IN THE SUPREME COURT OF FLORIDA

Case No. 75,282

On Appeal From The Florida Public Service Commission

INTERNATIONAL TELECHARGE, INC.,

Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION,

Appellee.

INITIAL BRIEF OF APPELLANT **INTERNATIONAL TELECHARGE, INC.**

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STATEMENT OF THE CASE AND FACTS

This case is before the Court on appeal from a Final Order (No. 20489) of the Public Service Commission ("PSC") [A 1-25], as modified by an Order Granting In Part and Denying In Part Motions For Reconsideration of Order No. 20489 ("Order on Reconsideration") [A 26-43], in a proceeding initiated by the PSC to determine whether and under what conditions the provision of operator services by telephone companies other than the local exchange companies ("LECs") and AT&T Communications of the Southern States, Inc. ("ATT-C") should be permitted in the public interest. The PSC has labelled those telephone companies providing operator services other than the LECs and ATT-C as alternative operator service ("AOS") providers. By those orders, the PSC ruled that AOS providers are in the public interest only if they comply with certain AOS-specific regulatory requirements [A 22, 39], including a rate cap tied to ATT-C rates [A 15-16, 33-34]. Because the requirements imposed by the PSC relate to the rates and services of telephone companies, this Court has jurisdiction. Art. V, §3(b)2, Fla. Const.; §§350.128(1), and 364.381, Fla. Stat. (1989).

Appellant, INTERNATIONAL TELECHARGE, INC. ("ITI"), like other AOS companies, provides intrastate long distance operator services primarily to the transient public through subscribing locations such as hotels, motels, hospitals, and privately owned pay telephones [T 733]. The AOS industry is of relatively recent origin, having developed in the mid-1980s as part of the emerging

competition in the long distance telecommunications industry. The capability of long distance telephone companies, other than ATT-C, to furnish operators to complete operator assisted long distance calls has emerged recently as (1) the technology has developed that allows the traditional service to be improved upon, and **(2)** the Regional Bell Operating Companies have been forced to make available to long distance telephone companies the capability of validating collect, third party and calling card numbers. The AOS industry has also fulfilled a market demand that was created when ATT-C and the LECs stopped paying commissions to hotels, hospitals and private pay telephone owners on operator-assisted calls made by their guests, patients or patrons [T **30-31**, 41]. In essence, the hotel, hospital, or private payphone owner subscribes to the services of an AOS, which handles operator-assisted calls from the premises, charges the caller based on time and distance with an additional flat fee for operator handling, and in some instances remits a portion of the charge to the subscriber in the form of a commission [T **43**, **49**]. Subscribers such as hotels and private payphone owners consider AOS companies beneficial because they not only pay commissions that help to defray the cost of equipment, but also provide billing alternatives and enhanced services not available from ATT-C or the LECs [T **880-912**, **921-33**, **1548–53**].

The PSC began certificating AOS providers as interexchange carriers ("IXCs") in 1986.[1] As a result of consumer inquiries and complaints about AOS practices, however, the PSC at its February 2, 1988 Agenda Conference initiated this proceeding to determine whether the provision of AOS services was in the public interest; it also imposed certain restrictions in the interim, including a rate cap based on ATT-C charges for comparable service [A 4]. The PSC permitted AOS providers to continue charging the rates set forth in their approved tariffs pending a hearing, but ordered that all revenues generated by charges in excess of the ATT-C rate for a comparable call be held subject to refund [A 4].

At its March 15, 1988 Agenda Conference, the PSC voted to amend its ruling by reducing the amounts subject to refund to charges in excess of the comparable LEC rate or, for calls from non-LEC (private) payphones, to charges in excess of the ATT-C daytime rate plus $1.00 [A 4]. This ruling was embodied in Order No. 19095, issued on April 4, 1988. The remaining portions of Order No. 19095 was rendered as proposed agency action and, as such, the PSC proposed to subject all AOS providers to specific conditions of service and certification requirements. [R 60].

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[1] ITI filed with the PSC an application for an interexchange carrier certificate along with its proposed tariff on May 6, 1987. By proposed agency action Order No. 18024 dated August 21, 1987 the PSC proposed to approve ITI's application and tariff. In re: Application of International Telecharae, Inc. for an Interexchange Certificate, 87 FPSC 8:247 (1987). Proposed Order No. 18024 was consummated by the PSC in Order No. 18146 on September 15, 1987.

ITI and other AOS providers filed petitions protesting Order No. 19095 [R 69, 77, 82, 88, 98], and numerous interested parties intervened, including several LECs, the Florida Pay Telephone Association, and the Florida Hotel and Motel Association [A 4, R 1048].

The "hold subject to refund" provision was then challenged by Central Corporation in a separate administrative proceeding, which resulted in a determination by a Division of Administrative Hearings ("DOAH") hearing officer that the provision constituted an invalidly promulgated rule [A 4]. While the PSC's appeal of that order was pending, the proceedings below continued to a hearing in August 1988. In the course of the hearing, which consumed three days, thirteen witnesses testified and submitted exhibits with respect to 21 separate issues [T 1-1584; R Vol. XI and XVI].[2] Subsequently, the parties and intervenors submitted post-hearing briefs [R 449-9061.

Following a vote on the issues at a Special Agenda Conference on November 17, 1988 [A 4], the PSC entered its Final Order on December 21, 1988 [A 1-25]. In that order, the PSC determined that the provision of intrastate operator services by AOS companies would be permitted subject to certain conditions, including the following restrictions:

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[2] In the interests of brevity and avoidance of unnecessary repetition, those portions of the testimony relevant to the issues presented here are treated in the appropriate section of argument together with record references.

1. AOS charges must be capped at the comparable ATT-C time-of-day rate, except that calls from private pay telephones could be charged up to the ATT-C daytime rate plus $1.00;

2. Refunds of amounts collected in excess of the specified rate since the initiation of the proceeding, if held to be valid on the pending appeal, must be made in the form of a prospective reduction in rates;

3. AOS providers must comply with certain operating restrictions and service standards, including "double branding" of calls (i.e., notifying the caller that the AOS provider is handling the call at both the beginning and end of each call), providing extensive rate and service information on stickers or "tent cards," and requiring these subscribers to assure access to all locally available IXCs; and

4. AOS providers must route to the LEC all 0+[3] long distance calls within a LATA[4] and all 0-[5] calls.

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[3] The term "0+" means that the caller simply dials "0" plus the called telephone number to complete the long distance call. Generally, a recorded message will advise the caller that he or she has reached an operator and to enter his or her billing method. The user is also told to touch 0 or to remain on the line if he or she requires the assistance of a live operator. For example, collect and person-to-person calls require a live operator. [T **740, 741.1**

[4] The term "LATA" is an acronym for Local Access and Transport Area. It is a creature of Judge Greene in the now famous divestiture or breakup of ATT case. The concept of LATAs was discussed at some length by this Court in US Sprint Com-

ITI, among others, moved for reconsideration of the Final Order [R **1060, 1145**] and requested a stay pending reconsideration [R **12801.** The PSC granted a stay of the rate cap pending reconsideration, conditioned on the posting of a bond or corporate undertaking [R **13501.** ITI filed a corporate undertaking which was approved by the PSC, allowing ITI to continue charging its tariffed rates subject to a refund of amounts exceeding the rate cap [R **13831.**

On October **19, 1989,** prior to the PSC's disposition of the motions for reconsideration, the First District Court of Appeal affirmed the determination that the "hold subject to refund" requirement in Order No. **19095** was invalid. Florida Public Service Commission v. Central Corp., **551** So.2d **568** (Fla. 1st DCA **1989).** The PSC did not appeal the First District's decision.

In its Order on Reconsideration issued November **19, 1989,** the PSC refused to reconsider the cap on AOS charges based on ATT-C rates, and further ordered that the rate cap would automatically adjust in accordance with any subsequent rate charges by ATT-C **[A 33-34].** The PSC also refused to reconsider the requirements regarding notice and disclosure, double branding, access to all locally available IXCs, and routing of 0+ intraLATA and 0- traffic to the LEC [A **36-37].** With respect to

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munications Company v. Marks, **509** So.2d 1107 (Fla. **1987).**

[5] "0-" refers to calls where the caller simply dials "0" and no other digit.

the refund of revenues collected by ITI in excess of the rate caps during the pendency of stay, however, the PSC reversed its ruling that refunds would be made by a prospective reduction in rates, and ordered ITI to make direct refunds by requiring that "[e]ach charged call shall be recalculated and the excess credited or refunded to the entity originally billed." [A **34.1**

ITI then filed a timely notice of appeal to seek review in this Court [R **15511.**

SUMMARY OF THE ARGUMENT

The PSC's imposition of a rate cap on AOS charges based upon ATT-C time-of-day rates is unsupported by any competent substantial evidence to show that such rates would be sufficient to afford AOS providers a fair rate of return. On the contrary, the unrefuted evidence showed not only that AOS providers must bear greater costs than ATT-C, but that ATT-C itself does not earn enough from its rates to cover the costs of operator services and must cross-subsidize from other sources of revenue -- an option not available to AOS providers. Although the burden was on the PSC to show that existing approved AOS rates are unreasonable and should be reduced, the PSC admittedly did not review and present any cost data supporting its supposition that ATT-C time-of-day rates would cover AOS costs. Absent such evidence, the rate cap cannot be sustained.

Because the evidence conclusively established that the ATT-C rates would not enable AOS providers to earn a fair rate of return, as required by statute and by the constitutional

guarantee of just compensation, the cap is confiscatory. Moreover, by ordering that the cap be automatically adjusted to conform to future rate changes by ATT-C, which do not require PSC approval, the PSC unlawfully delegated its exclusive ratemaking power to ATT-C. Such a delegation of power is not only unauthorized and arbitrary, but constitutes a manifest abuse of discretion where, as here, the power to fix AOS rates is reposed in their largest competitor, which is the dominant carrier in the marketplace.

The PSC's order, on reconsideration, that ITI make refunds directly to the transient end users rather than by a prospective rate reduction, is patently arbitrary and punitive. The testimony was uncontradicted, and the PSC itself found in its Final Order, that implementing a direct refund to transient callers would be virtually impossible, imprudent, time consuming, and cost prohibitive; no justification was offered for changing that conclusion. Because a direct refund would not accomplish the PSC's objective any better than a prospective rate reduction, and because the expense of processing direct refunds would likely exceed the total amount of the refund and impose costs on LECs and their local ratepayers, the decision to require direct refunds is arbitrary, and amounts to an unauthorized penalty.

The PSC order, by prescribing restrictions and requirements for AOS providers that are not imposed on ATT-C or LECs with respect to the same services, unjustifiably discriminates against AOS providers in violation of the equal protection

clause, and places AOS providers at a competitive disadvantage relative to ATT-C, contrary to the public interest.

Finally, the PSC's directive that all 0+ intraLATA traffic and all 0- traffic be reserved to the LECs is anticompetitive action based on policy assumptions that lack evidentiary support; and the requirement that all 0- traffic be routed to the LECs also exceeds the PSC's authority by effectively favoring ATT-C with respect to calls for which equal access has been federally mandated.

ARGUMENT

I. THE PSC'S IMPOSITION OF A RATE CAP BASED ON ATT-C RATES IS UNSUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE, IS CONFISCATORY, AND CONSTITUTES AN UNLAWFUL DELEGATION OF RATEMAKING POWER.

This Court has established that, in reviewing orders of the PSC, it "will not affirm a decision of the Commission if it is arbitrary and unsupported by substantial competent evidence, or in violation of a statute or a constitutionally guaranteed right." Shevin v. Yarborough, 274 So.2d 505, 509 (Fla. 1973). Analysis reveals that the PSC's imposition of a rate cap on AOS providers based upon ATT-C time-of-day rates constitutes reversible error because (a) the record reflects no competent substantial evidence to support a finding that ATT-C rates are fair, just, reasonable, and sufficient for AOS providers; (b) the evidence shows that the ATT-C rate cap denies AOS providers a fair rate of return, and thus is confiscatory in violation of the AOS providers' statutory and constitutional rights; and (c) by

tying the rate cap to ATT-C rates, including future changes by ATT-C, the PSC improperly delegated its ratemaking power.

(a) Application Of The ATT-C Rates As A Cap On AOS Rates Is Not Supported By Competent Substantial Evidence.

ITI does not dispute the PSC's authority to establish reasonable rates for telephone companies operating under its jurisdiction. In exercising that authority, however, the PSC is subject to two statutory limitations. First, Florida law requires that "[a]ll rates, tolls, contracts, and charges of ... telephone companies ... shall be fair, just, reasonable, and sufficient..." §364.03(1), Fla. Stat. (1989). The legislature has mandated that when the PSC fixes rates, "no telephone company shall be denied a reasonable rate of return upon its rate base." §364.035(1), Fla. Stat. (1989). Where, as here, rates are readjusted, the authorizing statute specifically directs that "the commission shall allow a fair and reasonable return on the telephone company's honest and prudent investment...." §364.14(1), Fla. Stat. (1989).

The second restraint on PSC ratemaking authority is the requirement that its actions must be based on findings "supported by competent substantial evidence in the record." §120.68(10), Fla. Stat. (1 9); see also §120.57(1)(b)7, Fla. Stat. (1989). 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 a

conclusion." De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). This Court has consistently held that an absence of competent substantial evidence requires reversal of PSC orders, because essential findings may not be based on "conclusory statements," Duval Utility Co. v. Florida Public Service Commission, 380 So.2d 1028, 1031 (Fla. 1980), or on "speculation or supposition," Tamiami Trail Tours, Inc. v. Bevis, 299 So.2d 22, 24 (Fla. 1974), or on "unreliable evidence or no evidence at all." Blocker's Transfer & Storage Co. v. Yarborouah, 277 So.2d 9, 12 (Fla. 1973).

In light of those two restrictions on PSC ratemaking power, the primary issue to be resolved here is whether there was competent substantial evidence presented below to support the conclusion that applying ATT-C rates as a cap on AOS charges is fair, just, reasonable, and sufficient to assure AOS providers a return on investment. A review of the record discloses not only a complete absence of any comparative cost analysis or other evidence to substantiate a finding that ATT-C rates would enable AOS providers to earn a reasonable rate of return, but an overwhelming body of unrebutted testimony establishing that AOS providers experience higher costs than ATT-C, and that ATT-C itself may not be recovering its operator service costs.

The absence of *any* evidence to show that a cap based on ATT-C rates would be sufficient to cover costs was not only admitted by the PSC's Staff witness [T 1230-31, 1292-95], but was openly acknowledged by the commissioners themselves during the

course of the hearing. After observing that the PSC was setting the rate cap "using ... an AT&T rate structure that is ... not based on a rate or cost study" [T 13861, Commissioner Herndon lamented:

> I guess what I'm struggling with is in trying to address the fundamental question here about how rates should be set, we have no evidence whatsoever in the record about the costs of any of these organizations, and we have no evidence about the cost for AT&T which we're using as a surrogate, ... and so I'm frankly in kind of a dilemma about how you go about setting rates without any real, tangible support for any'of the bases that we have used up to now. [T 1388-89.].

Indeed, Commissioner Beard recognized that the only evidence regarding costs of operator services was the testimony that in 1987 Southern Bell did not recover its costs but suffered a $16 million loss [T 13921.

The only testimony offered to support the imposition of a rate cap based on ATT-C rates was that of Alan Taylor, Chief of the PSC's Bureau of Service Evaluation. Taylor admitted that, in making its recommendation, the PSC Staff did not review any ATT-C or AOS cost of service studies [T 1230-31, 1349-50], did not determine whether ATT-C operator service rates cover costs [1292-94], did not request any actual cost data for any operator services [T 12951, did not analyze the impact of market forces on AOS providers [T 1275], and did not consider differences in billing and collection costs [T 1305-07]. Taylor acknowledged that operator service rates for ATT-C were last set by the PSC prior to divestiture [T 1358]. He also agreed generally that rates should be based on a carrier's reasonable costs plus a

return [T 13031, and that higher rates should be allowed if justified by costs [T 13551.

Nonetheless, Taylor recommended a rate cap based on ATT-C discounted time-of-day rates[6] [T 13071, even if that rate does not cover the AOS provider's costs [T 13641, based on consumer dissatisfaction with paying rates higher than ATT-C rates [T 1354-55]. He expressed the belief that the ATT-C rate is appropriate because service is generally available from ATT-C or the LECs at that rate [T 1359,'1363-65]. In Taylor's opinion, the AOS provider's cost of service is not relevant from the end user's perspective [T 13951.

Notwithstanding the statutory mandate regarding its ratemaking authority, the PSC never made an affirmative finding, either in the Final Order or in the Order On Reconsideration, that ATT-C time-of-day rates would afford AOS providers a reasonable rate of return, or even cover AOS costs. Rather, the PSC simply found that "AOS providers have failed to demonstrate why they should be permitted to charge rates above ATT-C's." [A 16, 34.1 While acknowledging the AOS testimony "that the rates charged by the LEC and ATT-C for operator services fail to cover costs," the PSC concluded:

> [N]o concrete evidence was presented to demonstrate whether current LEC or ATT-C intrastate operator rates do not cover costs. Further, the AOS parties did not produce sufficient cost data to show that

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[6] ATT-C experiences its peak traffic during the daytime business hours. As an incentive to encourage customers to shift their calls to the off-peak hours, ATT-C offers discounted rates during the evening and night hours. [T 1305-07.]

> their costs equaled or exceeded the current LEC or ATT-C rates. Therefore, our decision to cap the rates at the comparable ATT-C time-of-day charge is based on a lack of support for AOS providers charging higher rates for identical operator services provided by the LECs and ATT-C.

[A 16, 34.] In the Order On Rehearing, the PSC rejected the AOS claim that there was no evidence to show that ATT-C's costs are comparable to AOS costs, observing that "cost is only one factor in determining appropriate rates." [A 33-34.]

By predicating its decision to impose the ATT-C rate cap on "lack of support for AOS providers charging higher rates for identical services," the PSC departed from the essential requirements of law in several respects. First, the PSC's rationale rests on a legally improper presumption that a reduction of AOS rates to ATT-C time-of-day rates is appropriate for all AOS providers unless the AOS providers can prove that their existing rates are reasonable and justified. Under Florida law, where the agency that regulates utilities initiates the proceedings to determine whether existing rates are unreasonable and should be reduced, the agency as complainant bears the initial burden of proof to establish the unreasonableness of the rates, and the existing rates carry a presumption of reasonableness. Metropolitan Dade County Water and Sewer Board v. Community Utilities Corp., 200 So.2d 831, 832 (Fla. 3d DCA 1967); see also Westwood Lake, Inc. v. Metropolitan Dade County Water and Sewer Board, 203 So.2d 363, 365 (Fla. 3d DCA 1967).

Because there is no dispute that ITI has charged only those rates specified in its approved tariff [T 15071, the PSC

had the burden of overcoming the presumption that ITI's rates are reasonable and proving that a reduction was justified. Moreover, because the PSC's statutory authority to fix or readjust rates is conditioned on the requirement that the telephone company be allowed a reasonable rate of return, sections 364.035(1) and 364.14(1), Fla. Stat. (1989), the PSC was obliged to make a determination that any reduction would not result in rates that are insufficient to cover ITI's costs. Having concededly failed to request, review, or present any data showing that ITI's existing rates unreasonably exceed ITI's costs, or that a reduction to ATT-C time-of-day rates would still afford ITI a reasonable return, the PSC lacked any lawful basis or authority to impose the rate cap.

Even if the burden of proof could properly be shifted to the AOS providers, the PSC also departed from the essential requirements of law in finding AOS providers failed to demonstrate that LEC and ATT-C rates do not cover costs, or that AOS costs exceed current LEC and ATT-C rates. One major AOS provider testified that it initially charged rates that were equal to or less than ATT-C, but "lost a lot of money" and soon had to increase its rates [T 31-32, 51]. At least one other AOS provider also testified that it would lose money at ATT-C rates [T 668]. In addition, there was specific testimony that AOS providers could not charge ATT-C rates and continue to pay an average 15% commission to all subscribers, yet still earn a

profit [T 198, 227, 231]. None of this testimony was rebutted or discredited.

Of greatest significance, however, is the fact that "concrete" evidence of the relation between LEC or ATT-C revenues and costs was presented in the admission of Southern Bell that it does not make any profit from operator services, but actually suffered a loss of nearly $16 million in 1987 [T 1071-77]. Indeed, Commissioner Beard recognized at the hearing that this was the only evidence regarding actual costs of LEC operator service [T 13921. There was substantial corroborating testimony from a number of witnesses, however, that ATT-C is charging rates that do not cover its **own** operator service costs, but is supporting those underpriced services through cross-subsidies from other services that are priced to recover costs plus a profit, such as direct dial calls [T 54, 180-81, 231-32, 406, 589, 609, 695-97, 1172]. Conversely, there was no testimony from any witness, including PSC staff, that the rates charged by LECs or ATT-C are sufficient to cover their own operator service costs.[7]

Aside from the evidence that LEC and ATT-C rates may not even cover their own costs, the record reflects unrefuted testimony that AOS costs are higher than those of ATT-C because (1) AOS providers pay commissions to all subscribers while ATT-C

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[7] In fact, one commissioner and PSC staff witness acknowledged that when the PSC sets rates for LECs or IXCs, it allows cross-subsidies among various services to keep certain rates lower, but that AOS providers cannot cross-subsidize because they only sell operator services [T 13881.

only pays a select few [T 588]; (2) AOS providers are required to pay higher billing and collection fees to LECs than ATT-C [T 588, 773-77, 862, 868]; (3) AOS providers incur costs to comply with regulatory requirements imposed by the PSC that are not imposed on ATT-C [T 593]; (4) AOS providers do not enjoy the economies of scale or lower costs of capital that benefits ATT-C [T 868-69]; (5) AOS providers have a higher percentage of calls that are unbillable and must be written off [T 832, 846]; and (6) contrary to the PSC's assumption that they provide "identical operator services," AOS companies offer a number of new or enhanced operator services not available from ATT-C [T 364, 588, 873-74]. On the other hand, there was no testimony or other evidence to indicate that AOS costs are, in any respect, lower than ATT-C's costs.

In assessing whether a rate cap based on ATT-C time-of-day rates would cover AOS costs, the PSC apparently disregarded the undisputed fact that ATT-C time-of-day rates are structured to fit a schedule of peak use pericds that differs markedly from those of the AOS providers. The evidence established that, unlike ATT-C, which experiences peak hours during the daytime, AOS peak hours are in the evening and night, because their calls originate primarily from hotels, motels, hospitals, and universities. Thus, because ATT-C night rates are discounted -- and may actually be cross-subsidized by the higher daytime rates or other services -- application of ATT-C time-of-day rates will

force AOS providers to charge discounted rates during the AOS providers' peak hours [T 84, 588, 659, 666-67].

The PSC's failure to account for this fundamental difference in peak periods and its potential effect on the AOS providers' rate of return confirms that the imposition of a cap based on ATT-C time-of-day rates is patently arbitrary. While the ATT-C time-of-day rate schedule may serve a useful purpose for ATT-C by creating an incentive to alter calling patterns away from the daytime peak period, that schedule is manifestly unsuitable for AOS providers, which have peak hours that do not coincide with those of ATT-C. This Court has made it clear that the PSC is prohibited from selecting an arbitrary fee formula that is not based on the evidence of record relating specifically to the affected utility, but is fabricated from information concerning other companies. General Development Utilities, Inc. v. Hawkins, 357 So.2d 408 (Fla. 1978).

Considered in light of the foregoing record facts, the PSC's essential finding that ATT-C time-of-day rates will be sufficient to cover AOS costs and assure a fair rate of return is not only unsupported by competent substantial evidence, but flies directly in the face of the undisputed evidence, and must therefore be rejected. The evidence established without contradiction that ATT-C time-of-day rates are not sufficient to cover ATT-C's own costs, and that AOS costs are even higher than those of ATT-C; thus, the PSC's conclusion that ATT-C time-of-day rates are appropriate as a cap for AOS rates is flatly refuted

by the record. Because an agency order resting on a conclusion that conflicts with unrebutted testimony must be set aside as one not supported by competent substantial evidence, State v. Hawkins, 364 So.2d 723, 727-28 (Fla. 1978); Wade Bradford Grove Service, Inc. v. Bowen Bros., Inc., 382 So.2d 719, 720 (Fla. 1st DCA 1980), the imposition of the ATT-C time-of-day rate cap should properly be reversed.

Finally, even without regard to the question of costs, the record does not support the PSC's independent rationale that limiting AOS charges to ATT-C rates is necessary "to protect the transient public ... against excessive pricing." [A 15.] An expert economist testified that although AOS prices were initially high due to start-up costs and low volume, which is normal in an industry, this temporary disequilibrium will be corrected in time by market forces because of user education, the effects of competition, and response to complaints [T 265, 283, 291, 325-26]. Indeed, the testimony was overwhelming that market forces and regulatory pressures are already causing reductions of AOS rates[8] and that consumer complaints are declining significantly [T 52-53, 209, 362-63, 402, 405, 429-30, 516, 577-78, 586-87, 600, 602, 763-65, 770, 862, 1494-95, 1497, 1509-10]. The PSC's staff witness admitted that complaints are down [T 1571], and that as the general public comes to understand the differen-

[8] For some AOS providers, including ITI, rates for calls charged to a major credit cards are already lower than ATT-C rates [T 115, 317, 362, 725, 772-74].

ces in competitive services and prices, rate regulation will become unnecessary [T 1391].[9]

The evidence clearly established, however, that imposing the ATT-C time-of-day rate cap[10] would jeopardize the ability of AOS providers to compete and survive long enough to bring the potential public benefits to fruition. AOS providers are competitive because they pay commissions, which are of benefit to the public because they enable subscribers such as hotels, hospitals, and private pay telephone owners to maintain and upgrade equipment [T 399]. AOS commissions also provide hotel owners a contribution to overhead, which reduces the need to add premises surcharges or to increase rates for rooms or other services [T 182, 700-02, 705, 897]. The ATT-C rate cap will impair the ability of AOS providers to compete by forcing them either to discontinue commissions, or to cut costs and reduce the quality of service [T 786, 1056, 1548-51].

The PSC's conclusion that capping AOS rates will benefit the transient public was contradicted by evidence that the elimination or reduction of AOS commissions to hotels will simply shift the expense. A witness from the Florida Hotel & Motel Association and the expert economist explained that if AOS

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[9] In fact, there was testimony that the public generally expects rates to be higher at transient locations than at home [T 123, 401, 405].

[10] Various witnesses testified that,a reasonable compensatory guideline for AOS providers would be the ATT-C daytime rate plus $1.00, with the opportunity to justify higher rates based upon specific cost data [T 404-05, 590, 760, 884, 888].

commissions to hotels are reduced or eliminated, hotel owners will need to compensate for the loss of that contribution to overhead by imposing surcharges or raising room rates [T 290, 293, 335-37, 365-66, 897, 910]. Consequently, the transient public will still be required to pay for the services, and those who pay higher room rates may be subsidizing services that they do not use [T 365-66, 883]. In fact, the PSC staff witness admitted that an AOS rate cap would not protect the end user against premises surcharges, and thus it may accomplish nothing for the transient public [T 12231 -- contrary to the PSC's finding.

In sum, there is no evidentiary basis in the record to substantiate the PSC's findings that applying ATT-C time-of-day rates as a cap on AOS charges will protect the transient public and still provide AOS companies a proper rate of return. As this Court has recognized:

> Governmental bodies authorized by law to pass upon utility rates must base their decisions upon evidence and not upon some undisclosed factor or factors. A reviewing body's mere opinion as to what is a proper rate of return is not a valid substitute for evidence.

North Florida Water Co. v. City of Marianna, 235 So.2d 487, 489 (Fla. 1970). Accordingly, the rate cap should be set aside on the ground that it is not supported by competent substantial evidence.

(b) The ATT-C Rate Cap Is Confiscatory.

Even if the PSC's decision to impose the ATT-C time-of-day rate cap were based on findings supported by competent substan-

tial evidence, the record clearly establishes that the effect of such a rate cap would be confiscatory in that it would deprive AOS providers of the ability to earn a fair rate of return on their investment. As previously discussed, telephone company rates are required by statute to be fixed at a level that allows the company to earn a fair and reasonable rate of return. §§364.035(1) and 364.14(1), Fla. Stat. (1989). The right of a regulated utility to earn a fair rate of return is not merely mandated by statute, however, but is secured by the constitutional prohibition against confiscation of property without due process. Art. I, §9, Fla. Const.; amend. V and amend. XIV, U.S. Const.

As this Court has recognized, "[a] regulated public utility is entitled to an opportunity to earn a fair or reasonable rate of return on its invested capital ... for the benefit of the utility's investors," United Telephone Co. v. Mann, 403 So.2d 962, 966 (Fla. 1981), and "[f]ailure to allow the utility the opportunity to earn a fair rate of return would violate the rights to due process, to just compensation for taking of property and the right to possess and protect property." Gulf Power Co. v. Bevis, 289 So.2d 401, 403 n.1 (Fla. 1974). The United States Supreme Court has likewise held that denial of a reasonable return is "unjust, unreasonable, and confiscatory, and ... deprives the public utility company of its property in violation of the 14th Amendment." Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U.S. 679, 690

(1923). In the context of utility rate regulation, the constitutional guarantee of just compensation requires "a reasonable return on the value of the property used at the time that it is being used for the public service," and "rates not sufficient to yield that return are confiscatory." Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 31 (1926); see also United Telephone Co. v. Mayo, 345 So.2d 648, 653 (Fla. 1977).

Imposition of the ATT-C time-of-day rate cap by the PSC is clearly confiscatory because that restraint will effectively deny AOS providers an opportunity to earn a fair rate of return, in violation of the statutory requirements and the telephone companies' constitutionally protected property rights. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944). By adopting the ATT-C time-of-day rate as an appropriate industry-wide limitation, the PSC expressly or implicitly assumed (a) that all AOS companies provide operator services identical to or no greater than those provided by ATT-C; (b) that the AOS companies' costs of providing operator services are identical to or no greater than ATT-C's costs; and (c) that ATT-C's time-of-day rates are sufficient to produce a fair rate of return on the provision of operator services for ATT-C and AOS companies alike. As previously demonstrated, however, those assumptions are fundamentally irreconcilable with the facts established by the evidence of record and are otherwise wholly unwarranted.

The testimony below demonstrated beyond question that AOS companies, and ITI in particular, provide an array of innovative and beneficial services that are not available from ATT-C or the LECs:

1. AOS companies offer multi-lingual operators -- in the case of ITI, operators can provide nationwide services in 18 different languages -- while ATT-C has only recently made Spanish-speaking operators available outside of California [T 399, 489, 574, 725-26, 738-39, 764, 996, 1004, 1061, 1065, 1283, 1470, 14761.

2. AOS companies offer'voice message forwarding service, which enables the caller who gets a busy signal or no answer to leave a recorded voice message that is sent periodically until the called party answers; that service is not offered by ATT-C or the LECs [T 399, 488, 575, 727, 743, 998, 1062, 1138-39, 1283, 1470].

3. AOS companies pay commissions averaging 15% to all subscribers, which enables hotels to cover equipment costs while holding down room prices to the public, and allows private pay telephone owners to offer more advanced and widely available services to the public; ATT-C, which had stopped paying commissions in 1983 [T 572, 700], only pays limited commissions to a few very large volume subscribers, such as major hotel chains [T 199, 458, 717, 912].

4. AOS companies allow consumers the option to charge calls to Visa or MasterCard -- ITI permits billing to many major credit cards and offers discounted rates for such calls -- which is helpful to foreign tourists who do not have calling cards; ATT-C and the LECs do not offer credit card billing [T 120, 190, 488, 573, 737, 925-26, 998, 1060, 1139, 1146, 1470, 15531.

5. AOS companies, including ITI, offer advanced operator services made possible through state-of-the-art operator consoles that display extensive information about each call [T 734-37, 1469-70]. These enhanced services include, among other things, the ability (a) to identify the location of the telephone, which facilitates more effective emergency service and immediate trouble reporting; (b) to provide refund assistance to pay telephone users and repair advisories to pay telephone owners; (c) to provide

dialing instructions based on the specific set-up at the originating hotel or hospital; and (d) to screen calls for protection against fraudulent charges. ATT-C and the LECs do not offer such services.

The testimony was undisputed, and in fact the PSC staff witness admitted, that the provision of these added services by AOS companies are of benefit to the public [T 12831. Thus, the PSC's conclusion that there was "a lack of support for AOS providers charging higher rates for identical operator services provided by the LECs and ATT-C" is plainly predicated on an erroneous assumption.

Equally unfounded is the PSC's supposition that AOS providers incur no greater costs than ATT-C. As previously discussed, the record reflects that AOS costs are higher than ATT-C costs for a number of reasons:

1. AOS companies pay commissions averaging 15% to all subscribers, while ATT-C pays only limited commissions to a very few subscribers.

2. AOS companies are required to pay higher calling card validation and billing and collection fees to LECs than ATT-C.

3. AOS companies, by virtue of the PSC's order in this case, are required to comply with certain conditions and requirements not imposed on ATT-C (i.e., providing extensive rate and service information to users, providing access to all available IXCs, posting tent cards, double branding of calls, etc.), which entail additional expense.

4. AOS companies must bear a higher cost of capital than ATT-C, which is regarded as a less risky investment.

5. AOS companies have a higher percentage of calls that cannot be billed or collected.

6. AOS companies provide enhanced services not offered by ATT-C, such as multi-lingual operators, voice messaging, call screening, immediate repair and

refund assistance, etc., which entail significant added personnel and equipment expenses.

By assuming that **AOS** companies provide the same services as **ATT-C** at the same cost as **ATT-C,** the **PSC** improperly disregarded the undisputed evidence that **AOS** costs are higher than those of **ATT-C.**

Finally, the evidence presented below seriously undermined the **PSC's** basic assumption that **ATT-C** itself is earning a profit on its time-of-day rates. In addition to the testimony that Southern Bell lost $16 million on operator services in 1967, and that one **AOS** provider who initially charged **ATT-C** rates also suffered losses, there was substantial evidence to show that **ATT-C** is not able to cover its costs and is supporting its operator services with cross-subsidies from other sources of revenue, which are not available to **AOS** companies. Although **ATT-C** was not a party and no actual profit/loss data was introduced, there was no evidence whatsoever to support the **PSC's** contrary assumption that **ATT-C** time-of-day rates are sufficient to produce a profit.

Despite the unrebutted evidence that **AOS** costs are higher than those of **ATT-C,** the PSC dismissed the significance of that fact with the simple observation that "cost is only one factor in determining appropriate rates." Because of the statutory and constitutional mandates that telephone companies must be afforded a fair rate of return, however, cost is an essential and indispensable factor in fixing rates. If a company's rates are limited to levels that will not be sufficient to cover its costs of providing services, then those rates are by definition

confiscatory, and that result effectively renders all other factors irrelevant.

ITI recognizes that the PSC possesses broad discretion in exercising its ratemaking and regulatory powers. Such discretion, however, cannot conceivably be extended to a degree that permits the PSC to disregard uncontroverted facts that clearly refute the assumptions on which its rate determination is founded. Absent some evidence that ATT-C itself is covering its costs, any notion that ATT-C time-of-day rates are sufficient to enable ITI and other AOS companies to earn a fair rate of return is fundamentally irreconcilable with the fact that AOS costs are already higher than ATT-C's, and that the additional requirements imposed on AOS companies (but not on ATT-C) in this case will necessarily increase that cost differential. Because the record conclusively shows that the ATT-C time-of-day rates will not enable AOS providers to earn a fair rate of return, the order imposing the rate cap is plainly confiscatory and cannot be sustained.

(c) The Fixing Of AOS Rates By Reference To ATT-C Rates, Including Future Changes, Is An Improper Delegation Of The PSC's Ratemaking Power.

In addition to requiring that rates charged by AOS providers be capped at current ATT-C time-of-day rates, the PSC ordered that "AOS providers shall file tariff revisions to remain at or below the rate cap whenever ATT-C changes its rates." [A 34.1 Because ATT-C is free to alter its rates at any time without PSC approval, the directive that AOS providers must

automatically adjust their rates to conform to future changes by ATT-C is, in effect, a delegation to ATT-C of the PSC's power to fix rates. This is particularly egregious in that it allows the dominant player in the long distance marketplace (i.e., ATT-C) to automatically set rates for its competitors. Even if the PSC's determination that current ATT-C rates are appropriate as a limitation on AOS charges could otherwise be sustained, this delegation of the PSC's power to fix rates in the future is clearly invalid.

Under Florida law, the principle is firmly established that administrative agencies have no authority to delegate their exclusive statutory responsibilities to any party, including their own employees or other government agencies. City of Miami v. Fraternal Order of Police, 511 So.2d 549, 551 (Fla. 1987); Tamiami Trail Tours, Inc. v. Carter, 80 So.2d 322, 327 (Fla. 1955); Florida Dry Cleaning and Laundry Board v. Economy Cash & Carry Cleaners, Inc., 143 Fla. 859, 197 So. 550, 555-57 (1940); Booker Creek Preservation, Inc. v. Southwest Florida Water Management District, 534 So.2d 419, 424 (Fla. 5th DCA 1988), pet. for rev. denied, 542 So.2d 1334 (Fla. 1989); Upjohn Healthcare Services, Inc. v. Department of Health and Rehabilitative Services, 496 So.2d 147, 149 (Fla. 1st DCA 1986). This Court has specifically held that an agency may not delegate its authority by adopting the regulations of a federal agency as modified in the future. Hutchins v. Mayo, 143 Fla. 707, 197 So. 495, 498 (1940).

The Florida Legislature has expressly vested the PSC with "exclusive jurisdiction" to regulate telephone companies. §364.01(1), Fla. Stat. (1989). By providing for the automatic adoption of future changes in rates by ATT-C to govern AOS rates, the PSC has effectively delegated its exclusive ratemaking power. Such action constitutes an abdication of the PSC's own legislatively delegated responsibility, and is clearly invalid for lack of statutory authority. E.g., United Telephone Co. v. Public Service Commission, 496 So.2d 116, 118 (Fla. 1986).

The unlawful delegation in this case is particularly improper because it reposes the power to set rates for AOS providers in the hands of their largest competitor, in fact the dominant carrier in the marketplace. As the expert economist who testified below observed, by adopting a competitor's rate as a cap the PSC is "turning pricing over to that competitor" and essentially "giving AT&T the power to set rates." [T 305.1 Because ATT-C can (and does) set its rates for operator services at a level substantially below cost yet continue to survive by cross-subsidization, while AOS providers cannot rely upon other services as sources of revenue to compensate for losses, the PSC's order creates a potential for predatory pricing. Indeed, some concern was expressed at the hearing below that ATT-C could drive AOS companies out of business by adopting and maintaining artificially reduced rates [T 589].

The tying of AOS rates to ATT-C time-of-day rates, including future changes in those rates, is both an invalid

delegation of statutory authority and a patent abuse of agency discretion. Consequently, that portion of the PSC's ruling should be reversed.

11. THE PSC ERRED IN ORDERING ITI TO MAXE DIRECT REFUNDS.

When the PSC initiated the proceeding to determine whether alternative operator services are in the public interest at its Agenda Conference on February 2, 1988, it permitted AOS providers to continue charging the rates set forth in their respective approved tariffs pending a hearing, but ordered that all revenues generated by charges in excess of the ATT-C rate for a comparable call be held subject to refund [A 4]. That ruling was subsequently amended to limit the amounts subject to refund to those charges in excess of the comparable LEC rate or, for calls from non-LEC pay telephones, to those charges in excess of the stipulated private pay telephone rate, which is the ATT-C daytime rate plus $1.00 [A 4]. This ruling was embodied in Order No. 19095, issued on April 4, 1988 [R 60].

The "hold subject to refund" provision was then challenged in a separate administrative proceeding, which resulted in a determination by a hearing officer that the provision constituted an invalidly promulgated rule [A 4]. While the PSC's appeal of that order was pending, the proceedings below continued to a hearing in August 1988 and culminated in the Final Order, entered on December 21, 1988 [A 1-25], which made the rate cap effective. In the Final Order, the PSC stated that if the refund requirement was upheld on appeal, "[t]hat refund will be in the

nature of a prospective reduction in rates," because "[i]t appears virtually impossible to refund the money in question to the actual end users who incurred the charges," and "a direct refund would be imprudent, time consuming and cost prohibitive." [A 20.1

ITI, among others, moved for reconsideration of the Final Order [R 1060, 1145] and requested a stay pending reconsideration [R 12801. The PSC granted a stay of the rate cap pending reconsideration, conditioned on the posting of a bond or corporate undertaking [R 13501; and ITI filed a corporate undertaking, which was approved by the PSC, allowing ITI to continue charging its tariffed rates subject to a refund of amounts exceeding the rate cap [R 13831.

On October 19, 1989, prior to the PSC's disposition of the motions for reconsideration, the First District Court of Appeal affirmed the determination that the "hold subject to refund" order was invalid. Florida Public Service Commission v. Central Corp., 551 So.2d 568 (Fla. 1st DCA 1989).[11] That decision eliminated the obligation to refund revenues collected in excess of the rate cap prior to the effective date of the PSC's official vote adopting the rate cap after the hearing. See §364.063, Fla. Stat. (1989). Thus, the only refunds at issue here involve those amounts charged in excess of the rate cap after November 17, 1988, which were held by ITI pursuant to its corporate undertak-

[11] The PSC did not seek discretionary review of that decision in this Court.

ing filed as a condition of the stay pending reconsideration of the Final Order.

In its Order On Reconsideration issued November 29, 1989, the **PSC** adhered to its decision to impose the rate cap **[A 33-34].** With respect to the revenues collected by ITI in excess of the rate caps during the pendency of stay, however, the **PSC** inexplicably reversed the decision announced in the Final Order that refunds would be made by a prospective reduction in rates. Instead, the **PSC** ordered **ITI** to make direct refunds by requiring that "[e]ach charged call shall be recalculated and the excess credited or refunded to the entity originally billed." **[A 34.1**

Subject to this Court's determination as to the validity of the rate cap, ITI recognizes that Florida ratepayers should receive the benefit of any rate adjustment. ITI submits, however, that the **PSC's** Order on Reconsideration requiring direct refunds to "the entity originally billed" **--** i.e., transient hotel guests and pay telephone users **--** entails such an onerous and expensive process that it must be deemed a patently arbitrary decision, which as a practical matter imposes an unauthorized penalty.

The order mandating a direct refund is clearly contrary to the **PSC's** own findings in the Final Order that any refund should take the form of a prospective rate reduction because it is "virtually impossible to refund the money in question to the actual end users who incurred the charges," and "a direct refund would be imprudent, time consuming and cost prohibitive." In the

Order On Reconsideration, the PSC offered no reason or explanation whatsoever for reversing field with respect to those findings, and the record reflects no basis for the decision to require a direct refund. Indeed, the evidence presented below conclusively demonstrated that a direct refund would be impractical and improper for a number of reasons.

Direct refunds may be reasonable in cases where residential or commercial customers have a continuing relationship with the utility, and where records are available that make it a relatively simple task to identify the ratepayer, compute the amount of the refund, and process the credit or deliver the check. With respect to AOS providers, however, those conditions do not exist. Due to the nature of the business and the remoteness of the relationship between AOS providers and end users, the process of identifying the person entitled to a refund, determining the amount due, and making the refund or issuing the credit is an incomprehensibly laborious process. Moreover, the burden and expense of a direct refund falls not only upon ITI, but also on the LECs that perform the billing and collection services, and ultimately on their local ratepayers.

At the hearing below, those witnesses who addressed the issue attested uniformly to the immensity of the problems posed by a direct refund [T 111, 224, 418-27, 517, 599, 603, 869, 1053-54, 15701. Because AOS companies serve transient end users who give no identifying information other than a billing number, identification of the customer must be done by the various LECs

around the country that handle the billing [T 420]. For the LEC, identifying and locating the customer can be difficult, because the customer may no longer be at the billing number, or there may be several persons who use the same billing number [T 1053-54].

To determine the amount of the refund, each call must be reconstructed and re-rated to determine the amount charged in excess of the applicable rate cap; this entails, among other things, ascertaining the time when the call was made and whether it was made from a pay telephone or hotel. Because the LEC has discretion to adjust charges up to a certain limit, both the AOS provider and the LEC must review their records to determine whether the charge was paid, and whether it was subsequently adjusted in whole or in part because of billing error or customer complaint.[12] This simply cannot be done with 100% accuracy. Finally, a credit must be posted or a check issued, which presents additional problems [T 420-26, 1053-54].

Aside from the mechanical morass, direct refunds entail an enormous administrative expense that will likely exceed the amount of the refunds [T 426, 599, 16051. Some LECs charge as much as $3.00 for processing each adjustment [T 785], even though the refund amount is only the difference between the charge and

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[12] One adverse consequence of the process required to ascertain the amount of the refund is that ITI will incur significant costs simply to determine that no refund is required. Under PSC Rule 25-4.114, as made applicable to IXCs by Rule 25-24.490(1), a telephone company need not refund any amount less than $1.00 to persons not on that company's system. ITI will not know whether that exception applies, however, until after it has completed the costly and time consuming procedure of re-rating and verifying each call with the billing LEC.

the rate cap. As a practical matter, however, it is likely that the costs of processing direct refunds will fall partly on the LECs, and to that extent the burden will be borne by local ratepayers [T 786-87].

The PSC staff witness did not dispute these facts. Indeed, he acknowledged that implementation of direct refunds will present problems and will impose a burden on LECs that could affect local ratepayers [T 1331, 1334, 15701. He also admitted that he did not compare the costs of making direct refunds with the amount of the refunds to determine whether there will be a net benefit [T 13321, and did not consider the costs to LECs in other states[13] [T 1335].

Considering the enormous expense and difficulty of making direct refunds, as well as the likelihood that many refunds will never reach the intended recipients, there is simply no reason for requiring that procedure to the relatively easy and efficient alternative of a prospective rate reduction. To the extent that the refund promotes a public interest in requiring ITI to return a portion of the revenues collected during the pendency of the stay, that interest is equally well served by a prospective rate reduction.

The PSC's own finding that a direct refund would be "imprudent, time consuming and cost prohibitive" confirms that

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[13] Because a substantial segment of the traffic handled by AOS providers in Florida is from out-of-state travelers who charge calls to their calling cards or home telephones, the direct refund will impose a financial burden on non-Florida LECs that are beyond the PSC's jurisdiction.

the choice of that method is an arbitrary action, supported by no justification other than an intent to inflict punishment on ITI. "An arbitrary decision is one not supported by facts or logic, or despotic." Agrico Chemical Co. v. State Department of Environmental Reaulation, 365 So.2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So.2d 74 (Fla. 1979). Such a decision cannot stand. Citizens v. Public Service Commission, 435 So.2d 784, 785 (Fla. 1983).

In addition, because the decision to require direct refunds will impose costs that are manifestly disproportionate to the benefits, it amounts to an unauthorized penalty. The legislature has provided that "[a]ny refund ordered by the commission ... shall not be in excess of the amount of the revenues collected subject to refund," plus interest. §364.055(4), Fla. Stat. (1989). While this statute may be fairly construed to require that a telephone company bear the reasonable costs of implementing a refund, the legislature could not have contemplated or intended that the PSC be empowered to order a refund by a method that may cost more to administer than the amount of the refunds.

In effect, the order imposes a type of hidden penalty that is not within the authority of the PSC as defined in section 364.285, Florida Statutes (1989) (authorizing assessment of penalties for willful violation of its rules and orders). The Florida Constitution prohibits agencies from imposing any form of penalty without specific legislative authority. Art. I, §18,

Fla. Const.; Continental Construction Co. v. Board of Trustees of the Internal Improvement Trust Fund, 464 So.2d 204, 207 (Fla. 1st DCA), pet. for rev. denied, 472 So.2d 1180 (Fla. 1985). Accordingly, that portion of the order requiring ITI to make a direct refund, rather than a prospective rate reduction, must be reversed.

III. THE PSC ORDER UNLAWFULLY DISCRIMINATES AGAINST AOS PROVIDERS BY PRESCRIBING RESTRICTIONS AND REQUIREMENTS NOT IMPOSED ON ATT-C.

In its Final Order, the PSC imposed on AOS providers service restrictions and operating standards that are significantly different from those standards and restrictions imposed on ATT-C. For example, AOS providers are required to double brand all calls, to provide end users with extensive rate and service information, and to ensure that an end user is provided access to all locally available carriers. Furthermore, the PSC prohibits AOS companies from billing surcharges on behalf of a subscriber such as a hotel or hospital. Because none of these standards and restrictions is likewise imposed on operator services provided by ATT-C, the effect of the PSC's order is to authorize disparate regulatory treatment among similarly situated providers of operator services.

The constitutional guaranty of equal protection[14] forbids unjust discrimination by requiring that the states and their agencies afford the same rights and impose the same burdens on

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[14] Art XIV, U.S. Const.

similarly situated persons. See, e.g., Plyler v. Doe, 457 U.S. 202, 216 (1982); Davis v. Florida Power Co., 64 Fla. 246, 60 So. 759, 766 (1913). Although the PSC has the power to "make the rules" in this area, fundamental principles of law and fairness require that providers of interexchange operator services all play by the same rules, regardless of whether such provider is ATT-C, a LEC, or an independent operator service provider. To do otherwise would unlawfully discriminate among telephone companies providing the same general services to the public.

In its Final Order, the PSC attempted to justify this differential treatment by emphasizing the need to regulate operator services companies that "deal with end users on a captive basis." [A 7.] From such statements, it appears that the PSC is exempting ATT-C from regulatory requirements imposed on other operator service providers, including ITI, on the assumption that ATT-C does not deal with end users on a captive basis. That simply is not the case.

Ample and undisputed evidence in the record shows that ATT-C and many LECs pay commissions and provide operator services to many locations such as hotels and payphones. [T 199, 922, 942, 1105, 1109.1 Patrons of those hotels and users of those payphones are, in the PSC's own terms, captives of the ATT-C and LEC operators just as if ITI or any other operator service provider were serving that particular hotel or payphone location. Nonetheless, the Final Order suggests that ATT-C could handle

such calls without adhering to the same regulatory restrictions that bind AOS providers.

If the objective is truly to educate the public so that end users can make informed choices among competing operator service providers, and to assure that members of the public have access to their preferred carrier, the discrimination between ATT-C and the AOS providers with respect to these service standards and restrictions is counterproductive. In addition, by placing AOS providers at a disadvantage relative to ATT-C, the order inhibits rather than promotes the goal of competition. Thus, because there is no rational basis for the differential treatment, the order must be deemed violative of the equal protection clause.

IV. THE PSC'S REQUIREMENT THAT ALL 0- AND 0+ INTRALATA TRAFFIC BE EXCLUSIVELY RESERVED TO THE LEC IS ARBITRARY AND UNLAWFULLY DISCRIMINATES AGAINST AOS PROVIDERS

(a) There is no basis for the PSC's Requirement That All 0+ IntraLATA Traffic Be Exclusively Reserved To The LEC.

In the Final Order and again in the Order on Reconsideration, the PSC prohibited AOS providers from carrying 0+ long distance calls within a LATA. The sole basis asserted by the PSC for this requirement is that such routing of 0+ intraLATA traffic is "a matter of long standing Commission policy." Neither the record, nor prior orders, nor the decisional law support that assertion. Indeed, analysis reveals that requiring 0+ intraLATA traffic to be routed to the LECs is a retreat from, not an adherence to, the PSC's policy of promoting intraLATA

competition. This Court recognized the PSC's commitment to intraLATA competition in US Sprint Communications Co. v. Marks, 509 So.2d 1107, 1108 (Fla. 1987):

> In the orders under review in Microtel II, the PSC's commitment to intraLATA competition was evidenced by the fact that the PSC had further divided the federally mandated LATAs into twenty-two smaller geographic areas, equal access exchange areas (EAEAs). Under the PSC plan, the local exchange companies (LECs) were required to provide equal access to the competing IXCs for interEAEA long distance calls. . . . IXCs wishing to compete for intraEAEA calls were required to either use the LECs' facilities and compensate the LEC for that use, or if technically not feasible, the IXCs could use their own facilities and compensate the LEC.

(Emphasis added.)

Certainly, there are some restrictions on intraLATA competition in Florida. Order No. 13912, for example, provides that a customer can "presubscribe" to an IXC for 1+ and 0+ interLATA and interstate traffic, but cannot "presubscribe" to an IXC for 1+ and 0+ intraLATA interEAEA traffic. Order No. 13912, however, only prohibits an IXC from handling "presubscribed" 1+ and 0+ intraLATA traffic. "Presubscribed" 1+ and 0+ traffic means that the LEC has in place enhanced computer software and network capabilities (so-called equal access capabilities) that enable a subscriber to pre-select any one IXC to receive all of the subscriber's long distance traffic without dialing access codes.[15] Where access codes are used to reach an IXC, Order No.

[15] There are three basic forms of access to other carriers: by dialing 1-800 (for example, 1-800-950-1022 for MCI); by dialing a number beginning with 950 (for example, 950-1022 for MCI); or by dialing a number beginning with 10XXX (for example, 10222 for MCI).

13912 does not prohibit the completion of intraLATA 0+ calls. This was made abundantly clear in Order No. **14621**, issued after Order No. **13912**, wherein the PSC specifically recognized that intraLATA long distance calls may be completed on an access code basis. See In re: AT&T Communications Application for Public Convenience and Necessity -- WATS, **85** FPSC **7:234, 239 (1985)** (completion of intraLATA calls permitted using **10XXX** access code dialing).

Not only has the PSC confirmed that intraLATA calls may be completed through access codes, it also has recognized that autodialers and other equipment can expedite access to another carrier by allowing single digit access to that carrier, rather than the ten or more digits that otherwise would be required. This equipment enables an owner to program the telephone so that whenever a call is dialed 1+ or 0+, the telephone out-pulses the access code of the carrier chosen by the equipment owner. Prior to the Order on Reconsideration, the PSC had specifically determined that it would not regulate the provision of such autodialing equipment in a competitive marketplace. See In re: Revisions to Americal LDC, Inc.'s Tariff to Include Special Equipment, **84** FPSC **6:16 (1984)**. The foregoing facts refute the PSC's statement that its "longstanding" policy has been to require that **all** 0+ intraLATA calls be routed to the LEC. The PSC's failure to account for its 0+ intraLATA routing requirement confirms that such policy is patently arbitrary.

The 0+ intraLATA routing requirement is also discriminatory, because the PSC has in effect drawn an unfair distinction in the use of autodialers to transmit intraLATA calls. The Order on Reconsideration suggests that residential and business customers can employ an autodialer to route intraLATA long distance operator assisted traffic to a particular long distance carrier. However, the owner of a hotel, motel, hospital, university, or payphone served by an AOS provider is prohibited from doing the same thing. This disparate treatment not only denies such equipment owners their right to receive the enhanced services from ITI, but also adversely affects ITI and other AOS providers who primarily offer service to hospitals, hotels, and pay telephone owners. Because there is absolutely no basis in the record for this differential treatment, the order must be deemed violative of the equal protection clause.

(b) The PSC's Requirements That All 0-Traffic Be Routed To The LEC Is Unsupported By Competent Substantial Evidence And Discriminates Against AOS Providers In Favor Of ATT-C.

In both the Final Order and the Order on Reconsideration, the PSC required that all 0- traffic (where the caller dials 0 and no additional digits) be routed to the LEC. The PSC's primary reason for this requirement is that routing of 0- calls to the LEC is consistent with the North American Numbering Plan, which the PSC has endorsed.

The PSC's decision to endorse the North American Numbering Plan, however, is based on the erroneous assumption that the Plan

is a nation wide mandate that uniformly assigns "0" to the local exchange companies and "00"[16] to interexchange carriers. Uncontradicted record evidence, including the testimony of the PSC staff witness, established that the North American Numbering Plan is not a policy that has been adopted nationwide or even implemented uniformly in Florida [T 1259-61], but is simply a Bell Operating Company scheme that was formulated prior to the emergence of AOS companies [T 1481]. Indeed, several state commissions have authorized ITI and other AOS providers to complete 0- calls [T 236, 1481].

Moreover, the record shows that the North American Numbering Plan further ensconces ATT-C as the dominant carrier in the long distance market, thereby undermining the fundamental objectives of the Modified Final Judgment ("MFJ")[17] to protect against further anticompetitive practices of ATT-C and the Bell

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[16] "00" is a dialing pattern made available by only certain LECs in certain limited geographical areas where a caller dials "00" and is connected to a long distance operator. "00" dialing is not a technical possibility in many locations in Florida. Furthermore, "00" dialing is not a viable solution for most hotels, motels, hospitals or other institutions [T 1097].

[17] United States v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), aff'd sub nom, Maryland v. United States, 460 U.S. 1001 (1983), and subsequently modified by United States v. Western Electric Company, 569 F.Supp. 990 (D.D.C. 1983) (Western Electric 1), and United States v. Western Electric Company, 569 F.Supp. 1057 (D.D.C.), aff'd sub nom, California v. United States, 464 U.S. 1013 (1983) (Western Electric 2). The MFJ modified the consent decree which settled an antitrust action brought against ATT-C for violations of the Sherman Antitrust Act. As a consequence, ATT-C was divested of its local telephone companies, operating areas of local telephone companies were restricted, and protections were installed to ensure competitive interstate long distance telephone services.

Companies, and to "level the playing field" in the long distance market [T 293, 432, 591, 767-68]. Overwhelming evidence in the record reveals that a number of 0- calls are actually interLATA calls. Because Southern Bell and General Telephone cannot by law handle these calls, and because the LECs do not have the network compatibility with carriers other than ATT-C necessary to automatically hand-off 0- interLATA calls, most LEC operators in Florida transfer 0- interLATA calls to ATT-C operators for completion [T 1013-14, 1094-98, 1150]. The LECs are technologically incapable of returning such traffic to presubscribed carriers other than ATT-C [T 768]. Thus, reservation of 0- to the LEC effectively forces many location owners to direct interLATA operator service calling to ATT-C, regardless of the location owner's preference of IXC. The consequences of this routing system are patently anticompetitive because it perpetuates the dominant role of ATT-C in the interexchange market [T 1445]. ATT-C has no greater right to be the sole interexchange carrier providing interLATA operator services than it has to be the only interexchange carrier in Florida [T. 786, 14421.

Routing of all 0- intrastate calls to ATT-C also violates the MFJ requirement that each interexchange carrier be provided access equal in type, quality, and price to that provided to ATT-C [T 768]. See MFJ Section II.A., 552 F. Supp. at 227. Additionally, dedicating all 0- traffic to the LECs effectively usurps the Federal Communications Commission's (FCC's) exclusive jurisdiction over identifiable 0- interstate calls [T 768-69].

The record clearly establishes that many if not most 0- calls actually are interstate calls [Tr. 70, 591]. Thus, it is outside the authority of the PSC to mandate the routing of identifiable interstate calls which are exclusively under the jurisdiction of the FCC. National Association of Regulatory Utility Commissions v. FCC, 745 F.2d 1492, 1498 (D.D.C. 1984); New York Tel. Co. v. FCC, 631 F.2d 1059, 1065-66 (2d Cir. 1980).

The testimony presented below establishes that the most efficient and simple plan is to allow one operator to handle all calls. In this regard, it is significant that AOS providers have the ability to return local or intraEAEA calls to the LEC, but LEC operators cannot transfer interEAEA or interstate calls to the AOS operator [T. 1442, 1480]. Thus, for the PSC to institute the North American Numbering Plan -- a plan that has been shown to be anticompetitive, discriminatory, confusing, and generally unworkable -- is arbitrary agency action that must be overturned.

CONCLUSION

Based on the foregoing arguments and authorities, the PSC's order cannot be sustained. Apart from the fatal flaws in the separate aspects of the order, the collective effect is to jeopardize the viability of a fledgling industry that is just beginning to produce benefits for the public in the form of innovative services and enhanced competition, which forces the established companies to improve their own performance. The inevitable consequence of stifling competition would be the restoration of monopoly power, which does not benefit the public.

Accordingly, the order entered below should be quashed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 18th day of May, 1990, to:

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