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.

REPLY BRIEF OF APPELLANT INTERNATIONAL TELECHARGE, INC.

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TABLE OF CONTENTS

Page(s)

Table of Citations ii

Reply to Statement of the Facts. 1

Summary of the Argument. 3

Argument 4

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 4

11. THE PSC ERRED IN ORDERING ITI TO MAKE DIRECT REFUNDS 12

111. THE PSC ORDER UNLAWFULLY DISCRIMINATES AGAINST AOS PROVIDERS BY PRESCRIBING RESTRICTIONS AND REQUIREMENTS NOT IMPOSED ON ATT-C 15

IV. THE PSC'S REQUIREMENT THAT ALL 0- AND 0+ INTRALATA TRAFFIC BE EXCLUSIVELY RESERVED TO THE LOCAL EXCHANGE COMPANY IS ARBITRARY AND UNLAWFULLY DISCRIMINATES AGAINST AOS PROVIDERS. 15

Conclusion 15

Certificate of Service

NOTE: References to the hearing transcript are designated [T ___]; references to PSC's Answer Brief are designated [Br. ___]; and references to the record are designated [R ___].

TABLE OF CITATIONS

Cases **Page(S)**

General Development Utilities, Inc., v. Hawkins, 357 So.2d 408 (Fla. 1978) 9

North Florida Water Co. v. City of Marianna, 235 So.2d 487 (Fla. 1970). 10

State v. Hawkins, 364 So.2d 723 (Fla. 1978) 8

FLORIDA STATUTES

Ch. 90-244, Laws of Florida. 4,15
Ch. 90-244, §§2, 36, Laws of Florida 15
§120.57(1)(b)7, Fla. Stat. (1989). 7
§120.68(10), Fla. Stat. (1989) 7
§364.02(4), Fla. Stat. (1989). 6
§364.03, Fla. Stat. (1989) 6
§364.03(1), Fla. Stat. (1989). 6
§364.14, Fla. Stat. (1989) 6
§364.14(1), Fla. Stat. (1989). 6
S364.33, Fla. Stat. (1989) 2

RULES

Fla. R. App. Proc. 9.210(c). 1

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Y TO STATEMENT OF THE FACTS

Contrary to Florida Rule of Appellate Procedure 9.210(c), the PSC does not specify any "areas of disagreement" with ITI's statement of the case and facts, but nonetheless presents its own version on the premise that ITI's statement "does not contain all the relevant facts and details necessary for the Court's understanding of the Commission's decision in this case." [Br. 1.] In light of this charge, ITI respectfully submits that the Court should consider whether the PSC's own recitation fairly provides "all the relevant facts and details."

For example, in support of its initial point that some rate regulation is appropriate -- a point that ITI has not even disputed -- the PSC asserts:

> Ms. Kathy Brown, an analyst with the Commission's Consumer Affairs Division, stated that during a 5-month period an inordinate number of complaints were received concerning AOS providers (T 1179-1180). Of the complaints that had been closed out by the Division of Consumer Affairs, 99% were found to be justified.

[Br. 12.1 The PSC adds that "AOS providers were charging as much as $4.01 for an unanswered call." [Br. 12-13.]

A review of the record reveals, however, that Ms. Brown did <u>not</u> state that an "inordinate number" of complaints were received concerning AOS providers; rather, that was the <u>PSC's</u> conclusion. In fact, Ms. Brown testified that complaints against AOS companies represented "approximately 10%" of complaints logged against all telephone companies, and "32% of all complaints regarding long distance companies" [T 1179-80]; that of the 87 complaints closed out, 86 (or 99%) were recorded "as being justified or having some justification" [T 1181 (emphasis added)]; that some of those complaints were made by AT&T employees [T 11941; that the number of complaints had decreased since March 1988 [T 11911; and that the AOS companies generally "have been cooperative" in resolving complaints [T 1197]. As for the claim that "AOS providers were charging as much as $4.01 for an unanswered call," a reference to the record source for this fact discloses a statement in the PSC's own Order No. 19095 that "[o]ne AOS provider billed $4.01 for an unanswered call." [R 61 (emphasis added)]. Moreover, Ms. Brown admitted in her testimony below that the PSC "still receive[s] complaints for calls that were billed but not completed for the established IXCs." [T 1189 (emphasis added).]

Throughout its brief, the PSC uses selected "facts" to convey impressions that are unfairly slanted against ITI. For example, the PSC points to its finding that "some AOS companies were operating illegally or in violation of previous Commission orders," and that "[s]ome AOS providers did not have certificates as required by section 364.33" [Br. 4] -- a predicate for the PSC's subsequent argument that the burden was on ITI as the "applicant seeking the license" to show that ATT-C rates were not sufficient [Br. 16]. As noted in ITI's Initial Brief at page 3, note 1, however, ITI's application for a certificate and ITI's rate tariff for its AOS services had been approved by the PSC in 1987, well before the PSC initiated the proceedings below. The PSC neither acknowledges nor disputes this fact.

Limitations on the length of this reply brief preclude a thorough analysis of the PSC's facts, but the foregoing examples illustrate why the Court should be wary of the PSC's suggestion that its brief, unlike ITI's, contains "all the relevant facts and details." While the PSC is certainly entitled to focus attention on facts that are favorable to its position, it is unfair and unseemly to accuse ITI of omitting "relevant facts and details" when the PSC's own portrayal of the case conveniently overlooks undisputed facts that directly refute or seriously undermine its findings.

SUMMARY OF THE ARGUMENT

While a reasonable rate cap on AOS providers would be appropriate, the PSC is required by statute to ensure that the rates are "fair, just, reasonable, and sufficient." The PSC's arguments that the ATT-C time-of-day rates represent a "reasonable" cap because it is the rate the public would pay absent AOS providers in the market, and because AOS providers did not "convince" the PSC that ATT-C rates would not cover AOS costs, are unsupported by the record evidence and contrary to law. The unrefuted evidence showed (a) that reducing AOS rates to eliminate commissions for hotels will not protect the public because hotels will recoup the money through surcharges, and (b) that AOS providers have higher costs than ATT-C and cannot compete at ATT-C rates, which were last set by the PSC prior to divestiture in 1982. Because the PSC simply decided to allow ATT-C to control AOS rates, rather than finding on the basis of competent substantial evidence that ATT-C rates are "fair, just, reasonable, and sufficient" for AOS providers, the order cannot stand.

The PSC's finding in its Final Order that a direct refund (as opposed to a prospective rate reduction) would be "virtually impossible" because it is "impudent, time consuming and cost prohibitive" applies with equal force to ITI alone as to the AOS industry generally. Ordering ITI alone to undertake the difficulty and expense of a direct refund is punitive, arbitrary, and an abuse of discretion.

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.

In defense of its decision to impose a rate cap based on ATT-C time-of-day rates, the PSC initially contends that there was sufficient evidence to support the imposition of some rate cap on AOS providers, and that recent legislation (chapter 90-244, Laws of Florida) has now mandated such a rate cap. This argument is puzzling, because ITI does not contend otherwise.[1] As the PSC itself points out, ITI and other AOS providers have acknowledged the propriety of a reasonable limit on rates and the PSC's authority to impose such a restriction. Thus, the only significance of chapter 90-244 here is that it mandates the

[1] The apparent purpose of this "straw man" argument is to provide a context in which to exhume isolated examples of past abuses by some AOS providers and to cast a cloud of infamy upon the entire industry by repeated references to "exorbitant rates," the "inordinate number of complaints," an "aberrant form of competition," and "price gouging" [Br. 11-13].

imposition of certain requirements, such as maximum rates, for all "operator service providers" -- includina ATT-C.

The issue here is not whether a rate cap is warranted, but whether the PSC could properly fix the AOS rate cap at ATT-C discounted time-of-day rates based on the record in this case. ITI maintains that there was no competent substantial evidence to support a conclusion that application of the ATT-C time-of-day rates would produce rates for AOS companies that are "fair, just, reasonable, and sufficient," as required by section 364.03(1). In response, the PSC does not even attempt to identify any supporting evidence, but instead argues (a) that selection of ATT-C rates as a cap on AOS providers was "a reasonable choice" because "it was the rate the public would pay absent AOS providers being in the market," and because ATT-C rates "have been approved by the Commission" [Br. 15]; and (b) that the burden was on ITI as the "applicant seeking a license" to prove "a higher rate cap would be in the public interest," but the PSC "was unconvinced that the general information presented by AOS providers demonstrated that their costs equalled or exceeded the ATT-C rates." [Br. 16-17.] The fatal flaw in these arguments is that they rest on premises that are both legally erroneous and factually unfounded.

At the outset, the PSC's attempt to characterize the proceeding below as one in which ITI was an "applicant for a certificate," with the burden of proving that a rate cap above

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[2] As discussed in Point III below, this new legislation confirms ITI's position that the PSC cannot fairly impose more onerous conditions on AOS providers than it requires of ATT-C.

the ATT-C rate would be "in the public interest," is plainly wrong. It is undisputed that ITI had already received a certificate and approval of its tariff for operator services from the PSC in 1987, and that ITI has charged only those rates specified in its PSC-approved tariff. Consequently, this was a proceeding <u>initiated by the regulating agency</u> to determine whether <u>existing</u> rates of a <u>certificated</u> company are unreasonable; under the Florida authorities cited in ITI's Initial Brief -- which the PSC has failed to address -- these circumstances impose upon the agency as complainant the initial burden to prove the unreasonableness of the existing rates.

Regardless of which side had the burden, however, the issue was <u>not</u> whether a rate cap higher than ATT-C time-of-day rates "would be in the public interest," as the PSC suggests, but whether the ATT-C rate would be "fair, just, reasonable, and sufficient" for AOS providers. §364.03(1), Fla. Stat.; see also §364.14(1), Fla. Stat. (when readjusting rates, "the commission shall allow a fair and reasonable return on the telephone company's honest and prudent investment...."). [3] Furthermore, in fulfilling its statutory mandate to assure that rates are "fair, just, reasonable, and sufficient," the PSC is required to base its decision on findings "supported by competent substantial

[3] Although the PSC contends that the "fair rate of return" standard does not apply to companies in a competitive rather than monopoly market, sections 364.03 and 364.14 by their terms govern the PSC's regulation of rates for any "telephone company," and the definition of "telephone company" for purposes of chapter 364 does not contain any such distinction or limitation. See §364.02(4), Fla. Stat. In any event, it is clear that whenever the state exercises regulatory authority, it must do so in a manner consistent with constitutionally protected rights.

evidence in the record." §120.68(10), Fla. Stat.; see also §120.57(1)(b)7, Fla. Stat.

In this case, the PSC bases its finding that application of ATT-C rates as a cap on AOS charges is "reasonable" on the conclusion that the ATT-C rate "was the rate the public would pay absent AOS providers being in the market." This conclusion, however, is contradicted by unrefuted testimony that if AOS providers do not pay commissions to hotels, the hotels will simply impose surcharges, which will pass the cost back to the public in another form. Indeed, the PSC expressly acknowledges in its brief that hotels can compensate for the loss of commissions by imposing surcharges on the end users [Br. 18, note 10.1

Thus, the record does not substantiate the PSC's conclusion that limiting AOS charges to ATT-C rates as a means of eliminating commissions will actually benefit the public. In fact, the PSC staff witness admitted below that such a rate cap would not protect the end user against premises surcharges, and may accomplish nothing for the transient pubic [T 12231 -- contrary to the PSC's finding. Because the selection of ATT-C rates is predicated on a finding not supported by competent substantial evidence, that conclusion cannot stand.

Nor can the imposition of ATT-C rates as a cap on AOS charges be sustained on the basis of the PSC's assertion that "[t}he ATT-C rates currently in effect have been approved by the Commission." As the PSC itself concedes, <u>rates for ATT-C operator services were last set by the PSC prior to divestiture in 1982</u> [Br. 14]; and the PSC's current policy, in effect for the past two years, is one of complete "forebearance from earnings regulation" with respect to **ATT-C** [Br. **A** 32]. It requires no specific evidence of increases in the costs of labor, equipment, and services since 1982 to recognize that **ATT-C** rates approved by the **PSC** years ago cannot automatically be deemed "fair, just, reasonable, and sufficient" for **AOS** providers today.

Finally, the **PSC's** declaration that it "was unconvinced that the general information presented by AOS providers demonstrated that their costs equalled or exceeded the **ATT-C** rates" ignores the applicable standard and the unrebutted evidence. The issue below was not whether **ATT-C** rates would cover the **AOS** providers' costs, but whether the **ATT-C** rates were "fair, just, reasonable, and sufficient" for **AOS** providers. The issue here is not whether the **PSC** was "convinced" that the **AOS** providers "demonstrated that their costs equalled or exceeded the **ATT-C** rates," but whether the PSC's decision to impose **ATT-C** rates is based on findings supported by competent substantial evidence. **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).

As demonstrated in **ITI's** Initial Brief, the evidence that **ATT-C** rates would be insufficient for **AOS** providers was unrefuted. At least two **AOS** providers testified that they had actually lost money or would definitely lose money at **ATT-C** rates. There was voluminous unrebutted testimony that **AOS** costs are higher than those of **ATT-C**, not only due to payment of commissions, but also because AOS providers are required to pay higher billing and collection fees to LECs, have a higher percentage of unbillable calls, incur greater expenses to comply with regulatory conditions that the PSC does not impose on ATT-C, have a higher cost of capital, and expend more on equipment and personnel to provide enhanced services not available from ATT-C. In addition, the PSC completely disregarded the fact that ATT-C time-of-day rates are discounted during the very hours when AOS providers experience peak traffic -- a fact that conclusively demonstrates the impropriety of applying rates specifically tailored for ATT-C to the AOS providers. See General Development Utilities, Inc. v. Hawkins, 357 So.2d 408 (Fla. 1978).

There is no doubt that the PSC did not make any determination of whether ATT-C rates would be sufficient to cover AOS providers' costs. In fact, both the PSC staff witness and the commissioners themselves acknowledged that they did not even have evidence to show that ATT-C rates are sufficient to cover ATT-C's own costs, at least without cross-subsidies that are not available to AOS providers. Although the PSC attempts to cast the responsibility for that evidentiary deficiency on the AOS providers, the unavailability of the ATT-C cost information is understandable in light of the fact that ATT-C was not a party below and has not been required to provide such data in a rate base proceeding for years. Again, it was the PSC's burden to show that ITI's previously approved rates should be reduced to the ATT-C level.

In any event, it is clear that no amount of evidence reaardina costs would have been sufficient to "convince" the PSC that a higher rate cap was warranted. The PSC staff witness who supported the ATT-C rate cap admitted that he would make that recommendation even if it did not cover AOS providers' costs, because in his opinion the AOS provider's cost is not relevant from the end user's perspective. Moreover, in its Order On Rehearing, the PSC dismissed the argument that there was no evidence to show that ATT-C's costs are comparable to AOS costs, concluding that "cost is only one factor in determining appropriate rates."

Clearly, the only factor of interest to the PSC in limiting AOS rates was "to protect the transient public ... against excessive pricing." In selecting ATT-C rates as a cap to accomplish that objective, the PSC did not base its decision on findings supported by competent substantial evidence, but relied entirely on the opinion of its own staff witness that the public should never be charged more than what ATT-C charges. As this Court has recognized, however, when a governmental body is determining utility rates, its "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).

Aside from the fact that imposition of the ATT-C rate cap will not as a practical matter result in any real benefit or savings for the transient public, the PSC's decision produces two ironic consequences. Although the PSC rejected the higher rate cap of ATT-C daytime rates plus $1.00 proposed by AOS providers, it approved that same rate for private payphones. Thus, if a hotel guest uses the payphone in the lobby rather than the telephone in the room, the PSC apparently has no problem with allowing payment of ATT-C daytime rate plus $1.00 -- a discrimination that hardly comports with the notion that the lower ATT-C discounted time-of-day rate is necessary to protect the transient public. Moreover, by requiring AOS providers to operate at a loss or not at all, the PSC is effectively solidifying the dominant position of ATT-C and stifling competition in Florida -- a result that undermines the PSC's professed goals and the public interest.

Nowhere is this latter consequence more vividly demonstrated than in the PSC's directive that AOS rates must automatically be adjusted to match any future rate changes by ATT-C. As argued in ITI's Initial Brief, such a tying arrangement clearly constitutes an unlawful delegation of the PSC's ratemaking authority and improperly reposes in ATT-C -- the dominant company -- the power to destroy competitors through predatory pricing. The PSC's assurances that it maintains "ultimate control" over ATT-C rates and that AOS providers can initiate proceedings to show the impropriety of those rates must be regarded as hollow, considering that the PSC has virtually abolished rate base regulation for ATT-C, that AOS providers have no practical means of obtaining ATT-C cost data, and that the PSC has in any event signified that it ascribes little or no importance to costs as a factor in formulating the AOS rate cap.

In sum, the evidence presented below demonstrated beyond any doubt that ITI and other AOS companies must bear higher costs than ATT-C, and thus cannot compete or earn a fair rate of return at ATT-C rates. By disregarding that evidence and imposing the ATT-C rate cap based on the erroneous assumption that it would protect the transient public, the PSC departed from the essential requirements of law. Unless the PSC's decision is reversed, the statutory requirements that rates be set fairly on the basis of competent substantial evidence, and the constitutional prohibitions against confiscatory ratemaking and delegation of governmental powers, will be rendered meaningless here.

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

When the PSC entered the Final Order below, it ruled that any refund of monies collected by AOS companies in excess of a specified rate would "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." During the period when that Final Order was under reconsideration, the PSC allowed ITI to file a corporate undertaking and continue charging its tariffed rates subject to a refund of excess charges if the ATT-C rate cap was not modified on reconsideration. In its Order On Reconsideration, however, the PSC inexplicably reversed the decision announced in the Final Order that refunds would be made by a prospective reduction in rates and ordered ITI to do what was previously found to be so "imprudent, time consuming and cost prohibitive" as to be "virtually impossible" -- make direct refunds by requiring that each charged call be recalculated and the excess refunded to the end user.

The PSC does not offer any explanation of the reason for this radical change, and the record certainly suggests none. The PSC does not even dispute that the evidence presented at the hearing uniformly supported its original conclusion that a direct refund to transient end users would be "virtually impossible," as well as "imprudent, time consuming and cost prohibitive." Instead, the PSC defends its decision to impose the burden of making direct refunds on ITI as "a proper exercise of its discretion" consistent with the statute and rule governing refunds, and as an "appropriate" differentiation based on the fact that "[t]he ITI refund involved only one company, not the entire industry."

Although the PSC professes to have "followed the law and its own rule to the letter" in ordering a direct refund, it concedes that the method of refund is a matter within its discretion. Given its own findings in the Final Order, the PSC's subsequent decision to require ITI to undertake a "virtually impossible" task must be deemed an abuse of discretion unless there is in fact a significant difference between ITI's refunds and those that other AOS providers would have made. The record here does not support any such distinction.

The PSC's finding in the first instance that a direct refund would be "virtually impossible" was not based on the quantity of refunds required, but on the immense difficulty and expense of processing individual refunds for transient end users through the LECs that actually billed the calls. As explained in ITI's Initial Brief, a direct refund requires numerous complicated steps -- identifying and locating the transient caller, reconstructing and re-rating each call, checking both AOS and LEC records to determine if the charge was paid or was adjusted in whole or in part, and posting a credit or issuing a check. In addition, the costs of processing direct refunds often exceeds the refund itself, and must be borne in part by the LECs (and their ratepayers) -- including LECs in other states. This process is no less "imprudent, time consuming and cost prohibitive" for one company than it is for the entire industry.

In fact, the only real difference between ITI and the other AOS providers is that ITI exercised its right to continue charging its tariffed rates pending reconsideration of the rate cap, and that ITI is the only company seeking appellate review. As a matter of fairness, ITI should not be punished for pursuing those remedies -- particularly considering the fact that the PSC gave no warning of the possibility that it would change the refund methodology announced in the Final Order, and that no party requested such a change. The order requiring ITI to make direct refunds -- imposing what the PSC itself has found to be a "virtually impossible" and "cost prohibitive" burden -- constitutes an arbitrary act and an abuse of discretion. Accordingly, this Court should direct that the refund -- which will only be necessary if the rate cap is upheld -- should be in the form of a prospective rate reduction.

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

The PSC's argument that it could lawfully impose conditions and requirements on AOS providers that it does not apply to ATT-C is completely answered by the very legislative enactment on which the PSC relies to support its order in this case. Chapter 90-244 provides that <u>all</u> "operator service providers" -- including ATT-C -- shall be required to comply with certain enumerated conditions of service that approximate those imposed by the PSC on AOS providers below. Ch. 90-244, §§2 and 36, Laws of Fla. In light of this legislative mandate that no distinction be drawn between ATT-C and other operator service providers with respect to such conditions and requirements, the Court need not reach the equal protection issue to overturn the PSC's order.

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.

With respect to this issue, ITI relies upon the arguments and authorities presented in its Initial Brief.

CONCLUSION

The foregoing analysis demonstrates that the PSC's order cannot be sustained, but should be set aside based on lack of record support and failure to comply with the requirements of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 10th day of August, 1990, to:

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30188 rebrief 37