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## Statement of Case and Facts

This appeal relates to the Florida Public Service Commission's ("PSC") decision to restrict the certificated interexchange carriers ("IXCs") from providing their own access facilities to connect their customers with their interexchange long distance transmission systems. Appellants are IXCs that are directly impacted by the PSC's decision, and challenge the PSC's authority to impose the bypass restriction.<sup>1</sup> Appellants also seek reversal of Order No. 16804 on the basis that it is not supported by competent substantial evidence.

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.<sup>2</sup> Thereafter, in Order No. 13934, issued December 21, 1984, the PSC reaffirmed the bypass restriction, but 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.<sup>3</sup> In Order No. 16804, issued November 4, 1986, the PSC decided to maintain the bypass restriction.

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<sup>1</sup> Appellants are AT&T Communications of the Southern States, Inc., ("AT&T"), MCI Telecommunications Corporation ("MCI") and MICROTEL, Inc. ("Microtel").

<sup>2</sup> Florida PSC Order No. 12765, Docket No. 820537-TP, p.20.

<sup>3</sup> Florida PSC Order No. 13934, Docket No. 820537-TP, p.13.

The PSC contends that the alternate access restriction, which is commonly called "the bypass restriction" and has the effect of requiring the IXCs to purchase all of their access requirements from the LECs, is necessary in order to maintain universal service and to protect the LECs' revenues.<sup>4</sup> At the same time, this bypass restriction does not apply to customers/end users who may provide their own access facilities which bypass the LEC access facilities. Indeed, the LECs have been encouraged by the PSC to establish special contract rates for customers who have evidenced an intent to provide their own access facilities.<sup>5</sup> These customer provided access facilities may be connected either to the IXC's interexchange service and facilities ("point of presence" or "POP"), or to private interexchange facilities owned by the customer. (See illustration on following page.)

Access facilities and bypass are recent developments in the telecommunications industry. Prior to the introduction of competition into the provision of long distance telephone service, the LECs, either jointly or individually, provided all end-to-end long distance telephone service within the State of Florida. That is, a long distance call originating from a customer's business or residential premises was carried over a local phone line (also known as a local loop) to a local switch and thence to a toll switch. These local facilities are now also

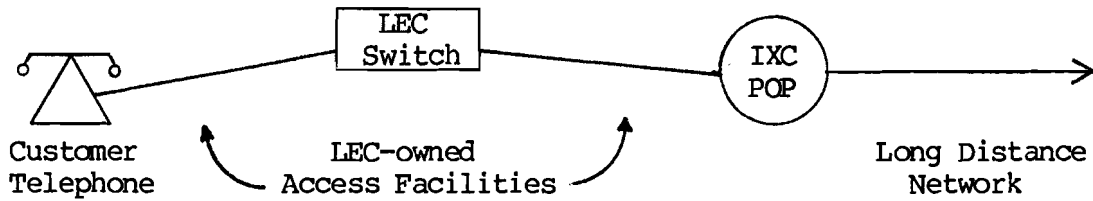
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<sup>4</sup> Order No. 16804, at p.4.

<sup>5</sup> Florida PSC Order No. 12765, Docket No. 820537-TP, p.20.

LOCAL EXCHANGE COMPANY-PROVIDED ACCESS

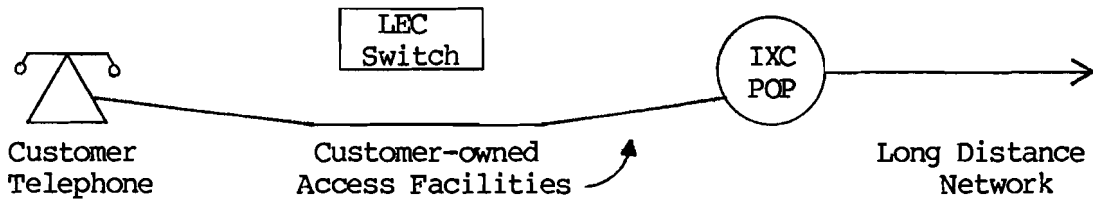
o typical access arrangement



IXC pays access charges to LEC for use of LEC access facilities.

CUSTOMER-PROVIDED ACCESS (BYPASS)

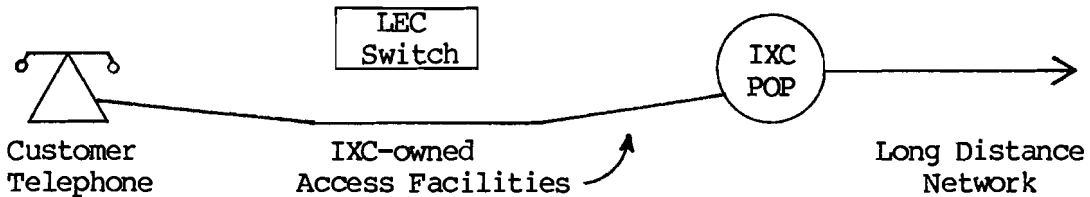
o admittedly outside PSC jurisdiction



Customer owns access facilities. No access charges paid to LEC.

IXC-PROVIDED ACCESS (BYPASS)

o prohibited by PSC order



IXC owns access facilities. No access charges paid to LEC.



termed "access facilities". From the toll switch the call was connected to LEC-owned toll transmission facilities connecting other toll switches serving other local exchange areas within the state of Florida. Upon delivery to the appropriate terminating toll switch, the call then was carried over local facilities for delivery to the called number. The terminating toll switch and local facilities would be owned by the same LEC that handled the call origination (intracompany), or by another LEC (intercompany).

Compensation for intercompany toll traffic was handled through a toll settlements arrangement in which all Florida LECs participated. Under this arrangement, all long distance toll revenues generated by long distance calls within the State of Florida -- both intercompany and intracompany -- were pooled, and then distributed to each LEC according to a formula that took into account the individual LEC's investment in facilities and expenses assigned to the toll service, plus a rate of return.

The rates for toll calls were uniform, regardless of the point of origination or the LEC handling the origination and termination of the call. These toll rates were set by the PSC at a level which greatly exceeds the direct costs of transporting the long distance calls. The purpose behind the inflated toll rates was to provide a subsidy from the toll users to support low local exchange rates. This process of subsidy became known as support for "universal service". "Universal service" embodies the concept that all consumers who wish to have local telephone service should not be prevented from having service because of

price. To date, the PSC has concluded that in order to have universal service local rates must be held below cost for all consumers, regardless of the individual consumer's ability to pay. In other words, toll users have been required by the PSC to pay more than the economic cost of making toll calls so that the rates for all local exchange customers can be held below the actual cost of providing local exchange service.

Upon the introduction of long distance toll competition, and the divestiture of the Bell operating companies from AT&T, certain toll routes within the state of Florida became the market for the newly certificated IXCs. The IXCs filed their own toll tariffs, collected their own revenues, and were not made parties to the toll revenue pooling arrangement. In response to this very fundamental change in the handling of toll revenues, the PSC instituted access charges for compensating the LECs for interconnecting the IXC with its customer, and, more importantly, for maintaining the toll subsidy. Thus, through access charges, the PSC sought to maintain a business-as-usual arrangement in so far as making a pool of revenues available to support the rates for local exchange services.

It became quite clear, however, that because access charges exceed the economic cost of providing access, the IXC's toll rates, which must cover access charges, are also set at an inflated level. Hence, there is pressure by the larger toll users to find less costly ways of providing access in the hopes of receiving lower toll charges. This threat of bypass, which is driven in the first instance by the customer's desire to only pay

toll rates that reflect economic costs, triggered the PSC's efforts to combat bypass.<sup>6</sup> In the face of this "threat of bypass", and the resultant potential loss of a subsidy flowing from toll revenues to the local exchange services, the PSC determined that the IXCs, who the PSC concluded were the predominant source of potential bypass, must purchase all of their access requirements from the LECs. The mechanism used by the PSC to achieve this result was to restrict the IXCs from providing their own access facilities to reach their customers.<sup>7</sup> While imposing such a restriction on the IXCs, the PSC concluded it has no authority to impose a similar restriction on customers.<sup>8</sup>

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<sup>6</sup> Fla. PSC Order No. 13934, p.13.

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In addition to its Orders in the access charge proceedings (Docket No. 820537-TP), the PSC also has issued orders in connection with the IXCs' certification proceedings imposing the same bypass restriction. For example, in Order No. 12788, which granted AT&T its certificate of convenience and necessity, the PSC stated:

The changing environment of the telecommunications industry has raised concerns about the interexchange company bypassing the local exchange company to provide interexchange service. We know bypass is a concern; we do not know the possible extent of bypass or the cost of bypass. Since there are so many unknowns, we find it appropriate to prohibit AT&T from accessing end users (subscribers) for intrastate service other than by interconnection with the local exchange company's distribution facilities, unless expressly authorized by the Commission. AT&T must advise the Commission when in a particular market it appears more economical to construct bypass facilities than to interconnect with the facilities of the local exchange company. The Commission will then analyze the bypass proposal for acceptance or rejection.

Order No. 12788, p. 4.

<sup>8</sup> Hearing Transcript, Docket No. 820537-TP, August 18, 1986, p. 41-42.

It is generally recognized that the threat of bypass can be reduced by setting access charges at a level that eliminates the subsidy element.<sup>9</sup> The PSC, however, has consistently rejected any ratemaking alternative that would remove the subsidy element and replace it with a charge which results in an increase in local subscriber rates.<sup>10</sup> This reluctance to remove the subsidy element from access charges allegedly is based on the PSC's concern that if the subsidy flowing from toll rates is eliminated or reduced, local exchange rates will have to be increased by a commensurate amount, thereby jeopardizing the PSC's view of universal service. Yet, evidence has never been presented in any of the hearings in which access charges and the bypass restriction have been considered that removing the subsidy element from access charges will necessarily jeopardize universal service.

When the bypass restriction was first imposed on the IXCs in Order No. 12765, AT&T, MCI and Microtel requested reconsideration of the PSC's bypass restriction on the basis that it was an artificial and ineffectual reaction to the threat of bypass. The PSC denied reconsideration of the bypass facilities restriction, noting that the restriction "is only an interim measure at this point", and stating that "an investigation of

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<sup>9</sup> Fla. PSC Order No. 16804, p.5.

<sup>10</sup> Fla. PSC Order No. 12765, p. 20.

bypass and the development of a different rate structure are under way."<sup>11</sup>

Thereafter, the bypass restriction was addressed by the PSC in Order No. 13934, in which the PSC concluded that,

"This restriction is still appropriate and should be continued until September 1, 1986, when it should be reviewed in connection with our review of LEC toll transmission monopoly areas."<sup>12</sup>

At the hearings held in August, 1986, on the sole issue of whether the bypass restriction ought to be continued, the evidence developed during the two days of testimony showed that the bypass restriction applies only to IXCs, yet bypass takes place today. (Follensbee, Tr. 137-139; Denton, Tr. 16.)<sup>13</sup> The principal source of bypass is the customers themselves and they have the technology and skills available to them to bypass not only the local exchange network but also the IXC's facilities as well. (Follensbee, Tr. 136-138; Denton, Tr. 17) In addition, because there is no interstate restriction on bypass, the IXCs are bypassing the local exchange network with facilities that handle jurisdictionally interstate traffic and services. (Denton, Tr. 15, 48, 55.) Finally, the LECs themselves are actively engaging in bypass of themselves, as well as other LECs. (Cronon, Tr. 174-178.) But, there is no evidence that the level of bypass occurring in Florida, where IXCs are restricted,

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<sup>11</sup> Fla. PSC Order No. 13091, pp. 5-6.

<sup>12</sup> Fla. PSC Order No. 13934, p. 13.

<sup>13</sup> All transcript references are to the hearing held on August 18, 1986, in FPSC Docket No. 820537-TP.

is any lower than or different from the bypass occurring in the many other jurisdictions where no such restrictions exist. (Follensbee, Tr. 140; Menard, Tr. 99-100.)

In its Order No. 16804, the PSC rejected the IXCs' contentions that the bypass restriction is inefficient and ineffective because it does not prevent customer provided facilities bypass, and because it fails to address the root cause of bypass, which is the high price of switched access, stating:

"Upon consideration, we find it appropriate to retain the bypass restriction until we implement an appropriate rate structure for the recovery of NTS 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.

From the outset of this docket we have recognized that proper pricing is the correct tool for combating uneconomic bypass. The lack of proper pricing affects the ability of the LECs to offer facilities at competitive prices. However, as we have continuously stated, an effective access charge plan with the proper pricing and structure requires a substantial amount of time to design, implement and refine. It was because of this time-lag that we imposed the bypass restriction."<sup>14</sup>

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<sup>14</sup> Fla. PSC Order No. 16804, p. 5.

## SUMMARY OF ARGUMENT

The PSC is without authority to require the IXCs to purchase all of their access requirement from the LECs by restricting the IXCs from providing their own access facilities for interexchange long distance purposes. Because it is a creature of the Legislature, the PSC only has such authority as is specifically granted to it by the Legislature. There is no general regulatory power which the PSC can rely upon to act in areas for which it has no specific statutory authority.

The PSC has not been given authority pursuant to Section 364.14, Florida Statutes, to use its ratemaking powers to require a customer to obtain a tariffed service from a regulated carrier when the customer can provide the service itself. This lack of authority also applies when the customer is an IXC. The fact that the IXC and the LEC are both entities subject to the jurisdiction of the PSC does not overcome the lack of specific statutory authority.

Likewise, the Legislature has not given the PSC authority, pursuant to Section 364.335(4), Florida Statutes, to limit or restrict the certificates of interexchange carriers in whatever fashion the PSC deems appropriate in the name of the public interest. The PSC is limited to modifying certificates only to the extent necessary to meet specifically identified regulatory requirements, and only to the extent that the PSC has been granted authority elsewhere in the statutes to do so.

Finally, assuming, arguendo, that the PSC has the requisite statutory authority to impose the bypass restriction on the IXCs, contrary to the PSC's assertion that the bypass restriction is in the public interest, there is no competent substantial evidence supporting the PSC's contention that the bypass restriction is either necessary to maintain universal service or has been effective in lessening the threat to universal service. In particular, there is no basis in the record to justify singling out IXCs for unequal treatment, and imposing on them a restriction that does not apply to any other player.



ARGUMENT

- I. THE FLORIDA PUBLIC SERVICE COMMISSION HAS NO STATUTORY AUTHORITY TO PROHIBIT CERTIFICATED INTEREXCHANGE CARRIERS (IXCs) FROM PROVIDING THEIR OWN FACILITIES TO ACCESS THEIR CUSTOMERS, OR TO REQUIRE IXCs TO PURCHASE ALL OF THEIR ACCESS REQUIREMENTS FROM THE LOCAL EXCHANGE CARRIERS.

By imposing the bypass restriction on the IXCs, the PSC is regulating the IXCs in a manner which has not been authorized by the Florida Legislature.

- A. The PSC Is A Creature Of The Legislature And Has Only Such Power As Is Specifically Delegated To It.

Despite its self-proclaimed public interest authority, the PSC has no inherent or general authority to regulate the public utilities beyond that which is specifically granted to it by the Legislature. It is settled law that the PSC, as a creature of statute, has only such authority as is conferred by statute. Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So.2d 577 (Fla. 1964). Moreover, any reasonable doubt as to the lawful existence of a particular power must be resolved against the exercise thereof. As this Court has held,

"[T]he Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State. . . . Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, . . . and the further exercise of the power should be arrested . . .  
. The Legislature of Florida has never conferred upon the Public Service Commission any general authority to regulate public utilities."

City of Cape Coral v. GAC Utilities, Inc., 281 So.2d at 496 (citations omitted; emphasis added). See also Aloha Utilities, Inc. v. Florida Public Service Commission, 376 So.2d 850, 851 (Fla. 1979); Florida Bridge Company v. Bevis, 363 So.2d 799, 802 (Fla. 1978); Deltona Corporation v. Mayo, 342 So.2d 510, 512 (Fla. 1977); Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So.2d 577, 582 (Fla. 1964).

B. The PSC Has No Roving Commission Or Catch-all "Public Interest" Authority to Impose the Bypass Restriction.

Lacking any specific authority to impose the bypass restriction, the PSC cannot justify its action on the basis of some roving commission to protect the public interest. State Department of Transportation v. Mayo, 354 So.2d 359 (Fla. 1977). The PSC has no authority to define "the public interest" to suit its needs, but must rely upon the Legislature to give it explicit meaning. Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985). Even where the Commission has particular expertise and the matter has special public interest connotations, the PSC may not act without specific legislative authority. Florida Power & Light Co. v. Florida Public Service Commission, 471 So.2d 526, 8 F.L.W. 116 (Fla. 1983).

The Florida Power & Light Co. decision is particularly analogous to the instant situation, because that decision deals with the authority of the PSC to require electric utilities to

purchase excess energy capacity from cogenerators. Until the United States Congress enacted the Public Utility Regulatory Act § 210, 16 U.S.C. §824a-3(b) (1978), electric utilities were under no obligation to interconnect with, purchase power from, or sell power to, cogenerators that were located in the electric utility's franchised territory.<sup>15</sup> The Florida PSC thereafter adopted rules, according to the federal guidelines, governing the relationship between the electric utilities subject to PSC jurisdiction and the qualifying cogeneration facilities.<sup>16</sup> Florida Power & Light Co. appealed the PSC's Order to this Court on the grounds, inter alia, that the PSC lacked authority to impose rules requiring the electric utilities to purchase excess capacity from cogenerators absent specific state legislative enactment.

This Court agreed that there was no state statutory authority for the promulgation of the cogeneration rules, stating:

"It is a cornerstone of administrative law that administrative bodies or commissions, unless specifically created in the Constitution, are creatures of statute and derive only the power specified therein. . . . As such they have no inherent power to promulgate rules, but must derive that power from a statutory base. Those rules which attempt to define or prescribe action set forth in a statute are considered legislative in nature and are designed to implement, interpret or prescribe law or policy. . . ."

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<sup>15</sup> American Paper Institute, Inc. v. American Electric Power Service Corp., 461 U.S. 402 (1983); FERC v. Mississippi, 456 U.S. 742 (1982).

<sup>16</sup> Florida PSC Order No. 9970.

Id. at 116 (citations omitted). The significant point of this decision is that even though the federal legislation commanded that the electric utilities purchase excess capacity, and even though such purchase was deemed to be in the public interest, the PSC could not regulate in this area and command the purchase of excess generating capacity without specific state statutory authority. Of equal importance and application here, during the time the matter was pending before the Court, the Legislature enacted legislation granting the PSC the power necessary to regulate this area.<sup>17</sup>

In the instant case, there has been significant federal intervention in the telecommunications industry, requiring an unprecedented and dramatic restructuring of the industry, including the realignment of markets and the participants in these markets, both on an interstate and state level. In order to meet the changes in interconnection and compensation procedures, access charges first were instituted by the Federal Communications Commission <sup>18</sup> in response to the Modification of Final Judgment entered by the U.S. District Court in the AT&T divestiture matter.<sup>19</sup> But even though access charges were thus considered to be in the public interest, and may be within the

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<sup>17</sup> Section 366.05(9), Florida Statutes (1981).

<sup>18</sup> Federal Communications Commission, Third Report and Order, Docket No. 78-72, Phase I, 93 F.C.C. 2d 241 (1983), modified *NARUC v. F.C.C.*, 737 F.2d 1095 (D.C. Ct.App. 1984), cert. denied 105 S.Ct. 1224 (1985).

<sup>19</sup> *United States v. American Telephone and Telegraph Co.*, 552 F.Supp. 131 (D.D.C. 1982), aff'd. sub nom. *Maryland v. United States*, 103 Sup.Ct. 1240 (1983).

PSC's general ratemaking authority to set, requiring the IXCs to purchase access services is a matter beyond the PSC's ratemaking authority, and requires specific legislative pronouncement.

C. The Bypass Restriction Is Not A Legitimate Rate Making Device.

The PSC, in addressing Appellant's argument that the PSC is without authority to impose the bypass restriction, has suggested that it has authority pursuant to Section 364.14, Florida Statutes. Order No. 16804, p. 8. Section 364.14 empowers the PSC to alter those telephone rates, charges or practices which it finds to be "unjust, unreasonable, unjustly discriminatory, [or] unduly preferential." But, that statutory section refers to rates and practices applied to ratepayers, and does not confer jurisdiction upon the PSC to impose a bypass restriction on the IXCs. United Telephone Company v. Florida Public Service Commission, 496 So.2d 116 (Fla. 1986).

In the United Telephone Company case, the PSC specifically referenced Section 364.14 as its statutory authority for abrogating the contractual agreement between United Telephone Company, General Telephone Company and Southern Bell Telephone Company. This Court, however, rejected that view after a careful examination of cases interpreting the scope of § 206(a) of the Federal Power Act, 16 U.S.C., § 824(e) (1982), which is similar to Section 364.14, Florida Statutes. This Court concluded,

"We find persuasive the interpretation placed upon the federal counterpart to Florida's section 364.14. We hold that section 364.055 and section 364.14 refer to rates and practices as applied to ratepayers and do not confer jurisdiction upon the commission to alter the contractual relationship between telephone companies."

Id., p. 119.

Not only does Section 364.14 fail to provide the PSC with the requisite authority to impose the bypass restriction, because it is inapplicable to rates and practices applied to the carriers, the bypass restriction is not even a legitimate ratemaking device. Indeed, the bypass restriction is the antithesis of legitimate ratemaking: Instead of developing access charges that address market and cost considerations, the PSC simply sidesteps the issue of establishing fair, just and reasonable rates by requiring the only customers that would subscribe to access service to purchase the service regardless of the price.

In Order No. 16804, the PSC suggests that its power to impose the bypass restriction also flows from Section 364.335(4), Florida Statutes. In particular, the PSC focuses on the language which states that "The Commission may grant a certificate, in whole or in part or with modifications in the public interest," as the root of its authority. Contrary to the PSC's assertion, that language does not provide the requisite authority. Indeed, that language is, in the first instance, limited to the Legislature's definition of "public interest".

The Legislature has stated that the public interest standard of Section 364.335(4), Florida Statutes, is competition, and that the PSC can only impose such modifications on

certificates as will promote competition. Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189, 1191 (Fla. 1985). The bypass restriction does not promote competition. Indeed, by hampering several players in the highly competitive interexchange business, the bypass restriction handicaps competition.

Furthermore, any more general interpretation placed on "public interest" must be viewed in the context of the legislative intent as reflected in the entire scheme of telephone regulation. Orange County Audubon Society, Inc. v. Hold, 276 So.2d 542 (Fla. 1973); Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District, 274 So.2d 522, 524 (Fla. 1973); State v. Hayes, 240 So.2d 1, 3 (Fla. 1970); and 49 Fla. Jur. Statutes §§115, 127. In other words, the PSC may not use the referenced language to restrict certificates in the name of whatever the PSC determines to be in the public interest. Instead, the PSC must look to specific legislative intent (i.e. promote competition), or to the legislative intent embodied in the scheme of regulation reflected in the statutory provisions governing telephone companies, such as ratemaking, quality of service, records and accounts, etc. But, there is no indication that the Legislature's regulatory scheme contemplates or requires the bypass restriction. Of course, where there is any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission, it must be resolved against the exercise thereof. City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493 (Fla. 1973).

Moreover, the carte blanche authority advocated by the PSC to impose any modification it finds to be in the public interest would be an unlawful delegation of legislative power. Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978). Unbridled discretion is prohibited by Florida's adherence to the doctrine of nondelegation of legislative power, pursuant to Article II, Section 3, Florida Constitution. As stated by this Court:

"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.

Askew v. Cross Key Waterways, Id. at 925 (Fla. 1978).

II. THE FLORIDA PUBLIC SERVICE COMMISSION HAS NO AUTHORITY TO INTERFERE WITH THE MANAGEMENT DECISIONS THAT RELATE TO THE OPERATIONS OF THE IXCs.

The PSC's bypass restriction unreasonably interferes with IXC management's prerogative of choosing to provide its own access facilities. It is well settled that the PSC has no authority to interfere with the legitimate management decisions of utilities that it regulates unless it has clear legislative authority to do so. Re: General Telephone Company of Florida,



Docket No. 7766-TP, Order No. 4137, p. 54 (Fla. PSC 1967).<sup>20</sup> The PSC only can regulate IXCs in the specific areas that the Legislature has established. But, selecting which other carriers the IXCs must deal with, or from whom the IXCs must buy supplies, are not such areas. Just as the PSC lacks authority to tell an IXC where to buy cable for its interexchange network, or typewriters for its secretaries, it similarly is without authority to tell an IXC where to obtain access services. However, the PSC's action of restricting IXCs from providing their own access facilities does precisely that, by effectively requiring the IXCs to purchase access service from the LECs when it is unquestioned that LEC access services are overpriced.

In the General Telephone Company of Florida case, which was a general rate increase proceeding, an intervenor, Pinellas County, insisted that the PSC require General Telephone to use liberalized depreciation rather than accelerated depreciation in computing General Telephone's Federal income tax liabilities. General Telephone objected on the basis that Pinellas County was

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<sup>20</sup> A regulatory commission may not, without specific statutory authority, prohibit activities that are within management discretion: e.g. capital structure, Re: Florida Power & Light, 67 PUR3d 113 (Fla.PSC 1966); accelerated depreciation for tax purposes, Re: General Tele. Co. of Fla., Docket No. 7766-TP, Order No. 4137 (Fla.PSC 1967); employee discounts, Central Maine Power Co. v. Maine PUC, 405 A.2d 153 (Maine 1979); promotional advertising, Central Hudson Gas & Elec. Corp. v. N.Y. Pub. Serv. Comm., 447 U.S. 557, 100 S.Ct. 2343 (1980); bill inserts, Consolidated Edison Co. v. N.Y. Pub.Serv.Comm., 447 U.S. 520, 100 S.Ct. 2326 (1980); charitable contributions, Oklahoma v. Oklahoma Gas & Elec. Co., 536 P.2d 887 (Okla. 1975); salaries and legal fees, United Transit Co. v. Nunes, 209 A.2d 215 (R.I. 1965); and construction of a nuclear plant, Phila. Elec. Co. v. Pa. Pub. Utility Comm., 455 A.2d 1244 (Pa.Comm.w.Ct. 1983).

advocating that the PSC deprive General Telephone of the right to make the choice and this would be an infringement on the rights of management. The PSC agreed, stating:

" We agree with the Company's position in this matter. In our opinion, regulation should, so far as reasonably possible, avoid any invasion of the province of management. Regulatory agencies have been given broad powers over the operations of public interest subject to their jurisdiction; however, they cannot encroach upon the field of management. The line between the two is sometimes very difficult to draw. That, however, is no excuse for the abandonment of this regulatory principle. Before regulation is justified in violating the prerogatives of management, there must be an obvious abuse of managerial discretion, or some affirmative showing that management has acted in bad faith. In the present case, no such justification has been made to appear. While we subscribe wholeheartedly to the principle that it is the obligation of all regulated public utilities to operate with all reasonable economies, we do not construe that principle as giving regulation carte blanche authority to supersede management's action or inaction on the simple assertion that by doing so some reduction can be effected in the cost of service."

Florida PSC Order No. 4137, Docket No. 7766-TP, sheet 54 (Fla. PSC 1967).

Likewise, the PSC has no statutory authority to require customers to purchase a service simply because that service is provided by a regulated carrier. If the contrary were true, then there would be no customer provided private telephone networks, electricity cogeneration facilities, or water wells and septic fields, to name just a few of the many services subject to regulation. Indeed, the PSC has conceded it has no statutory authority to require toll customers to purchase access services from the LECs. Transcript of Hearing, August 18, 1986, pp. 41-42. But, why then should the PSC have authority to require IXCs to purchase access service from the LECs when the IXCs could

provide the service themselves? Obviously, without a legislative finding that such a requirement is in the public interest, the Commission has no more authority to require IXCs to purchase access from LECs than it does to require other customers to make such purchases from the LECs.

The PSC can set rates for LEC access service at whatever level it chooses to do so, but having done so, the PSC is without authority to force customers -- including IXC customers -- to buy that service. Just because IXCs are regulated by the PSC does not provide the missing specific authority to impose the bypass restriction. As stated previously, the PSC has no roving commission with respect to the regulation of utilities. This is especially so when the action of the PSC intrudes on the management prerogatives of the utility to deal with whomever it chooses in the acquisition of equipment and services. Florida Power & Light Co. v. Florida Public Service Commission, 471 So.2d 526, 8 F.L.W. 116 (Fla. 1983).

III. THE FLORIDA PUBLIC SERVICE COMMISSION'S DECISION THAT THE BYPASS RESTRICTION IS IN THE PUBLIC INTEREST IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The imposition of the bypass restriction on the IXCs is not supported by competent substantial evidence. It is the PSC's contention that the bypass restriction is necessary to reduce the threat of bypass, and is thus in the public interest in order to protect universal service. Yet, the record is devoid of any evidence which shows that the bypass restriction is a reasonable and effective solution to the bypass threat.

In Order No. 12765, by which order the PSC instituted the bypass restriction for the first time, the PSC, after extensive hearings in which the issue of bypass was of paramount importance, never designated the record evidence supporting imposing the bypass restriction on the IXCs. Instead, the PSC merely identified bypass as a potential threat, and stated that an access charge rate structure eventually would be developed to counter the threat of bypass, but that in the meantime IXCs would be prohibited from constructing facilities to bypass the LECs. Order No. 12765, p.20. Likewise, twelve months later, and again after a lengthy evidentiary hearing in which bypass was an issue, the PSC merely reaffirmed its restriction on the IXCs, but without any reference to testimony requiring the imposition of the restriction on the IXCs. In both orders, however, the PSC rejected the elimination of the subsidy from access charges as a solution to the bypass threat. Yet, the PSC references no evidentiary record to support its conclusion.

Finally, in Order No. 16804, the order on appeal, the PSC for the first time references the evidentiary record to support its decision. Yet, the evidence cited for retention of the IXC bypass restriction is in actuality nothing more than speculation, conjecture, and opinion evidence without factual support. For example, the PSC places considerable reliance on the assertions of General Telephone's witness Menard that if the bypass restriction is removed "the IXCs' will be motivated to install facilities to their largest and most lucrative customers." Order No. 16804, p.4. This bare assertion is undermined by reality and

other record evidence. Witness Menard's testimony failed to consider that IXC bypass is not restricted in the interstate jurisdiction or in any other state. Moreover, witness Menard was unable to state that bypass is any less or greater in Florida, than in states where there is no IXC bypass restriction. Tr. 99-100. Appellant AT&T's witness Follensbee, on the other hand, testified that the bypass experience in other jurisdictions without a bypass restriction is no different from Florida. Tr. 140-141. Also, Mr. Follensbee testified that customers who are not restricted from providing their own access facilities are engaging in substantial bypass in Florida. Tr. 137-139. Even the LECs are actively engaging in bypass of themselves and other LECs in order to serve the needs of their larger customers. Tr. 174-178. This is important factual evidence which the PSC inexplicably disregarded. Thus, the very underpinning of the PSC's decision to maintain the bypass restriction is not supported by competent substantial evidence.

This lack of competent substantial evidence to support the bypass restriction is particularly troubling because the PSC has singled out the IXCs for unequal treatment. Customers can bypass, and that is beyond the PSC's jurisdiction. LECs (or their affiliates) can help a customer bypass another LEC or themselves, and that is beyond the PSC's jurisdiction. LECs can enter into special contracts with customers who might otherwise choose to bypass, and that is encouraged by the PSC. IXCs, however, cannot bypass. The record provides no factual basis for distinguishing the IXCs, and prohibiting them from engaging in

the same activity permitted to every other party that has an interest in helping consumers meet their long distance needs at the lowest possible cost.

Whether the PSC's decision comports with the essential requirements of law depends upon whether the decision is supported by competent substantial evidence. As stated by this Court:

"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. (Citations omitted.) In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. (Citation omitted.) 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." (Citations omitted.)

De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). Measured by this standard, the PSC's decision that the bypass restriction is in the public interest is not supported by competent substantial evidence. There is insufficient record basis to justify restricting bypass by any party, and no record basis to justify singling out IXCs for unequal treatment. The decision must therefore be reversed as being arbitrary and capricious.

CONCLUSION

The bypass restriction imposed on the IXCs by the PSC cannot be maintained because the PSC lacks the legislative authority to so regulate the IXCs. Moreover, Order No. 16804 is not based on competent substantial evidence. In any event, Order No. 16804 must be reversed and the PSC instructed to dissolve the bypass restriction.

Respectfully submitted,



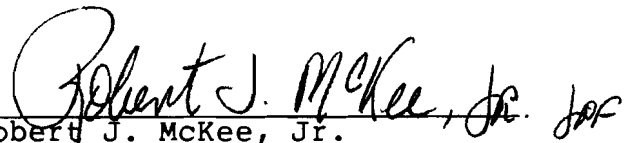
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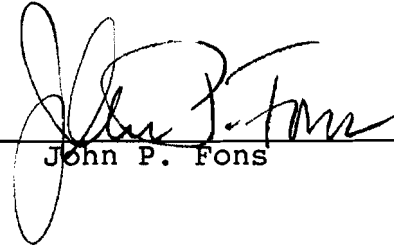
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