

IN THE SUPREME COURT OF FLORIDA

AT&T COMMUNICATIONS OF THE)
SOUTHERN STATES, INC., et al.,)

Appellants,)

v.)

JOHN R. MARKS, et al., in the)
official capacity as and constituting)
the FLORIDA PUBLIC SERVICE COMMISSION,)

Appellee.)
_____)

CASE NO. 69,732

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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GLOSSARY

1. LEC: Local Exchange Company. A local telephone company, such as Southern Bell or Centel, that provides local telephone service in its franchise area on a monopoly basis, and that also provides some long distance service.

2. Interexchange Service: Long distance (toll) telephone service.

3. IXC: Interexchange Carrier. A long distance telephone company, such as AT&T or MCI, that has authority to provide interexchange service to customers throughout the state on a competitive basis.

4. Access Service: The service sold by a LEC to an IXC which enables telephone customers to place long distance calls using the IXC. Different qualities of access service are available at different prices.

5. Bypass Restriction: A prohibition which prevents an IXC from constructing facilities designed to provide a direct link between an IXC and a customer, which duplicate facilities provided by a LEC.

STATEMENT OF THE FACTS

Appellants are certificated IXCs which are restricted by their certificates and by Florida Public Service Commission (PSC) Order No. 16804 from constructing facilities which would provide direct link to customers. This restriction is known as a "bypass restriction," because if allowed, the IXCs facilities would bypass and duplicate the facilities of the local exchange company.

In a series of orders, the most recent of which is Order No. 16804, the PSC has reconsidered the restriction, and continued it in each instance, while noting that the restriction is a transitional measure, designed to allow the PSC time to correctly design access rate structures.¹

Appellants object to the restriction and bring this appeal.

¹At least three current PSC dockets will directly affect access charges: Docket No. 850310-TL, Implementation of Local Exchange Company Toll Bill and Keep; Docket No. 820537-TP, Intrastate Telephone Access Charges for Toll Use of Local Exchange Services; and Docket No. 860984-TP, Investigation into Non-traffic Sensitive Cost Recovery.

STATEMENT OF THE CASE

The PSC has included a bypass restriction in the authority given to the certificate holders in all interexchange carrier (IXC) certificates issued to date. In addition, in Order No. 12765, issued December 9, 1983, the PSC ordered that the IXCs would not be permitted to construct facilities to bypass the local exchange company's (LEC's) access facilities unless it could be demonstrated that the LEC could not provide access facilities at a competitive price and in a timely manner.² Thereafter, in Order No. 13934, issued December 21, 1984, the PSC reaffirmed the bypass restriction. The PSC stated that this restriction should be continued for an interim period until September 1, 1986, when it should be reviewed in connection with the PSC's review of LEC toll transmission monopoly areas.³ After appropriate notice, the PSC, on August 18, 1986, conducted a hearing directed to the issue of whether the bypass restriction certificate modifications should remain. Order No. 16804 which provided a continuation of the restriction is the result of that hearing. From this Order, an appeal ensued.

²PSC Order No. 12765, Docket No. 820537-TP, p. 20.

³PSC Order No. 13934, Docket No. 820537-TP, p. 13.

SUMMARY OF ARGUMENT

AUTHORITY

The Public Service Commission has power to grant authority for the operations of interexchange carriers' services consistent with the public interest. Section 364.335(4), Florida Statutes, directs the PSC to grant certificates "with modifications in the public interest." The PSC has determined that IXCs bypassing the local exchange network is not consistent with the public interest. The public interest standard of section 364.335(4), Florida Statutes, is determined by reference to the legislative intent of the statute as a whole.

EVIDENCE

Order No. 16804 is supported by competent and substantial evidence. Although the IXCs presented evidence suggesting that the bypass restriction was not sound, other parties presented evidence that the bypass restriction was desirable and necessary to promote the public interest pending the continuing transition in the telecommunications industry. Appellants present this Court with the same factual argument that they made to the PSC. The PSC considered that argument and evidence as well as the arguments and evidence of other parties. On the basis of competent and substantial evidence, the PSC concluded that the bypass restriction should be continued because allowing bypass of local exchange facilities is contrary to public interest. The conclusion of the PSC is supported by competent and substantial evidence; this Court should affirm the decision of the PSC and let Order No. 16804 stand.

POINT I

THE PSC MAY GRANT CERTIFICATE APPLICATIONS IN WHOLE OR IN PART WITH MODIFICATIONS AND RESTRICTIONS APPROPRIATE TO THE PUBLIC INTEREST.

The PSC is a creation of the Legislature given powers to regulate the utility industry in Florida. With respect to restricting IXCs from bypassing the facilities of LECs, the authority is found in section 364.335(4), Florida Statutes:

The commission may grant a certificate, in whole or in 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 an 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. (emphasis added)

§364.335(4), Fla. Stat. (1985).

The PSC has granted each of the Appellants a certificate authorizing operations as a telephone company in this state. Among several other modifications to this authority, the PSC has conditioned each certificate to restrict each IXC from bypassing the facilities of the LECs. Because this restriction serves the public interest, it is a lawful modification of the certificates.

The public interest standard of the restriction is neither roving nor catchall; if Appellants believe so, they disagree with a recent pronouncement of this Court: In Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189, 1191 (Fla. 1985), this Court held that the fundamental and primary policy decision--that competition be permitted in long distance telephone service to the extent it is consistent with the public interest--was a decision reached by the Legislature with the implementation left to the PSC. Standards and guidelines for that implementation, according to Microtel, are to be found in section 364.335(1), Florida Statutes.

In section 364.335(4), Florida Statutes, the Legislature expressed another fundamental and primary policy decision: that there should be no competition in the provision of local exchange services. It falls to the PSC, armed with its expertise, to determine what of Appellants' activities would be in competition or duplicate local service or impact local service such that it is not in the public interest to permit the activity. As this Court said in Microtel:

In implementing this policy decision, the legislature is obliged by the nondelegation doctrine to establish adequate standards and guidelines. Subordinate functions may be transferred by the legislature to permit administration of legislative policy by an agency with the expertise and flexibility needed to deal with complex and fluid conditions. State, Department of Citrus v. Griffin, 239 So.2d 577 (Fla. 1970). Otherwise, the legislature would be forced to remain in perpetual session and devote a large portion of

its time to regulation. Id. "Obviously, the very conditions which may operate to make direct legislative control impractical or ineffective may also, for the same reasons, make the drafting of detailed or specific legislation impractical or undesirable. Id. at 581."

Id. at 1191.

Furthermore, in answer to Microtel's argument that the public interest standard of section 364.335(4), Florida Statutes, falls short of required legislative standards, this Court said,

The clear legislative intent to foster competition also illuminates the public interest of section 364.335(4). We are of the opinion that adequate standards and guidelines are provided in this statute in light of the legislative objective to bring competition into this business area which had not heretofore existed.

Id. at 1191.

While the Legislature intended to permit competition in long distance service, it had no similar intent with respect to local services. The public interest standard of section 364.335(4), Florida Statutes, is illuminated not only by the legislative intent to allow competition in long distance service, it is equally illuminated by the legislative intent to keep local services free from competition.

The commission shall not grant a certificate for a proposed telephone company, or for the extension of an existing telephone company, which will be in competition with or duplicate the local exchange services provided by any

other telephone company (unless it makes findings of inadequacy).

§364.335(4), Fla. Stat. (1985).

The hearing conducted by the PSC culminating in Order No. 16804 was designed to ascertain whether and to what extent lifting the bypass restriction would impact upon local services and whether it should continue. Because the clear legislative intent is to introduce competition into services other than local, the extent to which IXC operations impact upon local service is the central question as to whether the public interest is served.

The notion that courts and agencies should look to the purposes of legislation to give definitive meaning to "public interest" also is well-settled in the federal system. The U.S. Supreme Court, speaking to the question, said:

This court's cases have consistently held that the use of the words "public interest" in a regulatory statute is not a broad license to promote the public welfare. Rather, the words take meaning from the purposes of the regulatory legislation. (emphasis added)

NAACP v. Federal Power Commission, 425 U.S. 662, 669 (1976).

Far from being roving or catchall, the public interest standard of section 364.335(4), Florida Statutes, is a reflection of the purposes of the entire act. The Legislature did not intend to allow competition in the provision of local exchange services, and to the extent that IXC bypass of LEC facilities would compete

with or duplicate local service facilities, it is contrary to the public interest. The PSC has acted upon statutory authority.

Finally, Appellants' argument that the IXCs are forced by the PSC to buy LEC service is nonsensical. The PSC's regulation of IXCs controls what services can be offered by the IXCs--not what services can or cannot be purchased by the IXCs. The modifications to the certificates of which Appellants complain do not dictate purchases and do not dictate management prerogatives.

POINT II

THE COMMISSION'S ORDER RETAINING THE BYPASS RESTRICTION IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.

Judicial review of PSC orders is limited to whether the PSC's action complies with the essential requirements of law and whether the findings of fact are supported by competent and substantial evidence. Surf Coast Tours, Inc. v. Florida Public Service Commission, 385 So.2d 1353 (Fla. 1980); Kimball v. Hawkins, 364 So.2d 463 (Fla. 1978).

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. Duval Utility Co. v. Florida Public Service Commission, 380 So.2d 1028, 1031 (Fla. 1980); De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957).

As is frequently the case in PSC proceedings, the Commission benefitted from the opinions of a number of experts in their fields who, predictably, did not agree as to whether the bypass restriction serves the public interest. Their opinions tend to be aligned closely with the interests of their employers. Each cites studies and relevant data to support all conclusions.

The PSC is frequently called upon to consider the conflicting opinions of experts and reach conclusions therefrom. This Court has approved the principle:

The PSC was confronted with competing testimony from Gulf and the commission staff regarding what is to be a reasonable coal inventory. It is the PSC's prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems necessary. See United Telephone Co. v. Mayo, 345 So.2d 648, 654 (Fla. 1977). Although the PSC rejected both Gulf's 60-day nameplate policy and the staff's 90-day projected burn level as necessarily proper, it was presented with sufficient evidence to enable it to choose a reasonable alternative.

Gulf Power Company v. Florida Public Service Commission, 453 So.2d 799, 805 (Fla. 1984).

After careful consideration, the PSC found that the weight of the evidence dictated a continuation of the bypass restriction. This Court need not weigh the evidence to find a preponderance; it need only to look for substantial and competent evidence which supports the conclusion of the PSC.

As this Court stated in Pan American Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983):

We have only to determine whether the PSC's action comports with the essential requirements of law and is supported by substantial competent evidence. Florida Telephone Corp. v. Mayo, 350 So.2d 775 (Fla. 1977). The burden is upon appellants to overcome the presumption of correctness attached to orders of the PSC.

At 717.

One particularly important notion which was held by each witness testifying was the transitional state of telecommunications in Florida. As first stated by Southern Bell's witness Denton:

The main reason for the restriction was to help prevent the loss of LEC revenue until such time as effective rate structures for access, toll and private line services could be developed to counter the threat of uneconomic bypass. Although some rate structure changes have been implemented, there are still other changes that need to be made to better satisfy the Commission's intent to eliminate the price distortions that foster uneconomic bypass, such as those caused by the current method of non-traffic sensitive (NTS) cost recovery.

(Tr. 14.)

The necessity of retaining the bypass restriction during the evolution of access charges is supported by competent and substantial evidence: Witness Denton said that it should be continued (Tr. 14, 21, 67, and 79); Central Telephone's witness Moller agreed (Tr. 83). General Telephone's witness Menard put it especially well in the summary of her testimony:

Q (By Mr. Parker) Do you have a summary of your testimony at this time?

A (Witness Menard) Yes, I do. It is General Telephone Company's position that the bypass restrictions should be extended. We acknowledge that there is a pricing problem that causes the need for the bypass restriction and we acknowledge that the Commission has no jurisdiction over end users providing their own bypass facilities. However, we think the threat on the bypass is much greater by the IXC carriers who can get additional economies of scale by adding customers to those facilities and, therefore, we think the threat is worse from the IXC's than end users.

(Tr. 94.)

United Telephone's witness Griffin presented the same view and stated further that the lifting of the bypass restriction would cause financial harm to the LECs, IXCs and end users as well. (Tr. 111.)

Appellants' evidence merely stated their dislike for access charges and for the bypass restriction. Appellants' witnesses ventured speculation, conjecture, and opinion without factual support. In addition, Appellants fail to recognize that the bypass restriction is an interim measure. AT&T's witness Follensbee noted that the bypass restriction "must ultimately fail because it does not address the real problem, which is the pricing of exchange access services substantially above costs." (Tr. 135.) The bypass restriction was never intended to ultimately succeed: it is an interim measure.

The testimony by witnesses Menard, Denton, and Moller advances the position that the bypass restriction is necessary because access to the local network, in their opinion, is priced too high, thus encouraging IXCs to bypass. However, the reduction of access charges and permitting bypass both have the potential for significant adverse effects to local ratepayers. If access charges are reduced, local charges will have to increase to make up the revenue loss. If access charges are lost through the bypass, local rates will likewise have to increase to make up the revenue loss.

The LECs' advocacy of decreasing access charges to counter bypass, and the IXCs' desire to bypass is pursued at the expense

of the local ratepayers. The PSC recognized this in its decision to restrict bypass until such time as an equitable balance can be reached as to costs to be borne by local ratepayers and costs to be borne by IXCs through access charges.

The bypass restriction is not intended to function indefinitely. It is intended to serve during the time required for correct design of access charges. Appellants would not only like to bypass the facilities of the LEC, they would like to bypass the process as well. The provision of long distance service was restricted to one company for more than a hundred years. The advent of competition into this market calls for a cautious weighing of the interests of the parties, including the ratepayers of our state. The Commission is acting within its legislative grant of authority to protect the public interest. The Appellants seek the right to duplicate the service facilities of the LECs which, from evidence presented at hearing, would raise local rates to the detriment of the rate paying public. The Appellants want to cream skim with impunity from the LECs--the only entities in this case with an enforceable obligation to serve all local exchange customers. Having failed to persuade the Commission, they turn now to this Court.

CONCLUSION

This Court in Microtel approves the jurisdictional standards and the public interest standard of section 364.335, Florida Statutes. In this case, the PSC has certificated each of the Appellants, restricting each of them from providing facilities to bypass local exchange service facilities. In so doing, the PSC has acted within its jurisdiction and has applied the public interest standard previously approved by this Court.

The Appellants' testimony shows that the IXCs would like the PSC to move much faster toward full competition in all aspects of telecommunications without regard to the effect on local ratepayers. The Appellants would like the PSC to ignore the impact upon the ratepayers in the state, but this the PSC cannot do. The PSC is charged with the duty of regulating in the public interest. To the extent that PSC actions promote the business interests of Appellants, Appellants naturally enough agree. To the extent that the PSC declines to promote their interests at the expense of the general body of ratepayers in this state, Appellants object. Although the unquestioned thrust in communications in Florida is to provide additional competition and consumer choice in the long distance marketplace (with appropriate statutory exception for local services) the focus is not to enrich the various telephone companies. Quite to the contrary, as this Court stated in Microtel: "[T]his statute is intended to protect consumers, not the telephone companies." Supra at 1192.

Upon the receipt of competent and substantial evidence, the PSC found that the continuation of the bypass restriction serves an identifiable public interest. Having been provided the statutory authority to order the restriction, the PSC must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 4th day of March, 1987 to the following:

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