IN THE SUPREME COURT OF FLORIDA

GENERAL TELEPHONE COMPANY OF FLORIDA, Appellant, v. JOHN R. MARKS, III, et al., Appellee.	)	CASE NO. 66,633
	)	(Consolidated Cases)
UNITED TELEPHONE COMPANY OF FLORIDA, Appellant, v. JOHN R. MARKS, III, et al., Appellee.	)	CASE NO. 66,673

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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TABLE OF CONTENTS

CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Florida Public Service Commission[1] generally accepts the statement of facts contained in the Initial Brief of Appellant, General Telephone Company of Florida. However, we disagree with the following statements included therein:

On page 11, line 5 and 6, General states that "Bell no longer retained these additional costs and, appropriately, had not been receiving compensating revenues from the intrastate pools." The Commission objects to the use of "appropriately" in this context due to the fact that the Commission's final decision in Order No. 14047 evidences a contrary conclusion. (R- 550) The "appropriateness" of the Commission's decision is the subject of this appeal.

Further, on page 11, the last sentence is argumentative in nature and is inappropriately placed in the statement of facts.

General incorrectly states, on page 8, the last full paragraph, that the Commission conceded a lack of statutory authority for making its decision. To the contrary, the operational fact in this regard is that the Commission agreed that section 364.07, Florida Statutes (1983) granted the Commission

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[1]Appellee, the Florida Public Service Commission, will hereafter be referred to as "the Commission" or "PSC". Further designation of the parties are as follows: Appellant, General Telephone Company of Florida, will be referred to as "General." Appellant, United Telephone Company of Florida will be referred to as "United." Appellee, Southern Bell Telephone and Telegraph Company, will be referred to as "Southern Bell." Further, abbreviations used in this Brief are: Record on Appeal -- (R. _), Transcript of Hearings -- (Tr. __), Appendix -- (A. __).

limited authority in the review and resolution of settlement contracts and disputes. Although the Commission agreed with General's and United's interpretation that section 364.07 was limited in scope, it did not concede a lack of statutory authority for its actions.

Subject to the the changes herein stated, the Commission accepts the statement of the case and facts as presented by General.

In addition to the foregoing statements disagreeing with the facts and case as presented by General, the Commission concurs in the supplemental statement of the case and facts submitted by Appellee, Southern Bell Telephone and Telegraph Company.

SUMMARY OF ARGUMENT

The Commission's decision in this case was made in conformity with federal and state policy regarding the treatment of CPE during its ultimate phase out from interstate and intrastate rate base for toll purposes. Further, the Commission's action is appropriate in that it recognized the guiding policy of ensuring that the impact of divestiture would not result in drastic customer impacts.

The Commission has the statutory authority to allow Southern Bell to continue to recognize CPE-related investment expenses for settlement purposes. Section 364.14, Florida Statutes (1983), gives the Commission great latitude in determining appropriate practices of Florida telephone companies. In this case, the Commission acted in a manner to prevent the unreasonably burdensome impact on Southern Bell's ratepayers which disallowance of the CPE expense would have entailed.

The Appellants' argument that their settlement contracts enjoy a primacy over the Commission's statutory authority to determine reasonable practices of Florida telephone companies has not modified the contracts in any way.

Finally, the continued recognition of Southern Bell's CPE is in no way tantamount to retroactive ratemaking. Traditional ratemaking principals are inapplicable in this case since the emphasis during the proceeding focused only on specific costs of divestiture, and the Commission's final decision merely allowed the recognition of the CPE-related expense items.

POINT I

THE COMMISSION ACTED APPROPRIATELY AND IN CONFORMITY WITH FEDERAL AND STATE POLICY IN ALLOWING SOUTHERN BELL TO CONTINUE TO RECOGNIZE CPE-RELATED EXPENSES FOR SETTLEMENT PURPOSES.

The Commission has acted appropriately and in conformity with the established federal and state policy of ensuring that the impact of divestiture should not result in drastic customer impact.

In its Decision and Order in CC Docket No. 80-286,[2] the Federal Communications Commission reiterated its basic policies regarding detariffing of customer premises equipment (CPE)[3] and set forth its plan for removing CPE from separations:

> The intent of the plan is to facilitate the implementation of the Commission's policies regarding detariffing of customer premises equipment, as directed in our order establishing this Joint Board, 78 FCC 2d at 846, and to ensure that the detariffing does not result in abrupt rate increases. Under this plan, which is coordinated with the Commission's implementation date for the bifurcated detariffing of CPE, no investment or expenses associated with CPE incurred after January 1, 1983 would be allocated to interstate operations. The amounts in the CPE plant accounts on the books as of that date, and the average amounts in related expense

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[2]Amendment of Part 67 of the Commissions Rules and Establishment of a Joint Board, 89 F.C.C.2d 1 (1982).

[3]See Amendment of Section 64.702 of the Commission's Rules and Regulations The Second Computer Inquiry), 77 F.C.C.2d 384 (1980) (Final Decision), modified on reconsideration, 84 F.C.C.2d 50, (1980) further reconsideration, 88 F.C.C.2d 512 (1981), appeal pending sub. nom CCIA v F.C.C., Case No. 80-1471 (D.C. Cir. 1980).

> accounts for the previous year, would constitute a 'base amount' for separations purposes. The base amount would be reduced at the rate of one-sixtieth per month for a maximum of five years. (emphasis added)
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> . . . .
>
> The CPE proposal is intended to serve as a reasonable transition mechanism that will allow regulators and the industry to adjust to new conditions without imposing hardship on consumers, either in the form of burdensome rate increases or the perpetuation of conditions under which the purchase of terminal equipment is either unattractive or impractical. (emphasis added)

The F.C.C. went on to suggest that the Joint Board [4] should consider the likely effects of the then pending anti-trust litigation against AT&T,[5] especially the possibility of the sudden removal of CPE from the rate bases of the BOCs. 89 F.C.C.2d at 22.

Thus, the F.C.C. was aware at least as early as 1982 that the potential for a immediate cut of CPE and related expenses would require extraordinary measures in order to prevent abrupt and adverse ratepayer impact. The CPE phase-out plan alluded to by the Appellants was established as a mechanism for orderly transition absent special circumstances. Clearly the present case

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[4]The Joint Board is a body consisting of four State Commissioners and three F.C.C. Commissioners. Its function is to review issues referred to it by the F.C.C. and present recommendations for action.

[5]United States v. American Telephone and Telegraph Co., 552 F.Supp. 131 (D. D.C. 1982); affirmed sub. nom. Maryland v. United States, 460, U.S. 1001; 103 S.Ct 1240 (1983).

presented the Florida Commission with the type of exigent circumstances contemplated by the F.C.C. and warranted special consideration and treatment. Indeed, the Commission stated that it "did not believe...that the intent of divestiture was to create a windfall for the local exchange companies (LECs) [other Florida telephone companies] at the expense of Southern Bell's ratepayers. Order No. 14047, at 15 (January 30, 1985) (R- 550).

Were it not for the PSC's decision in this docket, United, General and all other independent local exchange companies would continue to recover from the pool certain indirect expenses associated with their CPE which Southern Bell would not otherwise be able to recover. The $3.5 million and the $4.9 million amounts which United and General, respectively, seek to collect from the pool are predicated on including the $19.8 million in the investment base of the pool. However, the companies wish to prevent Southern Bell from recovering the total $19.8 million, and would rather have their companies enriched by the amounts sought. The PSC acted in order to prevent this inequitable result.

State Commissions must be cognizant of federal policies when considering intrastate issues. The Commission was aware of the F.C.C.'s concern that the CPE phase out not result in drastic rate increases for consumers, 89 F.C.C.2d, at 22. Accordingly, the Commission exercised its authority consistent with state law, sections 364.055, 364.14, Florida Statutes (1983), in allowing Southern Bell to continue to recognize CPE-related investment and expenses on its books for settlement purposes in order to prevent the potential adverse ratepayer impact long since recognized by

the F.C.C. In making its decision, the PSC avoided the inequity that would have resulted if windfalls were realized by General and United at the expense of Southern Bell's ratepayers.

Implicit in the F.C.C.'s suggestion to the Joint Board with respect to the CPE phase-out was the recognition that extraordinary remedies would be required if and when the Bell Operating Companies were compelled to divest themselves of their CPE. As history has shown, such a transfer has now in fact occurred for Southern Bell and the decision of the Commission to prevent the serious customer impacts alluded to is clearly an appropriate response under the circumstances.

POINT II

THE COMMISSION ACTED WITHIN ITS STATUTORY AUTHORITY IN DETERMINING THE TREATMENT OF CPE-RELATED EXPENSES FOR SETTLEMENT PURPOSES.

The Commission has the authority to readjust practices of telepone companies if it determines that such practices would lead to unjust, unreasonable, unjustly discriminatory or unduly preferential effects. §364.14, Fla. Stat. (1983).

General's and United's respective settlements agreements with Southern Bell recognize that the Commission may "issue orders that direct certain telephone companies to adjust intrastate, intraLATA/intramarket investment, revenues, expense or tax items in settlements" and may "issue orders relating to generic matters that direct all or certain Florida telephone companies to make changes that affect IntraLATA/IntraMarket investment, revenue, expense or tax items." (emphasis added) Order No. 14047, at 15; United's Brief, at 15, A.22.

This language is merely a recognition of the Commission's authority to readjust practices of any telephone company whenever the Commission determines that such practices would lead to unjust, unreasonable, unjustly discriminatory or unduly preferential effects. §364.14(1), Fla. Stat. (1983). Upon finding such practices inappropriate, the Commission may further determine the proper practices and fix the same by order or rule. §364.14(2), Fla. Stat. (1983).

Neither General nor United challenges the Commission's authority to enter appropriate orders on the effects of

divestiture pursuant to sections 364.055, 364.14, Florida Statutes (1983). Rather, the Appellants attempt to assert the primacy of their toll settlement contracts over the authority vested in the Commission pursuant to the Florida Statutes. Id.

United argues "that a breach of the contracts has occured as a direct consequence of the Commission's orders." United Brief at 6. Similarly, General argues that "whether the Commission's action was proper rests solely on the language of the contracts and the evidence of record." General's Brief at 16.

Appellants then cite section 364.07, Florida Statutes (1983)[6] for the proposition that the Commission is without authority to alter the existing contracts because of the absence of a dispute. Such an argument is obviously misplaced in view of the fact that section 364.055, 364.14, Florida Statutes (1983), gives the Commission authority to act as it did. Moreover, Appellants attempt to make much of an argument that the Commission conceded in Order No. 14047:

> United and General argues that this Commission is without jurisdiction to authorize the removal of $9.7 million from the pools because we are limited by Section
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> 364.07, Florida Statutes, to disapproving settlement disputes, neither of which are involved here.

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[6]Fla. Admin. Code Rules 25-4.26 and 25-4.27 were promulgated in response to §364.07, Fla. Stat. (1983) pursuant to §350.127(2), Fla. Stat. (1983)

> We agree with that interpretation of what Section 364.07, Florida Statutes, states. However, that argument is not germane....

Order No. 14047, at 15 (emphasis added).

The Commission went on to cite the language in United's settlement contract related to the issuance of orders adjusting investment revenues, expense or tax items. Id. As previously stated the quoted language merely acknowledges the authority of the Commission to make such adjustments pursuant to section 364.14, Florida Statutes (1983) and indicates that Appellants were aware that such adjustments could affect IntraLATA/IntraMarket investment, revenue expense or tax items. The fact that the Commission agreed that no dispute existed has no bearing on the issue of the existence of statutory authority for the Commission to take the action it did. The Commission has the authority as previously stated under section 364.055, 364.14, Florida Statutes (1983). Also, having recognized the language quoted regarding the validity of Commission orders having a direct impact on the revenues distributed through the settlements process, we stated:

> The Commission has, in this case, recognized that, at least on an interim basis, Southern Bell has experienced a shortfall in CPE expenses which, but for divestiture, would have been recovered from the intrastate settlement pools. We find that it is entirely within the Commission's power to order the continued recognition of that expense for settlement purposes and to authorize Southern Bell to withdraw $9.7 million from the pools."

Order No. 14047, at 16.

The settlement agreements between the companies are subject to the Commission's authority to determine the appropriate expenses to be recognized for purposes of intrastate settlements. It is within the sound discretion of the Commission to make these decisions regarding the propriety of certain expenses. The Commission has often invoked section 364.14, Florida Statutes (1983), in ratemaking contexts. In this case, the Commission has used the section to determine and fix the proper practices with respect to the treatment of Southern Bell's CPE-related expenses. Consequently, since section 364.14, Florida Statutes (1983), gives the Commission great latitude in determining the proper practices of telephone companies in Florida, this Court should not substitute its judgment for that of the Commission on a discretionary matter such as presented in this case. General Telephone Company of Florida v.Florida Public Service Commission, 446 So.2d 1063 (Fla. 1984); City of Miami v. Florida Public Service Commission, 208 So.2d 249 (1968). Furthermore, since Commission orders come to this Court being presumptively correct and reasonable, Appellants must show that error exists plainly on the face of the order. Id. The Commission submits that General and United have failed to show a lack of statutory authority in the Commission to permit Southern Bell to continue to book expenses which if excluded would result in unjustly discriminatory effects on Southern Bell's ratepayers. Appellants' arguments urging the primacy of their contracts over the regulatory powers of this Commission are unfounded and without merit.

POINT III

THE COMMISSION'S CONTINUED RECOGNITION OF SOUTHERN BELL CPE DOES NOT CONSTITUTE RETROACTIVE RATEMAKING.

The portion of Order No. 14047 here on appeal concerns the Commission's determination of the appropriate CPE-related expenses Southern Bell may enter on its books for intrastate toll settlements purposes.

The Commission was not ratemaking in the traditional sense, but rather was only considering the specific treatment to be afforded one aspect of Southern Bell's operations, that pertaining to CPE-related expenses.

The situation is similar to that which arose in Citizens of the State of Florida v. Florida Public Service Commission, 415 So.2d 1268 (Fla. 1982), in which this Court held that the Commission's approval of Southern Bell's depreciation represcription for 1980 did not constitute retroactive ratemaking.

In Citizens this Court affirmed the decision of the Commission and further found that the consideration of depreciation represcription did not amount to ratemaking. The Court quoted with favor the following language from Commissioner Cresse:

> I think the main issue is whether or not the new represcription depreciation rate is appropriate or inappropriate. Notwithstanding what impact that has on any refunds or non-refunds because I think if you get those things combined, you're letting the appropriate and proper prescription of depreciation rates get confused with what further impact that may have. And you can look at it in the short-term or long-term period.

> So I think what we're dealing with here is whether or not the depreciation rates which are presently prescribed for Southern Bell by this Commission are adequate or inadequate and whether or not they should be revised," Id., at 1270. (emphasis added)

Public Counsel had contended that the proposed depreciation represcription would violate a stipulation entered into by certain parties, upon which the refund terms were established and further contended that such would also constitute retroactive ratemaking.

Public Counsel was apparently concerned that any increase in depreciation allowance would adversely affect Southern Bell's 1980 authorized rate of return and consequently the refund set by the stipulation.[7] The Court rejected Public Counsel's contentions both as to retroactive ratemaking and preclusion under the stipulation. Citizens, at 1270.

Docket No. 820263-TP began as an investigation into divestiture related costs as they affected Florida telephone ratepayers in general. Order No. 10939 (June 25, 1982). The focus shifted to the effect of divestiture on Southern Bell's ratepayers when the company filed its petition for emergency relief under section 364.055, Florida Statutes (1983). Order No. 11969 (May 26, 1983). However, the Commission noticed all parties during this second phase of the proceeding that it was not to be

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[7]Under the stipulation, Southern Bell would refund to its customers a specific amount for the calendar year 1979 and "whatever amount, if any, that the intrastate earnings reflected on the books of Southern Bell exceed 9.02% on average net investment for the calendar year 1980."

viewed as a full rate case, but rather was a limited proceeding to consider the cost of divestiture to Southern Bell. Order No. 14047, at 2. (R. 537) In this limited proceeding neither the Commission nor the parties contemplated any rate impact on Southern Bell's customers. Moreover, the Commission's ultimate decision did not change rates for Southern Bell. As such, the Commission's decision did not arise out of a traditional ratemaking setting, and therefore the principles regarding retroactive ratemaking are inapposite.

The Commission's consideration and ultimate recognition of the CPE-related investment and expenses of Southern Bell in this limited proceeding did not amount to traditional ratemaking. Rather, the purpose was to examine the appropriate treatment of CPE-related expenses and to avoid having the effects of divestiture adversely affect Southern Bell's ratepayers through intrastate settlements. Stated another way, the Commission sought to maintain the status quo during the phase-out of CPE. Order No. 13179, at 6 (April 9, 1984).

The Commission merely continued to allow Southern Bell to book certain expenses for settlements purposes. This was done in order to ameliorate potential rate stock for Southern Bell customers. This course of action, the Commission determined, was the best way to protect the ratepayers of Southern Bell while maintaining basic parity in local rate treatment among all local exchange companies.

In this case, the Commission did not act under section 364.07, Florida Statutes (1984). The Commission did decide to allow Southern Bell to <u>continue to recognize</u> CPE as an expense. The

Commission has not adjusted rates or modified the toll settlements contracts. No retroactive change took place under the Commission's order. What further impact the decisions of the Commission in this case may cause was not a guiding factor in the Commission's decision as to the appropriate treatment of Southern Bell's CPE expenses.

CONCLUSION

The Commission's determination that Southern Bell be allowed to continue to recognize CPE-related expenses for settlement purposes is a reasonable exercise of its authority to determine and fix the proper practices of Florida telephone companies. 364.14, Fla. Stat. (1983). Further, the Commission acted in conformity with federal and state policy that the costs of divestiture should not result in abrupt and burdensome rate increaes. Finally, the Commission's continued recognition of Southern Bell's CPE-related expenses has not resulted in retroactive ratemaking. No rates were changed in this proceeding.

The Florida Public Service Commission urges the Court to affirm its decision and order in all respects.

Respectfully submitted,

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