

IN THE SUPREME COURT OF FLORIDA

UNITED TELEPHONE LONG DISTANCE)
INC., and UNITED TELEPHONE)
COMPANY OF FLORIDA,)

Appellants,)

v.)

FLORIDA PUBLIC SERVICE)
COMMISSION,)

Appellee.)

CASE NO. 72,988

ANSWER BRIEF OF THE
FLORIDA PUBLIC SERVICE COMMISSION

SUSAN F. CLARK
GENERAL COUNSEL

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32399-0861
(904) 488-7464

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DESIGNATION OF PARTIES AND
ABBREVIATIONS USED IN BRIEF

The Appellants are referred to in this brief as United Telephone Long Distance or UTLD and United Telephone of Florida as UTF.

The Appellee, Florida Public Service Commission is referred to as the Commission or PSC.

Citations to the record are denominated by R and the page number (R-___), references to transcripts are denominated by Tr. and the page number (Tr. ___).

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts as presented by Appellants do not contain all the relevant facts and details necessary for the Court's understanding of this case. Therefore, the Commission presents its own Statement of the Case and Facts.

This is an appeal of Commission's Order No. 18939 issued March 2, 1988 in Docket No. 870295-TI. That order granted a certificate to UTLD to provide long distance telephone service as an interexchange carrier (IXC) subject to certain conditions. UTLD is a wholly-owned subsidiary of United Telephone of Florida (UTF). UTF holds a certificate from the Commission authorizing it to provide local exchange services within a territory in Central Florida which includes all or part of 24 counties.

One of the conditions placed upon the grant of authority to UTLD was that it compensate UTF for the intangible benefits UTLD receives through its association with UTF (R-408). The Commission determined that fair compensation would be a percentage of UTLD's revenues, but that in no event should the compensation exceed 17.5% of UTLD's profits (R-408). This aspect of the Commission's decision is the subject of this appeal (R-469).

Background

A brief review of recent history regarding the telephone industry helps put this case in context.

Prior to 1982, competition in the provision of telephone

service in Florida was prohibited (s. 364.335(4), Fla. Stat., 1981). Each telephone company was the exclusive source of telephone service within the territory described in their certificate. Long distance service was provided by these certificated companies in conjunction with the Bell System, which included AT&T Long Lines. Revenue from this joint service was divided among the companies pursuant to a "separations and settlements" process administered by Southern Bell Telephone and Telegraph (Southern Bell).

In 1982, the Florida Legislature made the policy decision that there be competition in the provision of long distance telephone service. However, the Legislature preserved to each of the existing certificated telephone companies the monopoly franchise over the provision of local exchange service (§364.335(4), Fla. Stat.). These companies are now called local exchange companies (LECs) (R-469).

Since 1982, the Commission has issued over ninety certificates to various entities authorizing them to provide long distance service (called interexchange companies or IXCs). UTLD's request for a certificate as an IXC is the first instance "in which a major local exchange company has requested authority to provide long distance service through a wholly-owned subsidiary" (R-401). Southern Bell is prohibited from providing long distance services, except for short-haul long distance within Local Access Transport Areas (LATAs), pursuant to the terms of the court ordered divestiture in United States v. American Telephone and Telegraph

Co., 552 F. Supp. 131 (D.D.C. 1982). General Telephone of Florida, another major local exchange company in Florida, is similarly restricted pursuant to the settlement of the antitrust case against it. United States v. GTE Corp., 1985-1 Trade Cases (CCH) s. 66,355 (D.D.C. December 21, 1984).

UTLD's Application and Commission Proceedings

On March 18, 1987, UTLD filed an application for a certificate of authority to operate as an IXC. UTLD stated its primary business would be the sale of interLATA long distance services to customers of UTF. UTLD proposed to offer this service to coincide with the conversion of UTF's local central offices to equal access (R-400). The offering of service coincidental to conversion to equal access was to assure that UTLD would be among the IXC's from which a UTF customer could select its long distance service provider. Once a central office is converted to equal access and a customer selects an IXC, all interLATA calls made by that customer will automatically be carried by that carrier without the necessity of a seven-digit access code. UTLD's offering of long distance service was with the intention of benefiting from its association with UTF, the local exchange company, by offering "one-stop shopping" for both local and long distance service (Tr. 14).

Because UTLD's application raised significant public policy issues affecting UTF's ratepayers and the public in general, the Commission set the matter for hearing and several parties intervened.

With the exception of the Public Counsel, all the intervenors were IXCs certificated in Florida to provide interexchange long distance service (R-219, 220). These intervenors opposed the issuance of a certificate to UTLD, arguing that UTLD's association with UTF would create the opportunity for anti-competitive practices which would be detrimental to all other IXC's, UTF's ratepayers and the general public. More specifically, if the certificate was granted it would have the practical effect of permitting UTF, which has monopoly control over bottleneck local access facilities, to compete for interLATA customers with other IXCs that must rely on UTF for local access facilities to originate and terminate a long distance call (R-222). UTF would have the opportunity to cross-subsidize UTLD's operation to the detriment of UTF's ratepayers, other IXC's, and ultimately the general public. It would also have the opportunity to discriminate against other IXCs in the provision of local access service in favor of UTLD. The incentive for UTF to cross-subsidize and discriminate is in increased profits to its subsidiary, UTLD (Tr. 429).

Another concern of the intervenors was the appropriate compensation to be paid by UTLD to UTF for the services and benefits UTLD would receive through its association with UTF. It was this aspect of UTLD's application that most concerned Public Counsel (R-224). UTLD's application provided for payments to UTF for services rendered. UTF's Vice President of Operations, Mr. Bruce Reynold's testifying on behalf of UTLD said that UTLD

would compensate UTF by paying tariffed rates for such things as access charges, or pursuant to contract for such services as billing and collection, marketing, trouble reporting, among others (Tr. 15-17).¹ Compensation for assets and services shared by UTF and UTLD would be made through allocations pursuant to Nonregulated Accounting Procedures (NAP). Public Counsel and the other intervenors maintained these payments and cost allocation procedures (NAP) did not adequately compensate UTF for all the benefits it receives from its association with UTF (Tr. 520-521). Public Counsel proposed that in addition, UTLD be required to pay a "cost compensation fee" for the other benefits UTLD receives by virtue of its association with UTF (R-230). These benefits included: the use of the United name and logo, reliance on the United reputation; immediate access to financing; and the ability to capitalize on UTF's skilled and trained workforce (R-230).

Public Counsel's witness, Mr. Billy D. Smith testified that the value of the United Telephone name and logo was the by-product of the provision local exchange service, paid for by captive ratepayers. In addition, ratepayer revenues would maintain the skilled and trained workforce which UTLD could use as the need arose in establishing and operating its long distance business. Thus UTLD avoided costs of a fledgling business (Tr. 545). Mr. Smith recommended a cost compensation fee of 5% of gross

¹These services would be offered to other IXCs under the same terms and conditions (Tr. 16).

revenues (Tr. 526)² which was in addition to tariff and contract charges and NAP allocations (Tr. 539).

Dr. Daryl Nall, of the Commission's staff, also testified that UTLD would benefit from its association with UTF and should therefore compensate UTF for those benefits. She stated that UTLD's anticipated market power was likely the result of association with UTF (Tr. 580). Additionally, UTLD's ability to use the resources of UTF allowed UTLD to avoid costs which would be incurred by a stand alone, nonaffiliated entity. Dr. Nall stated that these substantial benefits were established and were being maintained by the monopoly company (UTF) at the expense of the ratepayers and for this reason, UTF should be compensated for the benefits (Tr. 579-580). To compensate UTF, Dr. Nall recommended a concept of profit sharing similar to that provided in section 364.037, Florida Statutes, for telephone directory advertising revenues.

In developing her profit sharing formula, Dr. Nall examined the revenues and profitability of AT&T. This was because there was no historical data regarding UTLD's profitability. AT&T was an appropriate surrogate because UTLD would be charging AT&T rates

²Attached as exhibits to Mr. Smith's and Dr. Nall's testimony were copies of a study done by the staff of the California PSC which recommended Pacific Bell affiliates be charged a similar fee. The exhibit was excluded from evidence. Both Witnesses testified that their recommendations were independent of the California study. Further, Dr. Nall said she read the study only as a matter of interest and background.

and it would be charged the same access charge rates as AT&T. Dr. Nall also opined that UTLD's profitability would likely be higher than AT&T's because of the economies of sharing UTF's personnel and facilities (T-586). Dr. Nall's recommendations included 8% of the difference between total revenues and access charges paid. For AT&T this represented about 50% of their net operating revenues (Tr. 596). In other words, Dr. Nall was recommending a method that would produce a 50/50 sharing of UTLD's profits. Another alternative presented by Dr. Nall was that a minimum of 2% of UTLD's revenues be paid to UTF with additional sharing of one-half of UTLD's profit up to 5% of total revenues (Tr. 592).

In addition to Mr. Smith and Dr. Nall, witnesses for the other intervenors also testified that UTLD would receive substantial benefits through its association with UTF. AT&T's witness, Mr. Evans, testified that the UTLD would receive "free use of the United name, logo, and goodwill; access to proprietary and nonpublic information, access to an unlimited source of capital at below-market rates; and access to an almost unlimited source of skilled employees (Tr. 249). Mr. Sulmonetti for Microtel and Mr. Neptune for Teltec also outlined the significant advantages UTLD would enjoy through its association with UTF (Tr. 420, 449, 448, 458-464). Mr. Neptune recommended a method for valuing the "intangible benefits provided by UTF to UTLD. He recommended "comparing UTLD's rate level and market penetration to that of an average new entrant" to establish approximate value for the

benefits. He further recommended UTLD be required to provide reports for the first two years of operation to gain data for this comparison (Tr. 463).

UTLD's two witnesses did not dispute that UTLD would benefit greatly from being associated with UTF. They agreed that the value was the result of the name United and the fact that United was the area's local exchange company (Tr. 47, 75-76, 80, 100). Indeed, Mr. Reynolds stated the company would not enter the IXC market unless it could use the name United (Tr. 64, 197). However, Mr. Reynolds testified that UTF and its ratepayers would be fully compensated for benefits provided UTF through appropriate contract and tariff charges and through NAP allocation procedures. He stated that UTLD should not be required to make any other compensation to UTF as suggested by other witnesses. Mr. Reynolds opposed any further compensation on the premise that such compensation would be for the use of the United name which was registered to UTF's parent, United Telecommunications (Tr. 24), and that any goodwill or reputation associated with the name was not furnished by ratepayers. Any goodwill or reputation has been earned and paid for by its stockholders (Tr. 25).

Based on the evidence presented in the case the Commission concluded in Order No. 18939, issued March 2, 1988, there were significant benefits provided UTLD by UTF. The Commission further concluded that benefits were a function of UTF being the area's local exchange company and the ratepayers of UTF contributed to the creation and maintenance of these benefits. Evidence in the

docket suggested a range of compensation from zero to at least 50% of UTLD's profit. The Commission selected a point at the lower end of the range: 2.8% of gross revenues minus originating and terminating access charges. However, the maximum for the fee was 17.5% of net income. Since net income is essentially equivalent to UTLD's profits, the effect of the order is to establish a 17.5/82.5% ratio of profit sharing.

The Commission voted to further review the compensation fee after two years and the companies are to provide 2-years financial data on the fee payments for Commission review (Appendix at 1).

UTLD and UTF requested reconsideration of the Commission's order on matters not directly related to the compensation fee (R-411), and on July 27, 1988 the Commission modified its order (R-466). On August 25, 1989, UTLD and UTF filed a Notice of Administrative Appeal on the limited issue of the required compensation fee (R-469).

SUMMARY OF THE ARGUMENT

The Commission's decision requiring United Telephone Long Distance Company (UTLD) to compensate United Telephone of Florida (UTF) and its ratepayers for benefits it receives from UTF is in the public interest and is supported by competent substantial evidence.

In granting a certificate to UTLD as an IXC, the Commission is authorized to make modifications to the certificate that are in the public interest (s. 364.335, Fla. Stat). Additionally, when issuing a certificate, the Commission is authorized to impose different conditions on the operation of a particular company if it is in the public interest (s. 364.337, Fla. Stat.).

In this case the Commission found, based upon competent substantial evidence, that UTLD would gain a significant share of the long distance market because of its association with UTF, the regulated local exchange company. Further, that association would allow UTLD to minimize the cost of doing business because UTLD would have ready access to and use of a workforce and facilities established and maintained by revenues from UTF's captive ratepayers. The Commission concluded the public interest required UTLD compensate UTF and its ratepayers for these benefits. The compensation is based on methodologies recommended by three expert witnesses, and falls within the range of amounts proposed by those experts.

The Commission's decision complies with the essential requirements of law and should be affirmed.

POINT I

THE REQUIREMENT THAT UTLD COMPENSATE UTF FOR THE SUBSTANTIAL BENEFITS IT RECEIVES THROUGH ITS ASSOCIATION WITH THE UTF IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The record is replete with evidence that United Long Distance Telephone Company (UTLD) will benefit substantially by using the name "United" and otherwise being associated with United Telephone Company of Florida (UTF). UTLD will benefit by an increased market share and by avoiding costs which a stand-alone company would incur in establishing and operating a long distance telephone company. There is also competent substantial evidence that the existence of these benefits is attributable to UTF and its ratepayers and they should therefore be compensated.

In proceedings before it, the Commission is required to evaluate the testimony of expert witnesses on various subjects. It is the Commission's responsibility to evaluate the testimony and accord whatever weight to conflicting opinion it deems appropriate United Telephone Co. v. Mayo, 345 So.2d 648 (Fla. 1977). The conflicting expert testimony in this case has been evaluated by the Commission. They have accorded the weight they found appropriate and made a decision. The record contains ample, competent and substantial evidence upon which the decision was based.

Competent substantial evidence is such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred or such relevant evidence as a

reasonable mind would accept as adequate to support the conclusion. Duval Utility Co. v. Public Service Commission, 380 So.2d 1028, 1031 (Fla. 1980); DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957).

In this case, the evidence is conclusive that UTLD will benefit from its association with UTF. UTF's purpose in organizing UTLD was to capitalize on the name United and its association with the area's local telephone company. UTLD would provide "an alternative long distance company to UTF's customers, to enable those customers to deal with one location for complete telephone service" (Appellant's brief at 2, Tr. 14, 47). This fact is confirmed by Mr. Reynolds' testimony that if the Commission did not allow UTLD to use the name "United" and market itself as being associated with the local exchange company, UTF would have to reconsider its decision to enter the long distance market:

Q. "Meaning you're not willing to operate under a name that does not include the name "United" in it?"

A. (Reynolds) "That is true." (Tr. 64)

Mr. Reynolds in effect agreed with what each of the other witnesses testified to: UTLD will gain significant market share by being associated with the area's local telephone company. Dr. Nall articulated the advantage this way:

The fact that UTLD proposes to charge AT&T rates indicates that UTLD anticipates sufficient market power to price above most competitors. It is likely that this market power results from the loyalty of the local company's monopoly customer base. Absent this monopoly customer base and UTLD's name identification with UTF, UTLD could not anticipate attracting customers for a premium-priced service. Compensation beyond the payment of access charges and contractual payments for services is appropriate because of these advantages. (Tr. 580-581)

The validity of this statement has been borne out in other jurisdictions. In each of the other jurisdictions United companies have formed companies to provide long distance service, the name of the long distance company is the same as the local exchange company (Tr. 107). In Missouri, UTLD obtained 26% of the market (Tr. 471-479). UTLD's acknowledges this high market penetration (Tr. 75-76, Exh. 11-k).

In addition to market share, UTLD's association with UTF will minimize the cost of doing business. UTLD could expect to minimize costs by having ready access to a skilled and trained workforce and to facilities of UTF. A workforce and facilities established and maintained by revenues from UTF's captive ratepayers (Tr. 249, 295-296, 420, 521-523, 545-546, 580-581, 584). Mr. Reynolds admitted that UTLD will have continued access to and use of UTF facilities and employees. Mr. Reynolds is himself a Vice President of UTF and the time he spent testifying in this docket was to be allocated between UTF and UTLD (Tr. 9). As Vice President of UTF, Mr. Reynolds' salary is paid by UTF ratepayers.

Dr. Nall and each of the intervenors' witnesses all stated that the basis for these benefits was not in the name "United" alone. These benefits existed because "United" is the name of the local telephone company, and by UTLD being associated with the local telephone company it will gain market share and at the same time save on operational costs.

The thrust of UTLD's argument in this appeal is that benefits inherent in UTLD being associated with UTF and the name United are solely attributable to the efforts of UTF personnel and stockholders. The benefits are a function of "goodwill, in terms of reputation, [which] is earned by the company's performance," and of image enhancing advertising which is borne entirely by UTF's stockholders (Appellant's brief at 21, 22). There is expert testimony in this case that contradicts this argument. The benefits are also a function of UTF being the area's monopoly local exchange service provider and being able to rely on revenues from captive customers to maintain a company from which it can launch a competitive service. These are characteristics unique to UTF that have value, value which cannot be traced back to the efforts of UTF personnel, management or stockholders. These benefits flow from the grant of an exclusive franchise for local exchange service and access to employees and equipment paid for by captive ratepayers.

UTLD's argument that UTF's name and reputation are a result of image enhancing advertising which is paid for by shareholders lacks credibility. No amount of image advertising can overcome a

reputation for poor quality. For a regulated local exchange company, the companies reputation is determined by its quality of service, which service is paid for by local ratepayers. In addition, there is a wide range of advertising for which ratepayers do pay that has the effect of enhancing the company's image by keeping its name before the public; e.g., logos on trucks, promotions for services.

The quality of service UTF provides, and hence its reputation, is likewise not solely attributable to the efforts of shareholders. In a competitive market, the incentive to provide quality service comes from the existence of competitors. Customers have a choice and, when service is poor, the customers can go elsewhere. The same incentive is not present in a monopoly market; customers cannot get service from another company. Regulation substitutes for competition. Part of the Commission's responsibilities in the regulation of telephone companies is to ensure that regulated companies deliver quality service. Section 364.035, Florida Statutes, requires the Commission to review the quality of service and hear service complaints in conjunction with ratemaking proceedings. Moreover, the Commission employs engineers to conduct tests of telephone equipment and service to ensure that quality standards prescribed in Chapter 25-4, Parts V, VI and VII, Florida Administrative Code, are met. The cost of this quality control is borne by the ratepayers.

The overwhelming weight of evidence established that UTLD will receive substantial intangible benefits from its association with UTF, the regulated local exchange company. The evidence further established that these benefits were substantially created by ratepayer revenues and are being maintained by those revenues. Once the substantial benefits to UTLD and the need for compensation were established, the Commission could not refuse to require compensation. See Citizens v. Public Service Commission, 440 So.2d 371 (Fla. 1st DCA 1983) in which the Court held that once the need for an attrition allowance was established it was an abuse of discretion for the Commission to totally deny the allowance based on the Commission's rejection of the utilities' methodology used in determining the appropriate allowance.

In this case the Commission had before it several methods for determining the level of compensation to be paid. Mr. Smith recommended one, Dr. Nall proposed two alternatives and Mr. Neptune recommended yet another. The compensation fee set by the Commission is within the range of fees recommended by witnesses in the proceeding. The methodology used to determine the fee is likewise based on methods recommended by the witnesses. The fee is a percentage of net revenues minus originating and terminating access charges with a maximum of 17.5% of UTLD's Net Operating Income, which represents UTLD's profit. Dr. Nall and Mr. Smith both recommended the fee be a percentage of revenues (though they differed as to adjustments to revenue). Additionally, Dr. Nall recommended a maximum fee.

Dr. Nall's use of AT&T revenues and access charges as a proxy for developing the 8% fee and the minor discrepancies between numbers used in calculations at her deposition and at the hearing do not affect the reasonableness of the method. The method is similar to the profit sharing arrangement prescribed by statute for yellow page advertising revenues. AT&T revenues and expenses were used to arrive at an appropriate percentage because no historical data on UTLD revenues and expenses was available. It was reasonable to AT&T use because, like AT&T, UTLD has the potential for being a dominant carrier in the market place. UTLD will be charging AT&T rates and it will be charged the same access rates as AT&T. The fee ultimately required by the Commission is significantly less than those recommended and the Commission has voted to review the fee after two years.

The Commission has the authority to set a reasonable compensation fee based on evidence that compensation was due. This Court has previously recognized the Commission's discretion to choose a reasonable alternative which is not specifically set out in testimony or evidence. In Gulf Power Co. v. Public Service Commission, 453 So.2d 799 (Fla. 1984), the Commission was presented with two proposed coal inventory levels, neither of which it believed was appropriate. This Court upheld the Commission's choice of a coal inventory level within the two proposed levels.

The Appellant has cited to two California PSC decisions in support of its position that no compensation is due UTF by UTLD.

That reliance is misplaced. Neither case is factually similar to this case. Neither case involved an LEC setting up a wholly-owned subsidiary to provide long distance service using the same name as the LEC. Indeed Pacific Bell is prohibited from providing interLATA long distance service. In the Pacific Bell case, the California PSC did not preclude compensation for intangible benefits in future cases. More importantly, the California PSC apparently used a different method of compensation; a 10 percent surcharge applied to affiliate transactions (Appellant's brief, Appendix at 21).

This Court has repeatedly stated that the standard of review is whether there is competent substantial evidence to support a Commission order. A PSC order cannot be overturned simply because the Court might have reached a different result. Citizens v. Public Service Commission, 435 So.2d 534 (Fla. 1983). The Appellant is requesting that this Court reweigh the evidence, reach a decision consistent with their position and substitute that decision for the Commission's. This Court is without authority to fulfill that request.

POINT II

THE COMMISSION HAS THE AUTHORITY TO REQUIRE UTLD TO COMPENSATE UTF FOR BENEFITS RECEIVED FROM UTF AS A CONDITION TO CERTIFICATION AS AN IXC.

The Florida Statutes require the Commission to consider the public interest in deciding to issue a certificate to an IXC and in deciding whether to prescribe different requirements for a company when a certificate is issued. The Commission found it was in the public interest to require UTLD compensate UTF for benefits it will receive from its association with UTF as a condition to issuing UTLD a certificate.

Section 364.335(4), Florida Statutes, provides in pertinent part:

364.335 Application for Certificate. -

(4) 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 may deny a certificate.

Section 364.337, Florida Statutes, is of similar import. When a certificate is issued for a competitive service the Commission may, if it is in the public interest:

(a) Prescribe different requirements for the company than are otherwise prescribed for telephone companies; or

Subsection (2) of 364.337, Florida Statutes, outlines areas to be considered in determining the public interest:

- (a) The number of firms providing the service;
- (b) The geographic availability of the service from other firms;
- (c) The quality of service available from alternative suppliers;
- (d) The effect on telephone service rates charged to customers of other companies; and
- (e) Any other factors that the commission considers relevant to the public interest.

This Court has previously reviewed Commission decisions imposing conditions on IXCs as part of the certification process. In Microtel, Inc. v. Public Service Commission, 483 So.2d 415 (Fla. 1986), (Microtel II), this Court interpreted the amendments to section 364.335, Florida Statutes, this way:

While we believe that the legislature has made the fundamental and primary decision that there will be competition in long distance services, we do not believe that it was the legislative intent that PSC issue certificates of service on demand, where it is not in the public interest, in making the above mentioned orderly transition to full competition on long distance service.

at 419.

In Microtel II the Court affirmed the Commission's decision to prohibit IXCs from carrying toll traffic over their own facilities within Equal Access Exchange Areas (EAEAs). The prohibition was to minimize the dislocation of local exchange company revenues in recognition of the adverse impact dislocation would have on local rates. This Court said "maintaining the universality and quality of (telephone) service" was to be considered in determining the public interest (Microtel II at 418).

In 1987, the Court was again asked to review the Commission's decision to maintain the local exchange companies' toll monopoly

within EAEAs. The Commission's decision was again upheld. In U.S. Sprint Communications Co. v. Marks, 509 So.2d 1107 (Fla. 1987) the Court noted the interplay of section 364.335 (4), Florida Statutes, and the standards in section 364.337(2):

... the first step in the certification process, section 364.335, required the PSC "to make an initial decision whether to issue a certificate, guided by the discretionary proviso that certification be in the public interest." The second step in the process are the provisions of section 364.337; section 364.337(2) sets forth specific factors the PSC must consider in its public interest determination.

U.S. Sprint at 1110.

Finally, in AT&T Communications v. Marks, 515 So.2d 741 (Fla. 1987) this Court again specifically acknowledged that universal service considerations were a part of the public interest determination. The concept of universal service is based on a policy that local service should be affordable to all that desire it.

UTLD's application presented the Commission with competing public interest concerns. On the one hand UTLD's application might not be in the public interest because of the necessity of protecting monopoly customers of UTF, and market competitors of UTLD, from potential abuses to them through inappropriate allocation of costs or discrimination (Tr. 578). On the other hand, UTLD's application might be in the public interest because it would provide UTF's customers with the opportunity for one-stop shopping for telephone service needs and the chance for local

rates to be positively affected by cost and revenue sharing with UTLD.

In her testimony, Dr. Nall discussed the pros and cons of a number of regulatory options available to the Commission regarding UTLD's application (Tr. 576-580). One of Dr. Nall's recommendations was that if a certificate was granted, the Commission should require UTLD compensate UTF and its ratepayers for benefits UTLD will receive from UTF (Tr. 580-581).

The Commission concluded that modifications could be made to the UTLD's application and requirements prescribed for UTLD which would result in the issuance of the certificate being in the public interest. Those modifications included measures to protect against cross-subsidization and discrimination and the requirement that UTLD compensate UTF ratepayers for benefits UTLD would receive. This requirement, unique to UTLD, is consistent with the public interest because it recognizes the unique advantages UTLD has in entering the long distance market in affiliation with the area's local exchange company and that those advantages were established and are maintained by the regulated company, UTF, at the expense of its ratepayers. By requiring a compensation fee, some of these expenses can be returned to the ratepayers through reduced rates. This furthers the public interest in assuring universal service at affordable rates. Moreover, section 364.337 (2), Florida Statutes, specifically requires the Commission consider "[t]he effect on telephone service rates charged to customers of other companies," in deciding to prescribe different

requirements when a certificate is issued.

The Commission's requirement of a compensation fee has statutory precedent. In a 1981 rate case, Southern Bell advocated that the company's activities in the publication and sale of yellow page advertising be excluded in setting rates for local service. Yellow page advertising was very profitable. Southern Bell argued that yellow page advertising revenues should not be included in setting rates because these advertising activities were subject to competition from other sources; the PSC did not set the rates for advertising; and these activities were not essential to the provision of telephone service. In rejecting Southern Bell's proposal the Commission noted that while there may be competition in this service, it was not meaningful competition and:

Bell, by virtue of its franchise, enjoys a position not available to other publishers of yellow pages in that only the telephone company has entry into every subscriber's home or business place via its directory and only the company has the complete up-to-date information concerning numbers.

Petition of Southern Bell Telephone and Telegraph Company For a Rate Increase, 81 FPSC 12: 59, 77.

The Commission went on to say:

Finally, we point out that the grant of a franchise carries with it certain obligations. By virtue of this franchise, Southern Bell has the obligation morally and legally to provide services to its customers as economically as possible.

81 FPSC 12: at 78.

Southern Bell appealed to the Supreme Court. Southern Bell Telephone and Telegraph Company v. Public Service Commission, 443 So.2d 92 (Fla. 1983). However, before the Court could decide the issue, the Florida Legislature settled the matter. It enacted section 364.037, Florida Statutes, which provides that some revenue from yellow page advertising will be regulated and some will not. Shareholders and ratepayers would share in the profitability of the service, rather than shareholders getting it all or ratepayers getting it all through reduced rates.

The sharing of revenues from UTF's long distance business in recognition the unique advantages UTF's local franchise brings to the long distance business follows the Legislature's precedent and is otherwise in the public interest. Absent this sharing of revenues, the Commission might well have decided the granting of a certificate to UTLD was not in the public interest.

POINT III

THE REQUIREMENT THAT UTLD COMPENSATE UTF DOES NOT VIOLATE THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

The requirement that UTLD compensate UTF for benefits it receives from its association with UTF is in the public interest and is not a deprivation of any property right of UTF without due process of law. Further UTLD is the only IXC in Florida which is associated with the area's local telephone company. The requirement that it compensate local ratepayers for benefits resulting from that association recognizes UTLD is a uniquely situated IXC and therefore there is no unjust discrimination.

The Appellant's due process argument invites the Court to make an internally inconsistent decision. The Commission found compensation was in the public interest because UTLD would enjoy benefits which were attributable to UTFs' local service franchise and to UTF's ratepayers, not just for the use of the United name. The Appellant argues that even if this Court agrees that UTF's local franchise and its ratepayers contributed to the value of the UTLD/UTF association it should nonetheless find any compensation is a taking of property. The two are mutually: it cannot be concluded that compensation is due and in the public interest, yet find it deprives UTF of any property.

The Commission found compensation to UTF was necessary to recognize the contribution the local franchise and local ratepayers make to the advantages UTLD will gain by being associated with UTF. While UTLD would like to overlook this fact, it is apparent it too realizes that it is not the UTF's name and

reputation alone which provide advantages to UTF:

First, to the extent that the royalty provides compensation to UTF's ratepayers for the value of UTF's reputation and goodwill, it constitutes a taking of property that belongs exclusively to UTF's stockholders. (Appellants brief at 28, 29).

The compensation required is for benefits which extend beyond the value of UTF's reputation and good will.

Appellees argument claiming a distortion of the ratemaking equation is itself a distortion. The evidence established that ratepayers contributed to the advantages UTLD will enjoy by its association with UTF. It is therefore appropriate to return the value of those benefits to the ratepayers by including in the ratemaking equation revenues from UTLD's long distance operation.

The last segment of Appellee's argument on this point which relies on equal protection grounds is legally unsound. There are no similarly situated IXC's to which UTLD can be compared. There is no other IXC that is situated to gain market share by virtue of being associated with the areas local exchange company or avoid costs by using the local exchange monopoly's facilities and personnel.

Further the other two major local exchange companies in Florida that could set up a "similarly situated" are prohibited from doing so.³ Perhaps the Appellants are advocating that UTLD should be treated the same as Southern Bell and General Telephone and that its certificate should be denied.

³Southern Bell and General Telephone are prohibited from engaging in InterLATA long distance service.

CONCLUSION

The Commission has the authority to prescribe different requirements for UTLD as a condition to issuing UTLD a certificate as an interexchange carrier. Based on competent substantial evidence, the Commission found it was in the public interest to require UTLD to compensate UTF and its ratepayers for benefits UTLD will receive through its association with UTF. The compensation recognizes the contribution ratepayers of UTF will make to the profitability of UTLD and there is no taking of UTLD property or a denial of equal protection to UTLD.

The Commission's decision should be affirmed.

Respectfully submitted,



Susan F. Clark
General Counsel

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32399-0861
(904) 488-7464

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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 ^{4/1} 11 day of January, 1989 to the following:

Michael Tye, Esq.
AT&T Communications Law Dept.
Suite 505
Barnett Bank Building
Tallahassee, FL 32301

Patrick K. Wiggins, Esq.
Ranson & Wiggins
Post Office Drawer 1657
Tallahassee, FL 32302

Richard D. Melson, Esq.
Hopping, Boyd, Green & Sams
Post Office Box 6526
Tallahassee, Florida 32302

Bruce W. Renard, Esq.
Messer, Vickers, Caparello,
French & Madsen
Post Office Box 1876
Tallahassee, FL 32302

Jack Shreve, Esq.
Office of Public Counsel
c/o Florida House of Representatives
The Capitol
Tallahassee, FL 32399-1300

Barrett G. Johnson, Esq.
Johnson & Associates
Post Office Box 1308
Tallahassee, FL 32302

John P. Fons, Esq.
Aurell, Fons, Radey & Hinkle
Post Office Box 11307
Tallahassee, FL 32302

Michael L. Rosen, Esq.
Holland & Knight
Post Office Drawer 810
Suite 600
Barnett Bank Building
Tallahassee, FL 32302


Susan F. Clark