IN THE SUPREME COURT OF FLORIDA

AT&T Communications of the Southern States, Inc., et al.,	)	
Appellants,	)	
vs.	)	Case No. 69,732
JOHN R. MARKS, et al.,	)	
Appellees.	)	

On Appeal From The Florida Public Service Commission

REPLY BRIEF OF APPELLANTS

AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.,

MCI TELECOMMUNICATIONS CORPORATION AND MICROTEL, INC.

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SUMMARY

In their Answer Briefs, Appellees fail to convincingly show that the PSC has the requisite statutory authority to require the IXCs to purchase their access service requirements from the LECs.[1] Furthermore, Appellees have inappropriately resorted to glossing-over the PSC's lack of specific statutory authority by suggesting that the PSC has some inherent public interest authority to discriminate against the interexchange carriers in order to protect the LECs' revenues. Additionally, Appellees' argument that Appellants' challenge to the PSC's authority is untimely, is without merit. Finally, Appellees have not demonstrated that the PSC's decision to retain the bypass restriction, rather than correctly pricing access service, is supported with competent, substantial evidence.

In the final analysis, the PSC's decision in Order No. 16804 to maintain the bypass restriction is unsustainable. Contrary to Appellees' assertions that the bypass restriction is in the public interest, it is, in reality, nothing more than a discriminatory device to protect the LECs' historical revenue stream by requiring the IXCs to purchase an overpriced access service. Moreover, through the use of the bypass restriction, there are millions of toll customers in Florida who must pay inflated toll rates so that the LECs and the PSC can continue to avoid pricing access services in a rational, economic fashion.

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[1] Answer Briefs were filed by the Florida Public Service Commission ("the PSC"), United Telephone Company of Florida ("United"), and General Telephone Company of Florida ("General").

ARGUMENT

I. APPELLEES HAVE FAILED TO SHOW THAT THE PSC HAS STATUTORY AUTHORITY TO REQUIRE THE IXCS TO PURCHASE ACCESS SERVICES FROM THE LECS.

Appellees, in their separate Answer Briefs, have submitted a number of different and, at times, inconsistent arguments as to the source of the PSC's alleged authority to require the IXCs to purchase access service from the LECs. Appellants will address each of these arguments separately.

A. The "Modifications in the Public Interest" Language of Section 364.335(4), Florida Statutes, Does Not Furnish the PSC With the Requisite Authority.

Appellees each argue that because the PSC has the power pursuant to Section 364.335(4), Florida Statutes, to grant certificates to IXCs "with modifications in the public interest", the PSC can impose the bypass restriction because it is a modification in the public interest. But this argument fails on two counts: It misconstrues the scope of "modifications in the public interest" language, and it does not recognize that the "public interest" standard, standing alone, does not provide any authority to act.

As Appellants pointed out in their Initial Brief, the "modifications in the public interest" language does not give the PSC carte blanche authority to impose whatever restrictions it wants on the certificates issued to IXCs. As conceded by the PSC, there must be a reasonable nexus between the modification and some specific authority granted to the PSC elsewhere in

Chapter 364, Florida Statutes. PSC Brief, p.7. However, Chapter 364 does not contain any language or requirements to which the bypass restriction attaches.

The PSC recognizes that this Court has declared that the public interest standard of Section 364.335(4) takes on its meaning from the guidelines and standards of Section 364.335(1) and from the Legislature's intention to foster competition in long distance service. PSC Brief, p.5. Yet, the bypass restriction neither fosters competition nor relates to any of the guidelines or standards of Section 364.335(1). See Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189, 1191 (1985).

Because the bypass restriction is not reasonably related to the scheme of regulation envisioned by the Legislature, it cannot be imposed solely on the basis that the PSC believes it is in the public interest to do so. The "public interest" language refers to the Legislature's delegation of specific powers to the PSC, and not to a roving commission to act in the public interest.[2] This is precisely the result reached by this Court in Florida Power & Light Company v. Florida Public Service Commission, 471 So.2d 526, 8 F.L.W 116 (Fla. 1983).

Appellants reviewed the Florida Power & Light Company decision in their Initial Brief pointing out the clear

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[2] United goes on to contend that Section 364.337 establishes the required minimal standards and guidelines for applying the public interest standard. United Brief, p.12. This contention incorrectly reads this Court's conclusion in Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985). There the Court stated that the Legislature has provided the standards and guidelines in Section 364.335(1). Id. 1191.

application of the Court's reasoning there to the instant appeal.[3] Nonetheless, it bears repeating that this Court in that appeal was called upon to decide whether the PSC had authority to require regulated electric utilities to purchase excess energy capacity from qualified cogeneration facilities. This Court found that, absent specific authority from the Florida Legislature, the PSC was without authority to require such purchases regardless of what may appear to be overwhelming public interest considerations.

B. The Local Exchange Monopoly Restriction of Section 364.335(4), Florida Statutes, Does Not Provide the PSC With the Necessary Authority.

Appellee, the PSC, claims for the first time in its Answer Brief that its authority for imposing the bypass restriction also flows from that provision of Section 364.335(4), Florida Statutes, which prevents competition with the local exchange services of the LECs. Specifically, the PSC states that,

> "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."

PSC Answer Brief, p.8.

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[3] Interestingly, Appellees have generally ignored the Florida Power & Light Company decision, supra, p.3. Only General has addressed that decision, and, even then, General has not successfully disputed that the factual situation is analogous, nor has it distinguished the Court's rationale for finding that the PSC was acting without authority. General Brief, p.16. The fact that the decision has been withdrawn from the Southern Reporter does not affect the validity of the Court's reasoning.

Because the success of this argument rests upon whether access service is a local exchange service, the PSC's claim is not sustainable. The PSC has never declared that access service is a local exchange service which cannot be duplicated or competed with. Nor is there any record to support such declaration. Practically speaking, access service cannot be used to make a local exchange telephone call, but can only be used to originate and terminate long distance toll calls. Hence, throughout the several proceedings in which access service was established and priced, access has been held to be an adjunct to toll service with the revenues generated by access service to be used as a substitute for intrastate toll settlements. Order No. 12765, p.5. Access service is therefore not local exchange service to be offered exclusively by the LECs, and the PSC's reliance for its authority on that provision of Section 364.335(4) making local exchange services a monopoly is misplaced.[4]

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[4] The PSC also suggests that its power under Section 364.335(4) to exclude competition from local exchange service also permits it to regulate matters "which might impact local service". PSC Brief, pp.5 and 7. Clearly, this quoted language, which does not appear in Section 364.335(4), would give the PSC a broader authority than contemplated by the Legislature. If the PSC's reading is permissible, then the PSC could exclude toll competition entirely on the basis that toll competition might impact local exchange service, even though the Legislature has declared toll competition to be in the public interest. Indeed, it is hard to conceive of any activity that could not be excluded by the PSC on this basis. Such a broad delegation of authority to the PSC without any guidelines would obviously run counter to this Court's declaration in Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978), that unbridled discretion is prohibited by Florida's adherence to the doctrine of nondelegation of legislative power. Id. at 925.

Furthermore, the PSC's newly claimed source of authority is inconsistent with its previous application of Section 364.335(4). The PSC has persistently maintained that IXC bypass will be permitted if it can be demonstrated that the LEC cannot offer the facilities at a competitive price and in a timely manner, and that, in any event, bypass is a temporary measure. Order No. 12765, p.20; Order No. 13091, pp. 5-6; Order No. 13934, p.13; Order No. 16804, p.5; and PSC Reply Brief, p.12. Yet, if this claim of authority is correct, then the PSC has been without authority to permit the IXCs to provide their own access facilities under any circumstances, and the PSC's previous orders to that effect are unlawful. Additionally, using the PSC's line of argument, before the PSC could remove the bypass restriction it would have to go to the Legislature for that authority as it has done for coin telephones and shared tenant services, which were declared to be local exchange services.

In any event, because access service is not local exchange monopoly service, the PSC's argument that Section 364.335(4) provides the PSC with authority to require the IXCs to purchase their access needs from the LECs is without merit.

C. The Language of Section 364.14, Florida Statutes, Does Not Provide the PSC with the Authority It Requires.

Appellee, United, advances another argument as to why the PSC has the requisite statutory authority to impose the requirement that the IXCs purchase access service from the LECs. It is United's contention that uneconomic bypass is an

inefficient practice by the IXCs, and the PSC has authority to strike down or prevent inefficient practices pursuant to Section 364.14(2), Florida Statutes. The keystone to United's argument is its contention that Section 364.14(2) is not restricted to rate matters, and deals in part with practices of a telephone company which are inefficient or improper. This contention is plainly wrong.[5]

The clear purpose of Section 364.14 is to govern the relationship between the telephone company and its customers, and is at the heart of the regulatory scheme. As this Court established in United Telephone Company of Florida v. Florida Public Service Commission, 496 So.2d 116 (Fla. 1986), Section 364.14 refers to rates and practices of a telephone company as applied to its ratepayers. Id. p.119. Yet, in the instant situation, the bypass restriction is unrelated to the purpose of Section 364.14(2).

In order for Section 364.14(2) to have any application to an IXC's provision of access facilities, there would have to be a showing that the IXC's provision of access facilities is inefficient as related to the IXC's ratepayers. But, there has been no such showing. Indeed, the PSC has imposed the bypass

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[5] Not only is United's analysis of the application of Section 364.14 to the instant appeal erroneous, United has improperly mixed language from two separate provisions of Section 364.14(2). United contends that Section 364.14(2) deals with practices of a telephone company which are inefficient or improper. Actually, the language of 364.14(2) refers to "practices of any telephone company" which are unjust or unreasonable. The words "inefficient or improper" refer to "equipment, facilities or service of any telephone company", and not to practices.

restriction to protect the revenues of the LECs, and not to benefit the IXC's ratepayers. And, this is precisely why the Court's United Telephone decision, Id., is controlling in this instance.

The record shows that with respect to the current level of access charges prescribed by the PSC, the IXCs can save money by providing their own access facilities. Flowing these savings through to its ratepayers in the form of lower rates, the IXC can more efficiently serve its ratepayers than by purchasing LEC access service. Order No. 16804, p.5. Hence, in the current environment, the IXC's provision of its own access could not be an inefficient practice, and United's argument is meritless.

II. THE PSC'S LACK OF AUTHORITY TO IMPOSE THE BYPASS RESTRICTION IS SUBJECT TO CHALLENGE BEFORE THIS COURT.

Appellees, General and United, assert that, regardless of whether the PSC was acting within its authority to impose the bypass restriction, this Court should not have the opportunity to determine this issue on its merits. Appellees argue, in this regard, that Appellants' challenge to the PSC's authority is untimely. However, Appellees' assertion is untenable, and the cases cited by General are not applicable to the instant appeal.[6]

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[6] Two of the cited cases, Bank of Port St. Joe v. Dept. of Banking and Finance, 362 So.2d 96 (Fla. 1st DCA 1978) and State ex rel. Florida Dept. of Natural Resources v. District Court of Appeal, Second District, 355 So.2d 772 (Fla. 1978), deal with out-of-time appeals of final administrative orders; while the third, Carrolwood State Bank v. Lewis 362 So.2d 110 (Fla. 1st DCA (cont'd next page)

The case law is well settled that an administrative agency's authority to act on a given subject matter may be challenged at any time. Texas v. United States, 749 F.2d 1144 (5th Cir. 1985), cert. denied, 105 S.Ct. 3513 (1985).

Further, the crux of Appellants' argument relating to statutory authority is that the PSC lacks jurisdiction to impose a bypass restriction. The law is well settled that questions relating to jurisdiction can be raised at any time. Such questions can be raised for the first time on appeal, In re O'Neal's Estate 142 So.2d 315 (Fla. 2nd DCA 1962), and can even be raised on a second appeal, after remand. City of Stuart v. Green, 91 F.2d 603 (5th Cir. 1937). See also L.B. Price Mercantile Co. v. Gay, 44 So.2d 87 (Fla. 1950) (an agency's construction of a statute is subject to judicial review even though the party affected has previously acquiesced in that construction).

General's and United's assertion that the PSC's order is binding on Appellants and that review by this Court is barred, is an implied res judicata or estoppel argument. However, such a bar only applies where the administrative action is attacked in a separate judicial proceeding. Coulter v. Davin, 373 So.2d 423, (Fla. 2d DCA 1979).

Contrary to General's and United's assertions, Appellants are not seeking a review of the PSC's decision in a separate

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1978), deals with an attempt by the State Bank to seek review of an order of the Department by the Leon County Circuit Court rather than pursuing the appellate procedures established by the Administrative Procedures Act.

judicial proceeding. Instead, Appellants are seeking review of a continuing administrative decision by a direct and timely appeal to this Court in accordance with Section 120.68, Florida Statutes, and Section 364.381, Florida Statutes.

III. APPELLEES HAVE FAILED TO DEMONSTRATE THAT THE PSC'S DECISION IS SUPPORTED WITH COMPETENT, SUBSTANTIAL EVIDENCE.

In Appellants' Initial Brief it was demonstrated that if, arguendo, the PSC had statutory authority to impose a requirement on the IXCs to purchase their access requirement from the LECs that, in any event, the PSC's decision to do so was not supported by competent, substantial evidence. Appellees, in their Reply briefs, challenge Appellants' position, but offer no compelling support for their contention that the decision is supported with competent substantial evidence.

Appellee, the PSC, for example, suggests that its decision is supported by competent, substantial evidence because it is a necessary interim measure, and the assertions of various witnesses support that position. PSC Brief, pp.11-12. But this argument misses the point: The PSC's decision to impose the bypass restriction is not supported by competent substantial evidence that the restriction is the proper and effective method to avoid bypass. As stated by Southern Bell witness Denton:

> "So that the prohibition, I don't think, is a very effective way of dealing with the problem. The problem is basically excessive charging to carriers to recover non-traffic sensitive costs. I think the solution to that problem is adopting a market based pricing for

> non-traffic sensitive costs and moving the remainder of that, that carriers won't and can't pay, over to end users."

Denton, Tr. 19.

The overwhelming weight of competent, substantial evidence is that removal of the non-traffic sensitive costs from access charges is the only proper and effective method for reducing the threat of bypass. Denton, Tr. 19, 51, 66; Menard, Tr. 94-97; Follensbee, Tr. 135; Ball, Tr. 199; Griffin, Tr. 110-111. Yet, despite that compelling evidence, the PSC has elected to impose an unnecessary and ineffective restriction on the IXCs in order to protect the revenues of the LECs at the expense of the millions of Florida toll customers. Denton, Tr. 48. If the PSC were to address the bypass threat consistent with the evidence presented to it -- that is, in a realistic fashion, then there would be no call for the bypass restriction. Denton, Tr. 67.

CONCLUSION

Appellants established in their Initial Brief that the PSC was acting beyond its authority by requiring the IXCs to purchase their access requirements from the LECs. Regardless of the PSC's intentions or its desire to act in the public interest, this requirement is not sustainable. Appellees have failed to provide any statutory basis for upholding the PSC's decision. Hence, this Court must grant the relief requested by Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE
Case No. 69,732

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 30th day of March, 1987.

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