IN THE SUPREME COURT OF FLORIDA

MCI TELECOMMUNICATIONS CORP.,

Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION,

Appellee.

Case No. 66,945

On Appeal from the Florida Public Service Commission

INITIAL BRIEF OF APPELLANT MCI TELECOMMUNICATIONS CORPORATION

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INITIAL BRIEF OF APPELLANT MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation ("MCI") appeals from a final order issued by the Florida Public Service Commission ("Commission") on December 21, 1984 (A. 1), and from the Commission's order on reconsideration issued on March 25, 1985. (A. 22) 1/ This appeal challenges the method by which the Commission implemented the 1984 amendments to Florida's gross receipts tax law.

1/ "R. ___" refers to pages of the Record. "Tr. ___" refers to pages of the final hearing Transcript. Appellant's Appendix ("A. ___") contains the orders on appeal.

STATEMENT OF THE CASE AND FACTS

MCI provides long distance telephone service in Florida. To enable customers to reach MCI's network from their telephones, MCI purchases "access" service from the local telephone companies, such as Southern Bell or Centel. That service is governed by an Access Services Tariff filed by Southern Bell on behalf of all local telephone companies. AT&T Communications of the Southern States (ATT-C), and the other long distance companies that do business in Florida, also purchase access service from the local telephone companies.

MCI pays tax at the rate of 1-1/2 percent on its gross receipts from the sale of intrastate long distance telephone service. § 203.01(1), Fla. Stat. [2/] For purposes of the gross receipts tax law, the access service purchased by MCI from the local telephone companies is deemed to be "resold" by MCI to its long distance customers.

Prior to January 1, 1985 (the effective date of Sections 3 and 4, Chapter 84-342, Laws of Florida), the local telephone companies paid the gross receipts tax on

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[2/] The gross receipts tax is imposed on sales of telephone and other utility services in Florida. It historically has differed from a sales tax in that it is not collected as a separate item from the user, but is included by the seller in the tariffed price for the service.

their access service revenues from MCI and the other long distance companies. MCI, in turn, was entitled to a credit against its gross receipts tax for the tax paid by the local companies on the access service "resold" by MCI. § 203.011, Fla. Stat. (1983) The local telephone companies' tariffed rates for access services included an amount sufficient for them to pay the gross receipts tax. Thus the local exchange companies paid the gross receipts tax on access services, but passed that cost on to the long distance companies through access charges.

Effective January 1, 1985, the liability for payment of the gross receipts tax on the value of access services was shifted from the local companies to the long distance companies. MCI now pays that tax on its total gross receipts from long distance service without any credit for resold access service. The local companies, in turn, now exclude access charge payments received from long distance companies in calculating their own taxable gross receipts.[3/]

This amendment to the tax law did not change the state's total gross receipts tax revenues. It merely shifted the

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3/ This change was accomplished by the repeal of the credit provision contained in Section 203.011 (see § 3, Ch. 84-342, Laws of Fla.), and the simultaneous amendment of the definition of gross receipts to exclude revenues from resold services from the local companies' gross receipts. (See § 4, Ch. 84-342, Laws of Fla., codified as § 203.01(3)(c), Fla. Stat.)

liability for payment from one set of taxpayers (the local companies) to another (the long distance companies).[4/] The amendment also did not change the principle that the value of access services was to be taxed once and only once. This principle was preserved by excluding access charges from the local companies' taxable receipts at the same time that the law eliminated the long distance companies' right to a tax credit related to access charge payments.

The Commission considered the ratemaking impact of the 1984 amendment during hearings in September and October 1984 in its continuing docket on access charges. The effect of that change had not been initially identified as an issue in that case; it was added on the next to last day of hearings. (Tr. 2932-2933) The record on this issue is therefore sparse.

When the issue was introduced, the Commission recognized that to avoid a windfall to the local companies (and a corresponding "double tax" to the long distance companies) it would be necessary to reduce the 1985 rates for access services by the amount of the gross receipts tax indirectly collected through those rates in 1984. (Tr. 2932-2936)

[4/] Chapter 84-342 also imposed a new tax on a portion of the gross receipts from interstate long distance calls that originate or terminate in Florida. The gross receipts tax law was amended again in 1985 by Chapter 85-174, Laws of Fla. Neither of these amendments affects the issue presented on appeal.

Without such a reduction, the local exchange companies would continue to recover revenues to pay a tax for which they were no longer liable, and the long distance companies would in effect pay the tax twice -- once to the state and a second time through the access rates they were charged by the local companies. The Commission recognized the adjustment as a legal requirement, and directed the parties to attempt to reach a stipulation as to the mechanics of implementation. (Tr. 2932; 2934; 2936)

ATT-C's witness Neal later appeared to explain the parties' agreement that access charges should be reduced by 1-1/2 percent in 1985 to account for the tax law change. (Tr. 3513-3521) The implication from his testimony, although never clearly stated, was that all access charges representing "resold" services should be reduced by 1-1/2 percent.

The Commission, however, did not order a 1-1/2 percent across-the-board reduction in access service rates. Instead, it calculated the total reduction required -- $6.15 million -- and then applied the entire reduction to the rates charged by the local companies for billing and collection services provided under the Access Services Tariff. (A. 4) [5/]

[5/] Billing and collection is a service under which the local company will, for a price, record calls made over long distance carriers, bill the caller on behalf of the long (continued)

The Commission's stated reason for singling out the billing and collection portion of the tariff for special treatment was as follows:

> We believe it is appropriate to reflect the adjustments in this portion of the tariff because we have been informed that ATT-C intends to establish its own billing and collection system rather than continuing the present arrangement wherein the LECs [local exchange companies] bill for ATT-C under contract. Reduction in the billing and collection charges to ATT-C may serve as an incentive for ATT-C not to establish its own billing and collection system which, in our opinion, would impose additional costs on the ratepayers of this state by requiring them to pay two separate bills for telephone service. If ATT-C proceeds with its plans, then the revenue loss to the LECs would be that much less and our task in determining where that loss would be recovered would also be lessened. (emphasis added)
>
> (A. 4-5)

There is no competent substantial evidence to support the Commission's findings that ATT-C intends to establish its own billing system, or that a reduction in the billing and collection charge would affect any such decision. The only

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distance company, and collect those bills for the long distance company. Billing and collection service is only a minor part of the total array of access services. Approximately 8% of the total access charges to long distance companies during 1984 were for billing and collection service ($35.5 million for billing and collection out of a total of $429.5 million for all access services). (Tr. 3168; A. 4)

testimony relating to these findings is set out in full in part II of this brief, at pages 16-17.

MCI filed a timely petition for reconsideration of the foregoing portion of the Commission's order. In its petition, MCI pointed out that the local companies offer billing and collection service only to long distance companies that are able to obtain "equal access." (R. 319-320) [6] Today, ATT-C is the only long distance company that enjoys such access in large areas of the state. Thus billing and collection service generally is available only to ATT-C and not to the five other long distance companies (including MCI) that do business in Florida.

Because billing and collection service is purchased almost entirely by ATT-C, the Commission's decision gave the overwhelming majority of the $6.15 million access service rate reduction to ATT-C, and virtually no rate reduction to other long distance carriers.[7] MCI argued that such a

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[6] Oversimplified, "equal access" enables a telephone customer to predesignate which long distance company will handle his phone calls when he places a long distance call by dialing "1" followed by an area code and telephone number. Historically, customers have been able to reach only ATT-C using this simplified dialing pattern. Equal access was first introduced by Southern Bell in some parts of Florida in October, 1984 and eventually will be available in most parts of the state.

[7] The possibility of linking the gross receipts tax law change to the billing and collection charge was never discussed in the record. Therefore, there is no evidence on the precise impact of the Commission's decision on the (continued)

result was improper, since the legislature had shifted only a portion of the underlying $6.15 gross receipts tax liability to ATT-C, with the remainder of that liability having been shifted to the five other long distance companies. (R. 320)

The Commission denied MCI's petition, stating that:

> Upon consideration, we deny MCI's request for reconsideration of this issue. We recognize that the data presented in this proceeding was imperfect, however, we believe it appropriate to reflect this adjustment in the billing and collection tariff element as discussed in Order No. 13934. . . .
>
> (A. 24)

This appeal followed.

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discussed in the record. Therefore, there is no evidence on the precise impact of the Commission's decision on the various long distance companies. MCI estimates that carriers other than ATT-C purchase substantially less than 1% of the total billing and collection service sold by the local companies. The Commission seems to have assumed that ATT-C purchases 100% of that service, since it implemented another $13.2 million rate adjustment relating to a refund to ATT-C by reducing the billing and collection service rates by that amount. (A. 4)

SUMMARY OF ARGUMENT

The gross receipts tax law was amended effective January 1, 1985 to shift the tax liability for access service from the local company that provides the service to the long distance company that resells the service. The legislature insured that this amendment would not result in double taxation within the four corners of the taxing statute. Additional action by the Commission was required to insure that double taxation did not occur through the ratemaking process.

In 1984, the gross receipts tax had been embedded in the access service rates charged by the local companies to the long distance companies. The Commission and all parties agreed that to prevent a windfall to the local companies, and a double tax to the long distance companies, access service rates for 1985 had to be reduced by $6.15 million -- the amount of tax liability that was being shifted.

The Commission addressed only the windfall; it compounded, rather than solved, the problem of double taxation. Instead of an even-handed 1-1/2 percent rate reduction for all resold access services, the Commission ordered an approximate 17% reduction for billing and collection service ($6.15 million reduction/$35.5 million total) and no reduction for any other access service.

Billing and collection service generally can be purchased only by one long distance company, ATT-C. The order therefore grants ATT-C a rate reduction large enough to offset both the tax now paid by itself and the tax now paid by all other long distance companies; MCI and the others must both pay the tax on services they resell and pay rates for those services that continue to have an allowance for gross receipts tax embedded in them. This discriminatory result is arbitrary and inequitable on its face and must be reversed.

The Commission's rationale for this decision was totally unrelated to the gross receipts tax law. The Commission admitted that it hoped to induce ATT-C not to establish its own billing system, and to make it easier for the Commission to deal with the future consequences to the local companies and their ratepayers if ATT-C did develop such a system. Yet no competent substantial evidence was introduced to show ATT-C is even planning to implement a general billing system, much less whether a $6.15 million rate reduction would influence ATT-C's decision.

Even if the meager evidence in the record could sustain such inferences, the Commission's decision would still fail. This Court never has allowed the Commission to arbitrarily benefit one group of ratepayers at the expense of another in order to ease its own future decision making. The Commission's attempt to do so in this case is a blatant abuse of discretion.

ARGUMENT

I. The Commission acted arbitrarily and abused its discretion when it used a revenue-neutral change in the gross receipts tax law as an excuse to lower the total access charge/gross receipts tax burden on one long distance company and raise the access charge/gross receipts tax burden for all other long distance companies.

A Commission action cannot be upheld where the Commission has acted arbitrarily or has abused its discretion. Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534, 539 (Fla. 1982); Shevin v. Yarborough, 274 So.2d 505, 508-509 (Fla. 1973). The Commission's implementation of the gross receipts tax-related rate reduction in this case is arbitrary on its face, constitutes an abuse of discretion, and therefore must be overturned.

A. The Commission arbitrarily favored one long distance company at the expense of its competitors.

By enactment of Chapter 84-342, the legislature shifted the burden for payment of the tax on access services from one group of taxpayers (the local companies) to another (the long distance companies). In a stated effort to "reflect changes brought about by the new Gross Receipts Tax Law" the Commission reduced the local companies' rates for access

services by the $6.15 million tax burden they would no longer bear. (A. 4) This reduction made the tax law change revenue-neutral to the local companies, in accordance with the parties' understanding of the legislative intent. (See, Tr. 2934)

But the Commission failed to reduce the access rates paid by each long distance company in proportion to the tax burden it would bear under the new law. Instead, it applied the entire reduction to a service that is usable in significant quantities only by ATT-C. (A. 23-24) This action dramatically increases the tax-related burden carried by MCI and the other long distance companies. MCI now must pay to the state 1-1/2 percent of every revenue dollar from resold access, and must continue to pay to the local companies an access charge rate that includes a 1-1/2 percent allowance originally designed to provide the local companies with the revenues needed to pay the tax. ATT-C, on the other hand, received the benefit of almost 100% of the tax related reduction in total access charge payments, even though it assumed responsibility for payment of much less than 100% of the gross receipts taxes formerly embedded in the access charge rates. The Commission, therefore, arbitrarily favored one group of taxpayers, ATT-C, over another group of similarly situated taxpayers, the remaining long distance companies that do business in Florida.

To avoid arbitrarily creating winners and losers from a tax law change that was intended to be revenue neutral, the Commission must reduce the rates for all access services resold by long distance companies by 1-1/2 percent across-the-board. Any other solution, no matter how well intentioned, reduces the total burden borne by one long distance company, or group of companies, at the expense of its competitors.[8/]

B. The Commission's abused its descretion by basing its decision in part on the desire to ease its future regulatory burden.

The Commission's initial decision to consider the tax law change as an issue in the ongoing access charge proceeding was motivated by its desire to avoid any windfalls to the local companies or shortages to the long distance companies:

> COMMISSIONER CRESSE: . . .that is the law and we ought to take cognizance of that when we set access charges and not leave I guess any of the interexchange [long distance] companies short, or leave any surpluses with the local exchange companies because of the change in tax law that is within our capability to adjust.

[8/] In its Petition for Reconsideration, MCI suggested an alternative that provides rough justice; i.e., applying the entire rate reduction to a single access service that is available to, and used by, all long distance companies. While not quite as precise as a 1-1/2 percent reduction in each access rate, this solution might be administratively easier to implement. (R. 320)

> As a matter of fact, I think the law was drafted to become effective Januray 1, 1985, because of the legislature's awareness that we would readdress the access charges prior to that date. It was kept like it is until that time because we had already set access charges.
>
> (Tr. 2934)

By the time of the Commission's decision, it had lost sight of this goal. Instead, the Commission changed its focus to the availability of a $6.15 million "surplus" in access rates and tried to determine how to best put those funds to use, without regard to the whether that use would "leave . . . any of the interexchange companies short." As indicated by the discussion in its order, the Commission ultimately decided to use this "surplus" in a way that would minimize the potential future impact on local rates, so as to ease the regulatory task it would face if ATT-C ever decided to implement its own billing and collection system. (A. 5) The Commission's desire to make its future life easier is understandable, but does not make its decision any less arbitrary or inequitable.

There is only one method of reflecting the tax law changes that would not arbitrarily shift the total burden among the various long distance companies. Therefore the case should be remanded with directions for the Commission to implement the adjustment in the form of an across-the-board 1-1/2 percent reduction from 1984 rate levels for

those access services that are subject to resale by long distance companies.

II. The Commission's decision to reduce the rate paid by ATT-C for billing and collection service was not supported by competent substantial evidence.

Assuming arguendo that the Commission could lawfully discriminate between similarly situated groups of long distance companies in giving effect to the tax law change, there is no competent substantial evidence to support the decision reached in this case.

It is well settled that the Commission's decisions must be supported by competent substantial evidence. Duval Utility Company v. Florida Public Service Commission, 380 So.2d 1028 (Fla. 1980); Citizens of Florida v. Hawkins, 356 So. 2d 254 (Fla. 1978); City of Plant City v. Mayo, 337 So.2d 966, 974 (Fla. 1976).

Competent substantial evidence was defined in the Duval Utility case as follows:

> Competent substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred [or] . . .such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957)

380 So.2d at 1031. In Citizens v. Hawkins, the Court made it clear that this standard must be applied separately to

each finding on which the agency's action depends:

> Each determination must be based on specific independent findings supported by competent substantial evidence. [citations omitted]

356 So.2d at 259. The evidence here does not meet the standards articulated by the Court.

The Commission's decision to reflect the gross receipts tax change solely in the charge for billing and collection service hinges on its findings that:

> . . .[1] we have been informed that ATT-C intends to establish its own billing and collection system rather than continuing the present arrangement wherein the LECs [local exchange companies] bill for ATT-C under contract. [2] Reduction in the billing and collection charges to ATT-C may serve as an incentive for ATT-C not to establish its own billing and collection system. . . .
>
> (A. 4-5)

The only support in the record relating to ATT-C's intent to establish its own billing system is the following testimony by ATT-C's witness Weber:

> Q. Does your company currently pay local exchange carriers for billing and collection?
>
> A. Yes, sir, we do.
>
> Q. Do you plan at some time in the future to do your own billing and collections?
>
> A. We're going to do some of it. We have definite plans to do more private line billing, and WATS and 800.

> Q. Could you give us the time frame on when you plan to start your own billing and collecting?
>
> A. We are going to -- we have historically, always have done some private line billing, if you will. We are picking up more of the private line billing during '85, and we are looking at WATS and 800 in the '85-'86 time frame.
>
> I think I can get you some specific information about that. I don't have it with me. I'll be happy to provide it. I think these plans, I'm sure, have been reviewed with United and all the companies as recently as last Friday in some cases. (emphasis added)
>
> (Tr. 1045-1046)

and this exchange with Central Telephone's witness Wahlen:

> COMMISSIONER CRESSE: . . .Should we have any concern that that [current billing service] rate [$35.5 million a year] may be so high as to encourage AT&T to establish their own billing and collection system?
>
> WITNESS WAHLEN: I think you absolutely should have, because I believe, if I'm not mistaken, AT&T has told us that they don't intend to continue to use our billing services more than another year or two.
>
> (Tr. 3168)

Under the competent substantial evidence standard articulated by this Court, the two brief exchanges quoted above do not rise to the level needed to support a finding that ATT-C intends to establish its own billing system. Witness Neal's testimony relates only to billing for specialized services -- private line, WATS and 800 (incoming

WATS) service. No clue is given as to when, if ever, ATT-C plans to implement billing for its basic long distance services. It is unclear whether Mr. Wahlen's testimony relates solely to these specialized services or to long distance service generally. If it was intended to relate to the latter, it constitutes unsubstantiated hearsay that is admissible in administrative proceedings, but is not sufficient, standing alone, to support a finding of fact. § 120.58(1)(a), Fla. Stat. (Supp. 1984) On this point it does stand alone.

There is even less evidence to support a finding, even if such a finding would suffice, that a $6.15 million billing rate reduction would be a necessary or sufficient incentive for ATT-C to continue to purchase that service from the local exchange companies. The incentive value is particularly suspect since the Commission in the same order had already reduced the billing and collection charges to ATT-C by $13.2 million for a different reason. (A. 4)

One local company witness agreed the Commission "could" reduce the charge for billing service, at least to the extent the current rates exceed the cost of providing the service. (Tr. 3168-3170) Another opined that the then-current rate levels for billing service represented an "everybody-wins" price, but indicated that she did not know if ATT-C shared that view. (Tr. 2865) No testimony at all

was forthcoming from ATT-C as to its reaction to the then-current billing and collection rates, much less to a $13.2 million rate reduction, or a $6.15 million reduction beyond that. This lack of evidence is understandable, since the issue of the gross receipts tax law impact entered the hearing as an afterthought, and was never linked through testimony or otherwise to the local companies' billing and collection service.

In summary, even if the Commission were free to apply the total rate reduction flowing from the tax law change arbitrarily to the rates for only one of the services affected by the change, there is insufficient evidence in the record to support such an action in this proceeding.

CONCLUSION

The Commission abused its discretion by implementing the 1984 amendment to the gross receipts tax law in an arbitrary and discriminatory manner. Further, the Commission's rationale for its method of implementation was not supported by competent substantial evidence.

The Court therefore should remand this case to the Commission with directions that the $6.15 million access charge reduction resulting from that amendment must applied across-the-board to all access services offered by the local companies to the long distance companies.

Respectfully submitted this 28 day of June, 1985.

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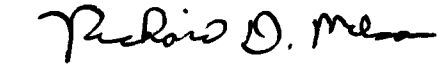

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