesting an extension of time for replying to the comments of AT&T and three competitive LECs: CBeyond Communications, LLC; Pac-West Telecomm, Inc.; and US LEC Corp.[163] Thorpe's reason for requesting the extension was that these comments should have been filed on May 11, 2003, but were filed "on or about" June 5 and 6, 2003,

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tariff. *Marcus v. AT&T*, 138 F.3d at 63 (citing *Kansas City S. Ry. Co. v. Carl*, 227 U.S. 639, 653 (1913)). Thus, in this case, Thorpe is charged with knowledge of these options and of the charges that corresponded to each. This undermines any claims based upon an argument that GTE Florida failed to disclose that long distance charges would apply to Thorpe's second line – including Thorpe's claims that she was subject to a negative option or default contract. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 306 n.14 (1976) ("if respondent's . . . practices were detailed in its tariff and therefore available to the public, a court presented with a claim of misrepresentation based on failure to disclose . . . could, applying settled principles of tort law, determine that the tariff provided sufficient notice to the party who brought the suit"); *Marcus v. AT&T*, 138 F.3d at 63 ("Because the appellants are held to know the filed rate and thus AT&T's practice of rounding up, it would be unreasonable for them to rely on any price quotes to the contrary."); *cf. Halprin, Temple, Goodman & Sugrue v. MCI Telecommunications Corp.*, File No. E-98-40, 13 FCC Rcd 22568, 22579, para. 23 (1998) (constructive notice established as a matter of law by the filed tariff doctrine cannot be used to prove that the charges and practices contained in the tariff are themselves lawful).

[157] *See* Defendants' Memorandum of Law in Support of Motion to Dismiss at 7 n.6 ("GTECC is a federally regulated IXC that is a separate entity from GTE Florida."); Verizon Comments at 2 n.2.

[158] *See* AT&T Comments at 2, 5-6 (citing Complaint); Thorpe Reply at 3-4.

[159] *See Presubscribed Interexchange Carrier Charges*, CC Docket No. 02-53, CCB/CPD File No. 01-12, RM-10131, Order and Notice of Proposed Rulemaking, 17 FCC Rcd 5568, 5575, para. 15 (2002) ("Under current network configurations, a PIC change must be completed by an end user's LEC.").

[160] *See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 5099, 5131-32, paras. 86-87 (2003) (IXCs are not required to reverify that the LEC accurately assigns the customer's PIC), *cited in* AT&T Comments at 2, 7.

[161] According to Thorpe's allegations, she chose GTECC as her second PIC after GTE Florida allegedly told her that she was required to have a long distance carrier. Petition at 2-3. Assuming that GTECC acted pursuant to lawful amendments to its tariff, *see* 47 U.S.C. § 203, it was entitled to change the terms of its long distance offering to Thorpe and begin charging a monthly minimum fee.

[162] *See supra* paras. 24-27; AT&T Comments at 9-11.

[163] Motion for Extension of Time to File a Reply to Comments Untimely Filed (filed June 17, 2003).

when counsel for Thorpe was on a three-week vacation.[164] Thorpe's assertion that AT&T and the competitive LECs should have filed their comments on May 11, 2003, is incorrect. The Public Notice requesting comment on Thorpe's petition stated that comments were due 45 days after publication of the Notice in the Federal Register, which occurred on April 21, 2003.[165] Thus comments on the petition were due June 5, 2003, which is when AT&T and the three competitive LECs (as well as other commenters) filed comments. While Thorpe's motion requested an extension of time until July 30, 2003, she eventually filed her reply on August 5, 2003.[166] Despite Thorpe's confusion regarding the comment filing deadline and the lateness of her reply, we grant the motion for extension of time and consider her reply.

37. *Paperwork Reduction Act*. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burdens for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.[167]

38. *Congressional Review Act*. The Commission will not send a copy of this *Order* pursuant to the Congressional Review Act because it establishes only rules of particular applicability.[168]

39. *Materials in Accessible Formats.* To request materials in accessible formats (such as Braille, large print, electronic files, or audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This *Report and Order* can also be downloaded in Word and Portable Document Formats (PDF) at http://www.fcc.gov/cgb.dro.

V. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 201, 202, 203, 251 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), (j), 201, 202, 203, 251, 254, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Petition for Declaratory Ruling on Issues Contained in *GTE v. Thorpe* is DENIED, as discussed herein.

41. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), and section 1.46 of the Commission's rules, 47 C.F.R. § 1.46, the Motion for Extension of Time to File a Reply is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[164] *Id.* at 2, paras. 3-7.

[165] *See Thorpe PN*, 18 FCC Rcd 5517; 68 Fed. Reg. 19542-01.

[166] *See* Thorpe Reply.

[167] *See* 44 U.S.C. § 3506(c)(4).

[168] *See* 5 U.S.C. § 801(a)(1)(A).