

IN THE SUPREME COURT OF FLORIDA
J. WHITE

AT&T COMMUNICATIONS OF THE
SOUTHERN STATES, INC., et al.,
Appellants,
vs.
JOHN R. MARKS, et al.,
Appellees.

MAR 9 1987
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CASE NO. 69,732

On Appeal From The Florida Public Service Commission

ANSWER BRIEF OF APPELLEE,
UNITED TELEPHONE COMPANY OF FLORIDA

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ABBREVIATIONS, ACRONYMS AND SHORTENED NAMES

| | |
|---------------|--|
| ATT-C | AT&T Communications of the Southern States, Inc. |
| Centel | Central Telephone Company of Florida |
| FPSC | Florida Public Service Commission |
| General | General Telephone Company of Florida |
| IXC | Interexchange Carrier |
| LEC | Local Exchange Carrier |
| MCI | MCI Telecommunications Corporation |
| MTS | Message Toll Service |
| NTS | Non-Traffic Sensitive |
| POP | Point of Presence |
| Southern Bell | Southern Bell Telephone and Telegraph Company |
| T | Transcript of the Hearing before the FPSC |
| United | United Telephone Company of Florida |
| WATS | Wide Area Telephone Service |

GLOSSARY

This Glossary is provided for the assistance of the reader of this Brief and the Order under review to explain some of the telecommunications industry terms used.

LEC

Local Exchange Company. A local telephone company. Florida has thirteen local telephone companies. United Telephone Company of Florida and General Telephone Company of Florida have intervened in this Appeal.

IXC

Interexchange carrier. A long distance telephone company, such as ATT-C, MCI or Microtel that has authority to provide interexchange telephone service to customers throughout the state.

End User

This term denotes any customer of a telecommunications service, who is not a local telephone company, IXC, reseller, or similar telecommunications business.

Access Service

Communications service provided to an IXC by a local telephone company for origination and termination of toll calls over an IXC's network. Since the local telephone companies have local telephone service facilities in place, the IXCs do not have to provide telephone lines to each of their customers, they "rent" access to their customers over the local telephone companies' facilities.

Access Charge

The compensation paid by an IXC to a local telephone company for access service. Access charges are normally assessed based on the type of access service ordered. Feature Group D service is equal access service which is in the process of being implemented throughout the State. Feature groups A and B are generally referred to as non-premium access and the charge is less for these services than for the feature groups C and D which are referred to as premium access services. Access charges consist of several elements.

Bypass

1) Service bypass - lease from an LEC of private lines or special access dedicated to the lessee for local access to end users.

2) Facilities bypass - use of non-local telephone company facilities for local access to an end user, thus avoiding the use of the local telephone companies' facilities, and charges for use of those facilities, as well as avoiding access charges.

MTS

Message telecommunications service. Standard long distance service.

WATS

A special bulk discounted form of MTS.

Non-Traffic Sensitive Costs

That portion of the cost of facilities used for providing local and toll service to end users that does not vary because of the amount of traffic carried over the facilities (e.g., the cost of a telephone pole). Deloading of NTS costs refers to reducing the portion on NTS costs now included in access charges.

Bill and Keep

Currently all intraLATA toll revenues received by local telephone companies are placed in a pool administered by Southern Bell. The local telephone companies first draw their costs of providing intraLATA toll service from the pool, and then divide any remaining funds in the pool. This pooling system is in the process of being changed to a system in which each local telephone company will bill for use of its intraLATA toll network, and keep the revenues it bills. The exact plan for implementing bill and keep is the subject of an open docket before the FPSC.

STATEMENT OF THE CASE

This case has its origins in Florida Public Service Commission (FPSC) Order No. 12765, issued December 9, 1983. (This Order is contained in the attached Appendix at page A-1) That Order, which originally established the uneconomic access bypass restriction, stated:

In light of the ongoing efforts by this Commission to implement this plan [the access charge plan], we find that the IXCs shall not be permitted to construct facilities to bypass the LECs unless it can be demonstrated the LEC cannot offer the facilities at a competitive price and in a timely manner. (At page 20)

In addition to generic Orders quoted herein, the FPSC has granted certificates of public convenience and necessity to IXCs under Section 364.335, Florida Statutes. These certificates were modified to include a restriction on bypass. Typical of these orders is FPSC Order No. 12788, issued December 17, 1983, to ATT-C. This Order contains language prohibiting ATT-C "from accessing end users (subscribers) for intrastate service other than by interconnection with the local exchange company's distribution facilities unless expressly authorized by Commission." (At page 4, a copy of FPSC Order No. 12788 is included in the Appendix to this Brief at page A-51).

In FPSC Order No. 13750, issued October 5, 1984, the FPSC created toll transmission monopoly areas. The language of that Order contains language on the "competitive price and timely manner" exception worded very much like the bypass restriction of FPSC Order No. 12765. The Order states:

Subject to two exceptions, the Commission finds that there shall be toll transmission

monopoly areas in which the LECs shall be the sole supplier of transmission facilities. Generally, resellers and IXC's may compete with LECs for the provision of toll service to customers within the EAEA only through the use of LEC-provided WATS and MTS. However, an exception will be granted if an IXC does not have facilities with technology in place for screening calls. In such case, the IXC may carry traffic over its own facilities and pay the existing MTS rates to the LEC. A second exception is that if, upon application, an IXC can demonstrate that they [sic] can handle the traffic in a more economical and timely manner, the IXC may use its facilities to carry such traffic without compensating the LECs. (At page 10-11)

The above quoted portions of FPSC Orders Nos. 12765 and 13750 can be interpreted as being unrelated to one another, with Order No. 12765 applying only to restrictions on bypass, and Order No. 13750 applying only to toll monopoly areas; however, the language of the quoted portions of the Orders is very similar when dealing with the "more timely and economically" exceptions. The similarity in language was sufficient to prompt the FPSC on its own motion to clarify its intent.

In FPSC Order No. 13912, issued December 11, 1984, the Commission stated:

A second exception to the LECs' toll transmission monopoly area contained in the second full sentence on page 11 in Order No. 13750, states that ". . . if, upon application, and IXC can demonstrate that they [sic] can handle the traffic in a more economical and timely manner, then the IXC may use its facilities to carry traffic without compensating the LECs." On our own motion we seek to clarify this statement. The intent of this language was to reiterate our bypass prohibition contained in Order No. 12765, which states that IXC's shall not construct facilities to bypass the LECs without first demonstrating to the Commission that the LEC cannot offer the facilities at a competitive

price and in a timely manner. (At page 2)

The next of the series of orders dealing with the bypass restriction, was FPSC Order No. 13934, issued December 21, 1984.

It states:

The bypass restriction contained in Order No. 12765 stated that IXCs shall not construct facilities to bypass the LECs without first demonstrating to the Commission that the LEC cannot offer the needed facilities at a competitive price in a timely manner. This restriction is still appropriate and should be continued until September 1, 1986, when it should be reviewed in conjunction with our review of LEC toll monopoly areas. (At page 13)

FPSC Order No. 16804, on appeal in this case, is the result of the review to be conducted on September 1, 1986. The uneconomic access bypass restriction was separated from the toll monopoly question, and considered by itself in a hearing held on August 18, 1986. FPSC Order No. 16804, retaining the uneconomic access bypass restriction on an interim basis was issued on November 4, 1986. This appeal was filed shortly thereafter.

STATEMENT OF THE FACTS

With the introduction of competitive long distance service in Florida, the FPSC undertook an investigation of where and how providers of long distance service could be accommodated in Florida. These long distance providers, also referred to as interexchange carriers, or IXC's, were involved in providing long distance service over their own facilities, or over resold facilities of existing local and long distance telephone companies.

These IXC's generally do not provide customer to customer service, but instead, use the existing facilities of local telephone companies, also referred to as local exchange companies, or LEC's, to reach or "access" customers. This is generally done by providing access between the customer's location and the IXC's point of presence, or POP, in the customer's general area. The local telephone company's customers can originate and terminate long distance calls using most of the same facilities used for their local telephone service. The LEC's receive access charges as compensation for use of their facilities in originating and terminating intrastate long distance calls carried by the IXC's. These access charges were established by the FPSC in the first phase of Docket No. 820537-TP, and form a part of the FPSC's overall access plan referred to on page 4 of FPSC Order No. 16804.

The FPSC's plan is still in the process of implementation, and several elements, most notably the "deloading" of non-traffic sensitive charges from access charges still need to be accomplished. This deloading is the subject of an open docket at

the FPSC. (FPSC Order No. 18604, at page 5)

In the interim, until implementation of the FPSC's access plan is complete, access charges in Florida are generally acknowledged to be too high. (See, for example, T 18, 96-97, 110) The high cost of access and other factors have caused some telecommunications customers to leave or bypass the telecommunications network or portions of the telecommunications network consisting of the IXCs' networks, and the LECs networks. This bypass takes many forms. (T 135-138) It could be a large stock brokerage firm installing satellite dishes at all its offices to allow direct communication between those offices, thus bypassing both the IXC and LEC networks. It could also be a customer directly connecting itself with the IXCs point of presence and avoiding access charges payable to the local telephone company.

The first bypass example removes the revenues formerly received from bypassing customer from the revenue stream of both the IXC and the LEC. The second bypass example removes the customer from only the LECs revenue stream.

Generally, as a vestige of the days when AT&T provided both local and toll service, prices were structured so toll service, and to some degree, business service, subsidized local and residential service. Much of that subsidization is still present in telecommunications pricing. Such pricing is responsible for the high degree of availability of affordable telephone service, or universal service, that characterizes the telephone system of both Florida and the United States. The loss of a large business customer from the network leaves that customer's share of the

subsidy to be made up by those who remain on the network. (T 136)

The bypass restriction under review on this appeal seeks to prohibit the IXC from building facilities from its point of presence to a customer, thus avoiding the payment of access charges to the local telephone company. It does not prevent the customer from building such facilities, nor does it prevent the first bypass example described above. The FPSC has no jurisdiction over those situations.

The bypass restriction contained in FPSC Order No. 16804 is described in the Order as an interim measure to be in effect only until the FPSC has fully implemented its access plan. (FPSC Order No. 16804, at page 4 and 5) The bypass restriction is subject to the significant limitation that if an IXC files notice that it wants to provide access facilities, and files its costs for providing such facilities, the LEC must then demonstrate that it can provide such access facilities at a lower cost and in a timely manner, or the IXC may then, upon the approval of the FPSC, provide the access facilities. (FPSC Order No. 16804, at page 6) In this manner, the FPSC has assured that it has only prevented uneconomic bypass by the IXCs.

SUMMARY OF ARGUMENT

The Appellants' Brief presents three arguments: 1) No statutory authority exists for FPSC Order No. 16804, 2) FPSC Order No. 16804 interferes with the management discretion of the IXC's, and 3) FPSC Order 16804 is not based on competent substantial evidence.

Statutory authority can be found in either Section 364.335, Florida Statutes (1985), or Section 364.14, Florida Statutes (1985). Each of these statutory sections contains a fundamental policy decision of the legislature, and standards and guidelines sufficient to satisfy the doctrine of non-delegation of legislative authority. Appellants' in their efforts to discredit reliance on Section 364.14, Florida Statutes, based on the case of United Telephone Company v. Florida Public Service Commission, 496 So.2d 116 (Fla. 1986), fail to recognize that the dispute in that case involved a contract between utilities, and the present case involves access to customers. 16 U.S.C.A. Section 824e cited by the Appellants does deal with ratepayer issues; the access to customer issues in this case also affect ratepayers. The federal statute cited also does not contain a subsection equivalent to Section 364.14(2), Florida Statutes, which deals with inefficient practices of telephone companies, such as the uneconomic bypass prohibited by the Order in question.

The management discretion argument of Appellants fails to recognize that all regulation to some degree interferes with management discretion. If such regulation has a statutory basis, which is lawfully delegated, and the FPSC has not failed to

comport with the essential requirements of law, has not acted arbitrarily or capriciously, and has based its Order on competent and substantial evidence, such interference cannot be found to be unreasonable. The management discretion argument by Appellants' continues the lack of concern for the customer and the public interest displayed throughout the Appellants' Brief. Nowhere do the Appellants state that the result they seek will have any benefit for the ratepayer or the public.

The Appellants' competent substantial evidence argument is nothing more than a request to the Court to reweigh the evidence and reach a different conclusion than the FPSC. Ample competent substantial evidence is cited in the Order in question to support the Order, and the record is replete with further evidence to support the Order.

The Order in question should be upheld.

ARGUMENT

POINT I

FLORIDA PUBLIC SERVICE COMMISSION ORDER NO. 16804 IS BASED ON STATUTORY AUTHORITY.

Orders of the FPSC "come before this Court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." General Telephone Co. v. Carter, 115 So.2d 554, 556 (Fla. 1959) (footnote omitted). See also Citizens v. Florida Public Service Commission, 448 So.2d 1024, 1026 (Fla. 1984).

This deference does not apply when the FPSC exceeds its authority. At the outset, the grant of legislative authority to the FPSC must be established. United Telephone Company v. Public Service Commission, 496 So.2d 116 (Fla. 1986).

FPSC Order No. 16804 cites Sections 364.335(4) and 364.14, Florida Statutes (1985), as the underlying statutory authority for the Order.

Section 364.335(4), Florida Statutes, states in part:

(4) The commission may grant a certificate, in whole or part or with modifications in the public interest, but in no event granting authority greater than that requested in the application or amendments thereto and noticed under subsection (1); or it may deny a certificate. The commission shall not grant a certificate for a proposed telephone company, or for the extension of any existing telephone company, which will be in competition with or duplicate the local exchange services provided by any other telephone company unless it first determines that the existing facilities are inadequate to meet the reasonable needs of the public and it first amends the certificate of such other telephone company to remove the basis for competition or duplication of services . . .

Telephone company is defined in Section 364.02, Florida Statutes, as follows:

The term "telephone company," when used in this chapter, includes every corporation, company, association, joint stock association, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, and every city or town, owning, operating, or managing any telephone line or part of a telephone line used in the conduct of the business of affording telephonic communication service for hire within this state . . .

Under Section 364.335(4), Florida Statutes, the FPSC is empowered to issue certificates of public convenience and necessity to telephone companies with modifications of those certificates in the public interest.

Interexchange carriers, such as the Appellants in this case, are telephone companies within the definition of Section 364.02, Florida Statutes, subject to regulation by the FPSC, and required to obtain certificates of public convenience and necessity from the FPSC.

Each of the Appellant IXCs has such a certificate and each of those certificates contains modifying language which prohibits those IXCs from accessing end users for intrastate service other than by interconnection with the local exchange company's distribution facilities unless expressly authorized by the Commission. (See for example, FPSC Order No. 12788, page 4, applicable to AT&T, a copy of which is included in the Appendix to this Brief at page A-51).

The modifying language appearing in the Appellants' certificates can also be found in several FPSC Orders which are

outlined in the Statement of the Case in this Brief. The Appellants made no appeal to this Court when the language requiring interconnection through LEC facilities was included in their Certificates. The Appellants did not appeal FPSC Order No. 12765, which originally imposed the uneconomic access bypass restriction, nor did they appeal the bypass restriction found in FPSC Order Nos. 13750, 13912, or 13934, all of which reaffirmed the uneconomic bypass restriction. If such inaction on the part of the Appellants' does not lead to estoppel at this late date, it at least establishes the presumption that the Appellants found no lack of statutory authority at the time their certificates and the subsequent FPSC Orders listed above were issued. The uneconomic access bypass restriction found in the certificates and FPSC Orders were not appealed for good reason: The FPSC has not been acting without statutory authority.

Section 364.335(4), Florida Statutes, establishes the authority of the FPSC to issue certificates with modifications in the public interest. Such modifications have been made to the certificates of the Appellants. Subsequent FPSC Orders have reaffirmed the modifications. The authority to make the modifications was lawfully delegated by the Legislature to the FPSC with the required standards and guidelines.

The case of Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978), describes the doctrine of non-delegation of legislative power as follows:

Under this doctrine fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative

programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program. (At page 925)

Section 364.335(4), Florida Statutes, quoted above, gives the FPSC authority to modify certificates in the public interest. When dealing with competitive or duplicative service, such as access to end users, Section 364.337, Florida Statutes establishes guidelines for determining whether actions authorized by the FPSC are consistent with the public interest. The FPSC has not relied on any inherent or general authority to regulate public utilities. It has relied on Section 364.335, Florida Statutes, which reflects a fundamental policy decision of the legislature and contains requisite standards and guidelines. See Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189, 1191 (Fla. 1985) (Microtel I). Section 364.337, Florida Statutes, establishes the required minimal standards and guidelines for the FPSC to apply the public interest standard created by the legislature. *Id.*, at 1190-1191.

The requirements of Askew v. Cross Key Waterways, *supra*, have been met by both the Legislature and the FPSC. FPSC Order No. 16804 is supported by statutory authority and that authority has been lawfully delegated.

FPSC Order No. 16804 also relies on Section 364.14, Florida Statutes, for statutory authority. Section 364.14 has two subsections. Subsection (1) is substantially similar to 16 U.S.C.A. Section 824e.

The Appellants argue in their Brief that 364.14, Florida Statutes, applies only to ratepayers, and does not confer

jurisdiction upon the FPSC to impose a bypass restriction on the IXCs. The Appellants rely on the United Telephone, supra, case to support this conclusion.

The decision in the United case was based partly on 16 U.S.C.A. Section 824e, which is a statute outlining powers of the Federal Power Commission. Section 824e(a) states:

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

Section 824e(b) deals with the costs of production or transmission of electrical energy.

United agrees with the Appellants that 16 U.S.C.A. Section 826e(a) applies to rates and practices applied to ratepayers.

The instant case does not involve FPSC interference with a contract between two utilities as did the United case cited above. The case at issue involves access by the IXCs to ratepayers, which falls within purview of Section 364.14(a).¹ If access to

^{1/} Appellants' characterization of their own status changes based on the point they are trying to make. The Appellants deny ratepayer status in their argument concerning the applicability of Section 364.14, Florida Statutes (Appellants' Brief at page 16), but later, to make the point that the FPSC cannot force customers to buy telephone service, they refer to themselves as customers of the LECs (Appellants' Brief at page 22). Since the terms ratepayer and customer are generally used interchangeably, this is particularly confusing and tends to impede a rational analysis of the Appellants' position.

ratepayers by the IXC is achieved in an uneconomic manner, it affects the rates not only of the uneconomically accessed IXC ratepayers, but all ratepayers for telephone service within the State of Florida.

The issue decided by FPSC Order No. 16804 is a rate and ratepayer issue, not a dispute between utility companies. The FPSC has properly relied on Section 364.14(1) as support for FPSC Order No. 16804.

Subsection (2) of Section 364.14, Florida Statutes, states:

(2) Whenever the commission finds that the rules, regulations, or practices of any telephone company are unjust or unreasonable or that the equipment or facilities, or service of any telephone company are inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities, and service to be thereafter installed, observed, and used and shall fix the same by order or rule as hereinafter provided.

The federal statute relied on in the United case cited above, 16 U.S.C.A. Section 826e, does not have a section which is the equivalent of Section 364.14(2), Florida Statutes, quoted above. Section 314.14(2) is not restricted to rate matters, and deals in part with practices of a telephone company which are inefficient or improper.

The FPSC concluded in FPSC Order No. 16804 that access bypass by an IXC where an LEC could provide equivalent service at a competitive price and in a timely manner is uneconomic. (p. 5-6) If it is uneconomic, it is also inefficient and affects the ratepayers, and is within the purview of either subsection of

Section 364.14, and subject to FPSC review.

The uneconomic bypass of LEC access facilities by IXC's for intrastate traffic, is an inefficient and inadequate practice. The FPSC has properly restricted it under the authority of Section 364.14(2), Florida Statutes.

A statutory basis for FPSC Order No. 16804 can be found in either Section 364.335, Florida Statutes or Section 364.14, Florida Statutes.

POINT II

FLORIDA PUBLIC SERVICE COMMISSION ORDER NO. 16804 DOES NOT EXCEED THE STATUTORY AUTHORITY OF THE FLORIDA PUBLIC SERVICE COMMISSION.

Having found in Point I above that FPSC Order No. 16804 is based on statutory authority, the FPSC Order in question must be examined to determine if the FPSC has exceeded the authority granted by the Legislature.

The scope of the FPSC's authority under Section 364.335, Florida Statutes, was examined in the case of Microtel v. Florida Public Service Commission, 483 So.2d 415 (Fla. 1986) (Microtel II). In that case, this Court found that although legislative policy was to encourage competition in the provision of long distance telephone service within the State of Florida, the FPSC had not exceeded its authority by temporarily establishing toll transmission monopoly areas within equal access exchange areas.

In Microtel II, the Court established a three part test, and found the FPSC action was limited in scope, limited in time, and that the toll transmission monopoly areas were in the public interest.

Access to end users is a local service for which no legislative policy encouraging competition can be cited, but even if it is assumed for the purpose of argument, that access is a competitive service, subject to the Microtel II three part test, the uneconomic access bypass restriction passes the test.

The restriction is limited in scope. The restriction limits bypass of LEC access facilities by IXCs only in those cases where the LEC can provide the access in a timely manner and at competitive prices. If an IXC desires to bypass, it need only file a notice of intent to bypass and its cost for the access facilities with the FPSC and the affected LEC. The LEC must then provide its cost to provide the facilities, and the time required to provide them. If the LEC fails to demonstrate it can provide the facilities at a lower cost and in a more timely manner, the IXC, upon approval of the FPSC, may provide the facilities. (FPSC Order No. 16804, page 6)

This procedure insures the most efficient provision of access facilities to the ratepayers. It effectively limits the uneconomic access bypass restriction to those cases in which it is uneconomic to bypass.

The restriction is not a complete ban on bypass by the IXCs. They can still engage in access bypass for interstate traffic which is outside the FPSC jurisdiction. The IXCs can encourage customers who desire a direct connection to the IXC to construct their own facilities; again this is outside the jurisdiction of the FPSC. (T 94, 48) Service bypass, which is using special access facilities in place of switched access to reach an IXC can

also continue to be used. (T 20)

The uneconomic access bypass restriction found in FPSC Order No. 16804 is not a restriction on all bypass of LEC access facilities. It is aimed at only uneconomic bypass of LEC facilities by IXCs subject to regulation by the FPSC. While numerous methods of bypass exist which avoid the bypass restriction, the FPSC should not avoid, and has not avoided, seeking to control those forms of uneconomic bypass over which it can exercise some control.

The uneconomic access bypass restriction is also limited in time. Numerous reference throughout FPSC Order No. 16804 point out that the restriction is an interim measure.

Page 4 of the Order states:

In Order No. 12765, in an effort to provide the LECs with tools to combat bypass, we outlined several mechanisms which we intend to implement within the structure of access charges. These include contract rates for large private line customers, volume discount tariffs rates to large users of both MTS and private line type services, and a flat rate capacity charge to IXCs to encourage off-peak usage of LEC facilities. Recognizing that this access plan would require time to implement and refine, we imposed the bypass restriction as an interim step to protect the LECS during the transition. (Emphasis added)

Page 5 of the Order states:

Upon consideration, we find it appropriate to retain the bypass restriction until we implement an appropriate rate structure for the recovery of MTS costs from IXCs and end users. Therefore, IXCs shall not be permitted to construct access facilities to bypass the LECS unless it can be demonstrated that the LECs cannot offer the access facilities at a competitive price and in a timely manner. (Emphasis added)

Similar language can be found throughout the Order. The Order is limited in time, it is an interim measure until other parts of the FPSC's total access plan can be implemented.

FPSC Order No. 16804 also considers the public interest in retaining the uneconomic access bypass restriction.

Page 5 of the Orders states:

We agree with witness Menard that during this transition to a proper pricing structure for the LECs, the greatest threat to the LECs and the general body of ratepayers is from IXC-provided bypass facilities, and the ability of the IXCs to exploit their economies of scale through aggregation of multiple customer traffic on those access facilities. In his direct testimony, ATT-C's witness, Follensbee, pointed out that consequences of customer-provided bypass: "[W]hen a large customer leaves the network, he's probably gone for good, and everyone losses - the local exchange company, the interexchange company, and the public. The cost burdens mount for those who are left behind." We agree with ATT-C's conclusion as to the effects of customer-provided facilities bypass. However, we decline to lift the bypass restriction to allow the IXCs the opportunity to accelerate facilities bypass and to leave the LECs and the public behind.

Public interest considerations have been duly weighed by the FPSC in formulating its Order No. 16804.

The three part test established in Microtel II has been met in FPSC Order No. 16804. The FPSC has not exceeded its jurisdiction in the Order.

POINT III

FLORIDA PUBLIC SERVICE COMMISSION ORDER NO. 16804 DOES NOT UNLAWFULLY INTERFERE WITH THE MANAGEMENT DISCRETION OF THE INTEREXCHANGE CARRIERS.

Reduced to its essence, Appellants' argument on this point

seems to be that the objective of telecommunications regulation in Florida is to avoid interfering with Appellants' efforts to conduct business in Florida. Thus, the refrain is heard in various forms: it is ". . . the management prerogatives of the utility . . ." which are at stake here. (Appellants' Brief, page 22) The numerous references in Appellants' Brief to their own economic self-interest starkly contrasts with the lack of references to the concerns of the FPSC in restricting bypass: that ". . . the continuation of support by the IXCs for universal service will benefit society as a whole and does not detract from the provisioning of telecommunications services." FPSC Order NO. 16804, at page 4. Concern for the extension and preservation of universal telephone service has been the foundation of national telecommunications policy since enactment of the Communications Act of 1934, 47 U.S.C.A. Section 151, et seq. Appellants analogize the FPSC's effort to restrict uneconomic bypass to specifying from whom the Appellants should buy ". . . typewriters for its secretaries . . ." (Appellants' Brief at page 20), but even a casual reading of FPSC Order No. 16804 makes clear that the FPSC's focus is upon legitimate national and state goals and not upon the trivialities hypothesized by Appellants.

Any form of regulation to some degree interferes with the management discretion of a public utility. Whether that interference is such to render a regulatory order invalid depends on whether or not the agency involved acted within the limits of its statutory authority. Any action within the limits of the agency's statutory authority which comports with the essential

requirements of law, is based on competent substantial evidence, and is not arbitrary and capricious, is a valid action.

The Appellants allege a lack of statutory authority, and that allegation is addressed at Points I and II above. The Appellants also allege that the Order in question is not based on competent substantial evidence and that allegation is addressed at Point IV below. Although not specifically alleged, failure to comport with the essential requirement of law can be implied in the allegation of lack of statutory authority, and lack of competent substantial evidence. Appellants have not alleged that the FPSC has acted arbitrarily and capriciously.

This is not a case where the Appellants had some authority, and the FPSC has prevented them from exercising it. The Appellants in this case have been restricted from the date their certificates were issued from providing uneconomic access bypass facilities. IXC management never had any discretion to exercise in this area. Nor is this a case similar to telling IXCs where to purchase paper, typewriters or cable. This case is concerned with how telecommunications customers will gain access to the telecommunications network of the State, and affects the rates all telecommunications customers in the State will pay for access. The FPSC has statutory authority to regulate such matters, and in this case has reached its conclusion based on competent substantial evidence. In such a case, the actions of the FPSC of necessity, and justifiably, must "interfere" with management discretion, if such discretion would have encompassed uneconomic bypass.

FPSC Order No. 4137 rendered in the General Telephone Company of Florida rate proceeding in Docket No. 7766-TP, and cited by the Appellants at page 21 of their Brief, states that it is a principle that all regulated utilities should operate with all reasonable economies. The FPSC also stated in that order that they did not construe that principle as "giving regulation carte blanche authority to supercede management's action or inaction on the simple assertion that by doing so some reduction can be effected in the cost of service." (Emphasis added)

What is present in the case at issue is much more than a simple assertion. Every LEC in the State was a party to the proceeding, and took the position that harm to them and to the public would result from removal of the bypass restriction before other elements of the overall access plan of the FPSC had been resolved. (FPSC Order No. 16435, the Prehearing Order in this Docket, at pages 3-6, attached in the Appendix to this Brief at page A-87) The Public Counsel of the State expressed similar reservations. (FPSC Order No. 16435, pages 8-9) Even ATT-C witness, Follensbee, as quoted in Point II above, expressed some concern at the effects of bypass on LECS, IXCs and the public. (T-136) This is hardly analogous to the "simple assertion" the FPSC faced in Docket No. 7766-TP, which resulted in the Order relied upon by the Appellants.

The case of Florida Power and Light Co. v. Florida Public Service Commission, 471 So.2d 526 (Fla. 1983), cited by the Appellants does not appear in the Southern Reporter, Second Series. A note on page 526 of volume 471 indicates that the

opinion was withdrawn from the bound volume at the request of the Court, and that the case was voluntarily dismissed.

POINT IV

**FLORIDA PUBLIC SERVICE COMMISSION ORDER NO.
16804 IS BASED ON COMPETENT SUBSTANTIAL
EVIDENCE.**

When submitted for appellate review, FPSC Orders are clothed with a presumption of validity. Florida Power Corporation v. Mayo, 203 So.2d 614, 615 (Fla. 1967) This Court has only to determine whether the FPSC's action comports with the essential requirements of law and is supported by competent substantial evidence. The burden is on the Appellants to overcome the presumption of correctness attached to orders of the FPSC. Pan Am World Airways v. Florida Public Service Commission, 427 So.2d 716, 717 (Fla. 1983)

It is not this Court's responsibility to reweigh the evidence in reviewing the FPSC order. Southern Bell Telephone and Telegraph Co. v. Florida Public Service Commission, 443 So.2d 92, 95 (Fla. 1983) It is the FPSC's prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems necessary. United Telephone Co. v. Mayo, 345 So.2d 648, 654 (Fla. 1977), and Gulf Power Co. v. Florida Public Service Commission, 453 So.2d 799, 805 (Fla. 1984).

This Court may not substitute its judgment for the FPSC's action taken within the statutory range of discretion. Gulf Power, supra at 805.

Competent substantial evidence is defined as:

Substantial evidence has been described as such evidence as will establish a substantial

basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceeding the formalities in the introduction of testimony common to courts of justice are not strictly employed We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent". . . . DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957)

With these guidelines in mind, an examination of Order No. 16804, and the record reveals more than ample competent substantial evidence to support the FPSC's conclusions.

As is usual in generic hearings of this type before the FPSC, several witnesses testified and took different and conflicting positions. It is the FPSC's responsibility to weigh this testimony and reach a conclusion. The FPSC has fulfilled its responsibility in FPSC Order No. 16804.

The record contains numerous examples of the type of competent substantial evidence relied upon by the FPSC. FPSC Order No. 16804, at pages 4-6, cites the testimony of several witnesses.

The Appellants argue only that the testimony opposing their point of view is "nothing more than speculation, conjecture, and opinion evidence without factual support" (Appellants' Brief at page 23), while the testimony of their own witness is "factual" and has been "inexplicably disregarded" by the FPSC. (Appellants' Brief at page 24)

A review of the record reveals nothing to elevate the quality of Appellants' evidence over that of the other parties to the Docket.

One of the Appellants' own witnesses, ATT-C witness, Follensbee, gave significant testimony which is cited in FPSC Order No. 16804, and relied upon by the FPSC. Mr. Follensbee testified that "when a large customer leaves the network, he's probably gone for good, and everyone losses - the local exchange company, the interexchange carrier, and the public. The cost burdens mount for those who are left behind." (T 136, FPSC Order No. 16804 at page 6) (Emphasis added). Mr. Follensbee further stated that "Customers, not IXCs, ultimately pay the price of uneconomic access . . ." (T 140) These statements are essential to the FPSC's finding that lifting of the bypass restriction will allow the IXCs to accelerate facilities bypass and leave the public behind. (FPSC Order No. 16804, at page 6)

The record also contains numerous statements by LEC witnesses indicating that the prices users are charged for use of the local network have not yet been properly structured by the FPSC. (See, Denton - T 14, Moeller - T 83, Menard - T 88-89, and Griffin - T 110) IXC and other witnesses also referred to the work yet to be done to properly structure access pricing. (See Follensbee - T 135, Ball - T 200-201, and Johnson - T 223)

The lack of proper pricing affects the ability of the LECs to offer facilities at competitive prices, and requires protection from uneconomic bypass until such prices are properly structured. The above cited references to the transcript are but a few of

the many references in the record which support the conclusions reached in FPSC Order No. 16804. The Appellants are merely asking that the evidence be reweighed and the matter decided in their favor. As the cases cited above indicate, it is not the responsibility of this Court to reweigh the evidence, it need only to review the record to determine if the findings and conclusions of the FPSC are based on competent substantial evidence. In this case, ample competent substantial evidence can be found to support FPSC Order No. 16804 by a review of the record. FPSC Order No. 16804 should be upheld.

CONCLUSION

The FPSC has acted in accordance with statutory authority lawfully delegated to it with required standards and guidelines. The action of the FPSC is in the public interest, and does not unreasonably interfere with management discretion.

The findings and conclusions of the FPSC in Order No. 16804, are based on competent substantial evidence in the record. The evidence was not uncontroverted, but it is the FPSC's responsibility to evaluate conflicting testimony and accord whatever weight to the evidence it deems appropriate. This Court should not reweigh the evidence and substitute its judgment for that of the FPSC when the FPSC has acted within its statutory range of authority.

Respectfully submitted this 9th day of March, 1987.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of United Telephone Company of Florida was served by hand-delivery or U.S. Mail on this 9th day of March, 1987, to the following:

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