IN THE SUPREME COURT OF FLORIDA

UNITED TELEPHONE COMPANY
OF FLORIDA,

APPELLANT,

v.

CASE NO. 66,673

JOHN R. MARKS, III, ET AL.

APPELLEE.

(CONSOLIDATED CASES)

GENERAL TELEPHONE COMPANY
OF FLORIDA,

APPELLANT,

v.

CASE NO. 66,633

JOHN R. MARKS, III, ET AL.

APPELLEE.

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ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

INITIAL BRIEF OF APPELLANT UNITED TELEPHONE COMPANY OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

This administrative appeal has been filed by United Telephone Company of Florida[1] to seek review of a final order of the Florida Public Service Commission in Docket No. 820263-TP. United was a party to that docket and has been and continues to be adversely affected in its substantial interests as a result of Commission Orders No. 13179 and 14047.

By way of background, on June 25, 1982, the Commission opened Docket No. 820263-TP to conduct an inquiry into the impact in Florida of the Bell System divestiture which resulted from settlement of antitrust litigation between the U. S. Department of Justice and American Telephone and Telegraph Company. United States v. American Telephone and Telegraph Co., 552 F.Supp 131 (D.C. 1982), aff'd sub nom Maryland v. United States, 460 U.S. 1001 (1983). (R. 1)

On February 17, 1984, Southern Bell filed a Petition with the Commission in this docket seeking immediate approval of a $92.5 million rate increase to recover what the company asserted was a loss resulting from the transfer of telephone equipment (CPE) to AT&T as part of the divestiture. (R. 62)

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1 Abbreviations used in this Brief are:

United Telephone Company of Florida.....United
Florida Public Service Commission.....Commission
General Telephone Company of Florida.....General Telephone
Southern Bell Telephone & Telegraph Company.....Southern Bell
Record on Appeal.....(R. ___)
Transcript of Hearings before the Commission.....(Tr. ___)
Appendix to this Brief.....(A. ___)

The Commission considered the Petition at its March 20, 1984, agenda conference, during which it heard testimony from Southern Bell witnesses in support of the Petition.

On April 9, 1984, the Commission issued its Order No. 13179 which withheld consent to the operation of the $92.5 million rate increase pending further review. It stated:

> This Commission has stated in various forums that the costs of divestiture should be borne by AT&T, not the ratepayer. The costs of providing telephone service, however, are legitimate costs to the ratepayers. (A. 4)

While the Commission would not allow the rate increase to take effect, it did find that Southern Bell's earnings had been adversely impacted by divestiture as a result of transferring its CPE to AT&T. Consequently, the Commission authorized Southern Bell to collect an additional $35.9 million, not from Southern Bell's customers, but from AT&T and the other Florida telephone companies, including United (A. 5-6). Specifically, the Commission authorized Southern Bell to collect an additional $9.7 million per year from the Florida telephone companies by charging that amount to two revenue pools which Southern Bell administers and which are described more fully below. Southern Bell was also authorized to surcharge AT&T $26.2 million. Subsequently, the Commission withdrew its approval to surcharge AT&T and ordered that Southern Bell and AT&T resolve among themselves the disposition of amounts already collected under the surcharge. (A. 24)

The $9.7 million which Southern Bell was authorized to collect as a temporary measure is still being collected today and

will continue until the Commission finds it should cease. (A. 23) Of this amount, United is paying approximately $3.5 million per year. (Tr. 608) The effect upon United is to pay $3.5 million annually for the settlement of antitrust litigation to which it was not even a party.

The charges are being collected from the "pools" for intraLATA toll service and intrastate access charges. The pools are Commission-ordered arrangements by which all Florida telephone companies, including Southern Bell, General Telephone and United pool the revenues they receive from certain long distance services and access charges (charges to long distance carriers for originating and terminating long distance calls using the telephone company's facilities). Southern Bell acts as administrator of the pools, collecting the revenues and disbursing the proceeds to the participant companies.

The procedures by which the telephone companies divide up the pooled revenues are detailed in division of revenue contracts between Southern Bell and each respective telephone company. Relevant portions of the contracts between United and Southern Bell are part of the record on appeal. (A. 35-43) Essentially the contracts provide that from the pool of revenues, each telephone company will be paid an amount equal to the expenses and taxes it has incurred to provide the service in question, following which Southern Bell will distribute the remaining money as profits in such a manner that every participant receives the same rate of return on the investments required to provide the services. (A. 36, 41)

United asserted before the Commission that the effect of its order to Southern Bell to withdraw an additional $9.7 million was to provide Southern Bell with a higher rate of return on both pools than United receives and that that directly resulted in a violation of its division of revenue contracts with Southern Bell. (Tr. 611-2, R. 284, and R. 431)

The Commission's final order affirms its earlier action ordering the withdrawal of $9.7 million per year from the pools and perpetuating it for the foreseeable future. (A. 8)

The Commission's final order was issued on January 30, 1985. On March 1, 1985, United filed its Notice of Administrative Appeal. General Telephone filed a similar Notice and the cases were consolidated by order of the Court dated April 10, 1985.

APPENDIX

The Appendix to this Brief contains the two Commission orders of which review is sought. Order No. 13179 establishes the right of Southern Bell to withdraw $9.7 million from the pools and Order NO. 14047 is the Commission's final order.

The Appendix also contains two exhibits received in evidence in proceedings before the Commission which are important to United's argument. Exhibit 2q is a portion of a deposition of R. Turner, Southern Bell's accounting witness in this proceeding. Exhibit 241a is the relevant portion of the division of revenues contracts between United and Southern Bell which United asserts have been reformed by the Commission's action.

Both exhibits may be found in Volume IV of the record on appeal, but since the Record Index prepared by the Commission does

not identify where in Volume IV they appear, United has reproduced them in the Appendix at pp 28-34 and 35-43, respectively.

SUMMARY OF ARGUMENT

By Orders No. 13179 and 14047, the Commission unlawfully reformed the division of revenue agreements between Southern Bell and United for intraLATA toll services and intrastate access charges. As a result, United has lost and continues to lose $3.5 million per year to Southern Bell.

The orders complained of forced Southern Bell to breach its contracts with United by directing Southern Bell to collect a higher rate of return from toll services and access charges than United receives. The contracts in question, which have been authorized by the Commission, plainly provide that both United and Southern Bell shall earn the same rate of return on those services.

The Commission has only such authority as is given to it by the legislature. With the exception of the limited authority granted to it in Section 364.07(2), Florida Statutes (1983), the Commission has no statutory authority to regulate the division of revenues among telephone companies. The orders complained of concede that the instant proceeding does not involve Section 364.07(2); to the contrary, it is a proceeding under Sections 364.05 and 364.055 Florida Statutes (1983). Consequently, the orders complained of are beyond the lawful power of the Commission to issue and, consequently, should be quashed.

The first order complained of was issued on April 9, 1984. It authorized Southern Bell to take an additional $9.7 million

annually from the toll and access charges pool. Southern Bell, as the administrator of the pool, retroactively began removing the $9.7 million annual amount as of January 1, 1984. The Commission countenanced this action and thereby has engaged in unlawful retroactive ratemaking by making the order effective one hundred days prior to its issuance.

ARGUMENT

I. THE COMMISSION HAS UNLAWFULLY REFORMED THE DIVISION OF REVENUE CONTRACTS BETWEEN UNITED AND SOUTHERN BELL AND CAUSED THE BREACH OF SAME BY ORDERING SOUTHERN BELL TO RECEIVE A GREATER RATE OF RETURN THAN UNITED ON INTRALATA TOLL SERVICE AND INTRASTATE ACCESS CHARGES.

A. The Public Service Commission's order authorizing Southern Bell to receive a greater rate of return than United Telephone Company of Florida on certain long distance services and access charges results in the breach of division of revenue contracts between Southern Bell and United.

At issue in this proceeding are two contracts between United and Southern Bell under which the two telephone companies recover their costs and divide profits from certain jointly provided services.

At the outset, United will establish that a breach of the contracts has occurred as a direct consequence of the Commission's orders. In subsequent sections of the Argument, United will address the Commission's lack of authority in this regard.

The two contracts in question deal with certain long distance services and access charges. Specifically, the long distance service contract deals with the joint provision by United and Southern Bell of intrastate intraLATA toll services. Similar agreements exist between Southern Bell and all Florida telephone

companies whereby Southern Bell acts as the administrator of a so-called "pool". All revenues for this toll service are pooled by all Florida telephone companies. As administrator, Southern Bell then pays out to each participating telephone company an amount equal to the expenses the respective telephone companies incurred in providing that service. After all expenses have been paid out, the remainder in the pool represents the profit on that service. Because the telephone companies vary substantially in size and scope of operations, the investment in plant and facilities each has to make to provide this service varies substantially. As administrator, Southern Bell verifies the amount of investment claimed by each telephone company and calculates the total investment, including its own, which was used to provide the long distance service in question. Dividing the total investment into the amount of profit, Southern Bell calculates the rate of return generated by the toll pool. Finally, Southern Bell multiplies the rate of return by each telephone company's investment and calculates the return or profit each company receives on intraLATA toll services.[2] The access charges contract is administered in the same manner and a rate of return is similarly calculated for each telephone company's participation in the access charge pool.[3]

2 IntraLATA toll is a portion of intrastate long distance service. Basically, it is short haul toll within or substantially within each company's service area. There are ten LATA's or their equivalents in Florida.

3 Access charges are the fees to long distance carriers such as AT&T and MCI for the use of telephone company facilities required to originate and terminate their intrastate interLATA long distance services.

With respect to both long distance service and access charges, the arrangements between United and Southern Bell are set forth in contracts which contain specific provisions as to how the profits of the two pools are to be divided.4

The pertinent parts of each contract were received into evidence in this docket and are part of the record on appeal. (See Appendix to this brief at A. 35-43)

Under the contracts, profits are to be divided so that both United and Southern Bell receive the same rate of return:

> I. METHOD OF COMPENSATION
>
> A. The United Company and the Bell Company shall receive as its share of revenues from the Intrastate IntraLATA/Intra-Market Area toll services revenue pool an amount equal to:
>
> 1. The portion of expenses and taxes applicable to intraLATA/Intra-Market Toll and Private Line Services as determined by approved Separations procedures; plus
>
> 2. An amount to give the United Company and the Bell Company the same compensation ratio (return) on the average net book costs of its property devoted to Intrastate IntraLATA/Intra-Market toll communications services as the statewide toll services revenue pool's achieved return on the average net book costs of property devoted to Intrastate IntraLATA/Intra-Market toll communications services; less
>
> * * *
>
> (Emphasis Added) (A. 36)

4 The pools were authorized by order of the Commission in Docket No. 820537-TP, Order No. 12765.

The access charges contract is similarly worded. (A. 41) Notwithstanding the fact that the contracts clearly require that both United and Southern Bell receive the same return on long distance services and access charges, the Commission in this docket has ordered Southern Bell to collect a greater rate of return than United from the profits of those two pools.

Order No. 13179 provides:

> After consideration we find and conclude that on an interim basis Southern Bell is authorized to collect, under bond or corporate undertaking and subject to refund with interest, revenues in the amount of $35.9 million on an annual basis, as follows:
>
> $9.7 million to be obtained from the intrastate pool (i.e., intraLATA/territory toll pool and intrastate access pool) as a divestiture related charge; and
>
> $26.2 million to be obtained from AT&T...
>
> (A. 5-6)

Southern Bell's own accounting witness testified that the effect of the Commission's action was to allow Southern Bell a greater rate of return than United received:

> Q. Is the effect of drawing the $9.7 million on the intrastate pools to give Southern Bell a higher rate of return on those pools than the other participants?
>
> A. Yes, it would, based on the Commission order.
>
> (A. 29)

The other witnesses who testified on this subject agreed with Southern Bell that the effect of the Commission's action was to provide a greater rate of return to Southern Bell than the other telephone companies. See testimony of Witness Menard for General

Telephone Company of Florida (Tr. 575-6) and Witness Reynolds for United (Tr. 611-3). There was no evidence to the contrary before the Commission.

Thus, while under contracts authorized by Commission order, Southern Bell and United have agreed to earn the same rate of return from the pools, all parties who addressed the subject agree that the effect of the Commission's action in Orders No. 13179 and 14047 is to give Southern Bell a higher rate of return than United.

The Commission's final order completely ignores the contractual provisions quoted above despite the efforts of United and General to have the Commission address them[5] and fastens instead on another provision of the contract which allegedly supports the Commission's action. This provision provides:

> From time to time, the Florida Public Service Commission (FPSC), after due process, may issue orders relating to generic matters that direct all or certain Florida telephone companies to make changes that affect IntraLATA/Intra-Market investment, revenue, expense, or tax items. Compensation between the United Company and the Bell Company reflecting such changes will be effective prospectively or at a date mutually agreed upon between the Companies, unless otherwise ordered by the FPSC. (A. 22)[6]

To give substance to this provision, the Commission cites one example of Commission action which would fall within it:

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5 See Tr. 575-6, and Tr. 611-4, as well as R-411, and R-431.

6 The Commission ignores the fact that this section speaks only to generic matters involving more than one telephone company in order to shoehorn it into a situation in which only one company, Southern Bell, has been authorized to surcharge the pools.

> An obvious example of such orders would be the represcription of depreciation. If the Commission sets new depreciation rates for an individual company or multiple companies participating in a pooling arrangement, it will have a direct effect on the companies' allowable expenses for pooling purposes.
>
> (A. 23)

If that is the basis upon which the Commission relies, its order is clearly unlawful. As quoted earlier, each of the contracts between Southern Bell and United provide for recovery of expenses by all parties before profits are recognized. (A. 36, Subsection I.A.1.) Depreciation is an expense which is recovered, under the contracts, before the return is calculated.[7] Assuming the Commission is correct that the quoted contract provision deals with depreciation expense, it still does not support Southern Bell's recovery of a different rate of return in the face of contractual language which states in plain terms that United and Southern Bell shall earn the same rate of return. United has not asserted that depreciation expense changes should not be recovered as expenses from the pools; to the contrary, the contract expressly provides for recovery of expenses. The Commission miscomprehends if it believes that the contracts do not distinguish between allowing the recovery of actual expenses versus providing for disparate rates of return. The former are clearly permitted; the latter are just as clearly prohibited.

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7 The United Company and the Bell Company shall receive ... an amount equal to: 1. The portion of expenses and taxes applicable ... as determined by approved Separations procedures ... (A. 36, Emphasis Added)

It is a fact that no one testified in support of the Commission's findings on this issue. As discussed earlier, Southern Bell's own witness correctly characterized the situation as providing a higher return for Southern Bell "...based on the Commission order." (A. 29) The Commission itself offered no witnesses on this subject thereby effectively precluding any examination or analysis of the Commission's interpretation.

Under recognized principles of contract construction, the Commission's interpretation is also in error. Where there are both general and specific provisions which might be subject to interpretation, the well settled law in Florida is that special provisions govern over general provisions. Aetna Life Insurance Co. v. White, 242 So.2d 771, 773 (Fla. 4th DCA 1971).

> Where a conflict arises under a contract, and such conflict requires construction of possibly inconsistent provisions thereof, the general rule of construction requires that provisions stated in general terms must yield to those stated in specific terms. Cypress Gardens Citrus Prod., Inc. v. Bowmen Bros., Inc., 223 So.2d 776 (Fla. 2nd DCA 1969)

In the instant proceeding the conflict involves a specific provision dealing with rates of return as opposed to a general provision which does not reference rates of return at all, but which can be reconciled with other specific provisions involving the recovery of certain expenses.

In sum, it is clear that the Commission has reformed the contracts between Southern Bell and United to the extent that it has caused Southern Bell to breach that provision which provides that both parties shall earn the same rate of return on intraLATA toll and intrastate access charges.

It is also apparent that, absent the Commission's reformation of the contracts, there would have been no breach. Southern Bell's petition seeking to recover the losses it allegedly incurred following the transfer of CPE to AT&T was filed under Section 364.05, Florida Statutes (1983). Southern Bell properly sought to recover its losses through an increase in its rates and charges. (R. 62. A. 1, 9) The Commission's action to obtain the required rate relief from a surcharge to the pools was not requested by Southern Bell or by any other party to the proceeding.

B. The Commission has no authority to reform or mandate the breach of contracts between Southern Bell and United.

The Court will find no reference by the Commission in this record to any statute which authorizes the actions of which United complains.

In Florida Telephone Corp. v. Mayo, 350 So.2d 775 (Fla. 1977), this Court held that the Commission had no statutory authority to regulate the contractual division of toll revenues. Subsequently, Chapter 80-36, §8, Laws of Florida, was enacted which vested limited power in the Commission to 1) disapprove division of revenue agreements which are not in the public interest, and 2) settle disputes between telephone companies regarding such agreements. See Section 364.07(2), Florida Statutes (1983). Absent that provision of the law, the Court's holding in Florida Telephone Corp. v. Mayo, supra, is controlling. As a corollary, if the Commission has any authority over the division of revenue contracts between United and Southern Bell, it must be found in Section 364.07(2) because there has been no other

statutory enactment by the legislature dealing with division of revenue agreements.

The question, then, is whether Section 364.07(2) empowers the Commission to order that Southern Bell receive a greater rate of return from the pools than United receives.

The Commission's own view is that Section 364.07 does not apply:

> United and General argued that this Commission is without jurisdiction to authorize the removal of $9.7 million from the pools because we are limited by Section 364.07, Florida Statutes, to disapproving settlement contracts which are not in the public interest or resolving settlement disputes, neither of which are [sic] involved here.
>
> We agree with that interpretation of what Section 364.07, Florida Statutes, states. However, that argument is not germane because the settlement contracts themselves contemplate the course of conduct taken by the Commission. (A. 22) (Emphasis Added)

The record reflects no dispute between Southern Bell and United. Indeed, when the loss of revenues was first detected, Southern Bell acted properly by filing a petition with the Commission under Section 364.05, Florida Statutes (1983) for an increase in rates. (R. 62) Neither have questions of public interest been raised which would cause the Commission to disapprove the contracts. To the contrary, the contracts were authorized by the Commission and remain in full force and effect today.

If Section 364.07 has not been invoked, and the holding in Florida Telephone Corporation v. Mayo, supra, is considered, where does the Commission find its statutory authority to direct

Southern Bell abrogate its division of revenue agreements?

The Commission claims to find its authority in the contracts themselves:

> As discussed above, the settlement agreements themselves contain provisions which recognize that the Commission may, from time to time, issue orders which have a direct impact on the revenues distributed through the settlements process. An obvious example of such orders would be the represcription of depreciation. If the Commission sets new depreciation rates for an individual company or multiple companies participating in a pooling arrangement, it will have a direct effect on the companies' allowable expenses for pooling purposes. That effect will ultimately carry over to the determination of the rate of return and revenues accruing to individual companies. 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. A. 23 (Emphasis Added)

It is a novel proposition for the Commission to claim authority based upon a contract between two telephone companies. The Commission derives its power solely from the legislature. Florida Bridge Co. v Bevis, 363 So.2d 799 (Fla. 1978).

The suggestion that its powers can be expanded, or contracted, by agreements between companies the Commission regulates is baseless. The contractual provision in question, irrelevant though it may be to this proceeding, regulates the course of dealing between Southern Bell and United; it can bestow no judicial powers upon the Commission.

Yet, analysis of the orders under review indicate that the Commission is actually relying on the contracts to authorize its actions since the record reflects no reference to any statutory support.

While the Court has historically given great deference to Commission orders, it has consistently overturned those orders in which the Commission exceeded its authority.

> [O]f course, the orders of the Florida Commission come to this court with a presumption of regularity, Section 364.20, Florida Statutes, F.S.A. But we cannot apply such presumption to support the exercise of jurisdiction where none has been granted by the Legislature. If there is reasonable doubt as to the lawful existence of a particular power, the further exercise of the power should be arrested. Radio Telephone Commun., Inc., v. Southeastern Tel. Co., 170 So.2d 577 (Fla. 1965)

The Commission has no general authority to regulate. City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493 (Fla. 1973).

There being no statutory foundation upon which to base its exercise of authority the orders under review should be quashed with instructions that the Commission order the refund of all revenues unlawfully held plus interest as provided for in Order No. 13179.

II. THE COMMISSION ORDERS UNDER REVIEW CONSTITUTE UNLAWFUL RETROACTIVE RATEMAKING

Setting aside the dispositive fact that the Commission's action is unauthorized by statute, there remains an issue with respect to the manner in which Southern Bell has been permitted to remove the $9.7 million from the pools.

Order No. 13179, issued on April 9, 1984, authorized Southern Bell to take an additional $9.7 million from the intraLATA toll and intrastate Access Charge pools during the pendency of this proceeding. The order did not specify when Southern Bell's rights vested in this regard, but Southern Bell assumed that the appropriate date was as of January 1, 1984, some three months and nine days earlier than the order authorizing the action. General Telephone brought this fact to the Commission's attention in a timely manner (R. 411), but the Commission chose not to address it in Order No. 14047.

The law in Florida is well settled that the Commission may not engage in retroactive ratemaking. In Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission, 453 So.2d 780 (Fla. 1984) the Court considered the question of whether the Commission could give retroactive effect to the adjudication of a dispute brought under Section 364.07, Florida Statutes (1983). The Court held that any such adjudication must be given prospective effect only "...from the date of the Commission's order..." Id, at 784.

Alternatively, if this is not a Section 364.07 proceeding, the Court's holding in City of Miami v. Florida Public Service Commission, 208 So.2d 249 (Fla. 1968) precludes the Commission action complained of in this proceeding.

> An examination of pertinent statutes leads us to conclude that the Commission would have no authority to make retroactive ratemaking orders. City of Miami v. Florida Public Service Commission, supra, at 259.

The pertinent statute in the City of Miami case was Section

364.14, F.S.A. It is not known in this proceeding what statute the Commission believes it is applying because the Commission has not chosen to identify it, but the practical effect on United, General, and all other Florida telephone companies, except Southern Bell, is a rate reduction of $9.7 million annually. Of that amount, one hundred days' worth, or $2.7 million[8] has been taken by Southern Bell for periods prior to the Commission order authorizing the taking. For the reason discussed above, the Commission's orders permitting this action violate the Court's holding in Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission, supra, and should be quashed.

CONCLUSION

For the reasons discussed above, United Telephone Company of Florida asks the Court to find that the Commission acted beyond its statutory authority in reforming or mandating the breach of division of revenue contracts between Southern Bell and United.

United seeks to have the Court quash Commission Orders No. 13179 and 14047 insofar as they direct Southern Bell to withdraw $9.7 million per year from the intraLATA toll pool and the intrastate access charge pool.

United further requests that the Court direct the Commission to issue an order to Southern Bell requiring it to repay to United and other telephone companies all amounts collected under the

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8 $\$9{,}700{,}000 \times \frac{100}{365} = \$2{,}657{,}534.$

authority of Orders No. 13179 and 14047, plus interest as provided for in Order No. 13179.

Alternatively, United asks the Court to find that Order No. 13179 constitutes retroactive ratemaking in that it has been given retroactive effect from April 9, 1984 to January 1, 1984. United seeks to have the Court quash Commission Orders No. 13179 and 14047 to the extent that they authorize retroactive ratemaking and direct the Commission to issue its order to Southern Bell to repay to United and other telephone companies all amounts collected during that period, plus interest as provided for in Order No. 13179.

Respectfully submitted,

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