IN THE SUPREME COURT OF FLORIDA

FLORIDA INTEREXCHANGE CARRIERS ASSOCIATION Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, Appellees.	)	CASE NO. 80,007

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 910179-TL

ANSWER BRIEF OF APPELLEE, FLORIDA PUBLIC SERVICE COMMISSION

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052

MARSHA E. RULE
Associate General Counsel
Florida Bar No. 302066

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32399-0862
(904) 488-7464

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE NO.

CASES — PAGE NO.

FLORIDA STATUTES — PAGE NO.

FLORIDA ADMINISTRATIVE RULES

FLORIDA PUBLIC SERVICE COMMISSION ORDERS PAGE NO.

OTHER

PRELIMINARY STATEMENT

The Florida Public Service Commission adopts the abbreviations used by Appellant, and will refer to the Florida Interexchange Carriers Association as "FIXCA". Appellee, the Florida Public Service Commission, is referred to as "the Commission". GTE Florida, Incorporated, is referred to as GTEFL. Citations to the record on appeal are designated as (R.).

STATEMENT OF THE CASE AND OF THE FACTS

The Commission disagrees with FIXCA's Statement of the Case and of the Facts, as noted below.

In its Background Statement, FIXCA mischaracterizes the service offered by local telephone companies. FIXCA correctly asserts that local telephone companies (known within the telecommunications industry as local exchange companies or "LECs") operate telecommunications networks by which subscribers' homes and businesses are interconnected. However, FIXCA's explanation of the basic service offered by LECs is misleading:

> Generally, these companies offer their basic service using a number of smaller geographic areas known as exchanges in which subscribers can place calls to one another without charge. (emphasis in original)

(FIXCA Brief at 3). First, the basic service offered by LECs is known as local exchange service, and calls made within local exchanges are not without charge. The Commission determines the rates and rate structure for such local exchange service, which may be provided on a base rate, per call, or other basis. Second, local exchange service is not limited to calls **within** geographic exchanges, but instead is offered **between groupings of local exchanges.** The grouping of local exchanges defines the local calling area scope within which a customer can make local calls. FIXCA's characterization would lead one to believe that all telephone calls that originate in one geographic exchange area and terminate in another are "interexchange services" which may be provided by either local exchange companies or interexchange

carriers. This is simply not the case. Only LECs may provide local exchange service. Interexchange carriers may provide only long distance service. Thus, FIXCA's conclusion that the "area of common interest" between LECs and interexchange carriers is "the completion of interexchange calls of short distance" is an oversimplification which begs the real issue here: the Commission's authority to determine the nature and scope of local exchange services.

The true area of overlap, in which service is subject to competition, is long distance calls within a geographic Toll Monopoly Area ("TMA")[1]. Although interexchange carriers were permitted to carry all long distance traffic, they were prohibited from carrying intraEAEA traffic **on their own facilities** prior to January 1, 1992. They could, however, carry intraEAEA long distance traffic by reselling services purchased from the LEC. As a practical matter, interexchange carriers did not compete for intraEAEA long distance traffic. Since they had to purchase the service from the LEC and add their own costs on top of that, their cost of providing the service (and therefore their prices) would always be higher than the price the LEC could charge. In re:

---

[1]TMAs were geographically the same as Equal Access Exchange Areas ("EAEAs"), so the Commission customarily referred to TMA traffic as "intraEAEA traffic". Interexchange carriers were prohibited from carrying long distance traffic over their own facilities within the TMAs. The Commission's elimination of TMAs effective January 1, 1992 negated the importance of EAEAs. In re: Investigation into Equal Access Exchange Areas, Toll Monopoly Areas, 1+ Restriction to the local exchange companies and the elimination of the access discount, 90 F.P.S.C. 10:18 (1990).

Investigation of methodology to account for access charges in local exchange company (LEC) toll pricing, 91 F.P.S.C. 7:477 (1991).

After January 1, 1992, interexchange carriers could carry all long distance traffic in the state over their own facilities or by resale. The removal of TMAs did not allow interexchange carriers to provide local exchange service.

The Commission also disagrees with some characterizations contained in FIXCA's Case History, the most misleading of which is the assertion that FIXCA's members are certificated "to provide long distance telephone service between exchanges" and that they are "authorized by the Commission to compete with GTEFL to provide service between the communities [of Clearwater, Tampa, Tarpon Springs and St. Petersburg]". (FIXCA Brief at 3). Interexchange certificates of public convenience and necessity do not authorize service between any particular exchanges or communities, as FIXCA intimates. Rather, the certificates authorize provision of interexchange service statewide, without regard to geographic area. Rule 25-24.471(4)(a), Florida Administrative Code.

The actual certificate issued by the Commission describes no particular territory or routes. It merely references the order granting the certificate, which in turn describes the authority of the carrier as follows: "Interexchange carriers (IXCs) are subject to the provisions of Rules 25-24.455 through 25-24.495, Florida Administrative Code." Thus, it is misleading to assert that FIXCA members have specific authority to serve particular routes, or that the Commission's reclassification of particular routes as local

effectively amended or revoked their certificates.

Additionally, an interexchange carrier's certificate does not authorize provision of local exchange service. Commission rules specify that an interexchange certificate "does not carry with it the authority to provide local exchange or pay telephone service." Rule 25-24.471(4)(c), Florida Administrative Code.

Finally, an understanding of the Commission's practice of expanding the scope of local exchange service is essential to this appeal. When reviewing a request for expansion of local calling scope, the Commission orders the affected LEC to provide a traffic study of the routes to determine whether a sufficient community of interest exists to order traditional, nonoptional, flat rate, two-way Extended Area Service ("EAS") under Rule 25-4.060, Florida Administrative Code. If the calling rates and community of interest considerations do not justify traditional EAS, the Commission nevertheless may determine that some form of toll relief is warranted. If traffic volumes are extremely low or the community interest factors are found insufficient, the Commission declines to expand the calling scope in any way. In this case, the Commission found a sufficient community of interest to justify expansion of local exchange service.

SUMMARY OF ARGUMENT

At issue here is the Commission's authority to determine which telephone services are local and which are long distance. Acceptance of FIXCA's argument would negate this authority.

Section 364.01, Florida Statutes, (1991) requires that the Public Service Commission exercise its exclusive jurisdiction to ensure the availability of adequate local exchange service to all citizens of the state at reasonable and affordable prices. In fact, the provision of local exchange service is deemed to be of sufficient importance to justify protection from competition. Section 364.335, Florida Statutes (1991).

As Florida's population grows, the needs of telephone subscribers change, and the legislature has granted the Commission authority to change the scope of local exchange services to meet subscribers' needs. The Commission correctly interpreted its statutes in expanding local exchange service in this case.

Recognizing the dynamic nature of subscribers' telephone usage patterns, Rule 25-4.042, Florida Administrative Code, identifies three factors upon which the need for expanded local services shall be determined: community of interest, high toll usage, and subscribers' desires. Here, the Commission examined all three factors, and its decision to expand GTEFL's local exchange service area was supported by competent, substantial evidence.

FIXCA improperly raises several arguments for the first time on appeal. These arguments should be rejected as procedurally improper, but even if considered, must be rejected on the merits.

I. THE COMMISSION ACTED WITHIN ITS AUTHORITY IN APPROVING GTEFL'S ECS TARIFFS AND DEFINING THE ECS ROUTES AS LOCAL.

A. The Commission has the authority to determine the scope of local exchange services.

Section 364.01(2), Florida Statutes (1991) grants the Commission exclusive jurisdiction over the regulation of telecommunication common carriers. The Commission's jurisdiction extends over both the rates charged by telecommunications companies and the services they provide. Section 364.01 (3)(a), (b), (c) and (e); Section 364.035(2), Florida Statutes (1991).

The legislature has directed the Commission to exercise its exclusive jurisdiction to "[p]rotect the public health, safety, and welfare by ensuring that basic telecommunications services are available to all residents of the state at reasonable and affordable prices" and by "ensuring that monopoly services provided by a local exchange telecommunications company continue to be subject to effective rate and service regulation." Section 364.02(3)(a) and (b), Florida Statutes (1991). Additionally, the term "service" must be "construed in its broadest and most inclusive sense." Section 364.02(6), Florida Statutes (1991). Thus, pursuant to statute, the Commission is the sole and proper authority for setting rates and determining what services may be offered by LECs such as GTEFL and interexchange companies, such as the members of FIXCA. The Commission properly exercised its authority in approving GTEFL's rates and ECS plan, and as part of

that process, properly classified GTEFL's extended calling service as local exchange service. As shown below, this authority was not contested by FIXCA at the hearing. Rather, the parties disputed whether or not there was an evidentiary basis for the Commission's classification of the routes as local.

B. The Commission's expansion of GTEFL's local exchange service area was supported by competent substantial evidence and was made in the public interest.

On appeal, FIXCA seeks to convert an evidentiary issue to a legal issue, and claims that the Commission abused its discretion because its order did not contain a hard and fast definition of "local exchange service". It is difficult to take FIXCA's claim seriously when it is raised for the first time on appeal: FIXCA, the petitioner herein, did not request a global definition in its petition, nor did it suggest in its pre- or post-hearing filings that a global definition was required. FIXCA's argument is designed to divert the Court's attention from the real issue herein: the Commission's authority to order the expansion of local calling routes and define those newly-expanded routes as local exchange service.

FIXCA recognized that this was an evidentiary, rather than legal, issue. In its petition, FIXCA called upon the Commission to reject GTEFL's tariff filing for factual reasons, alleging that the proposal was "nothing more than a preferential toll rate schedule. . . ." (R. 49) In its Amended Prehearing Statement, FIXCA argued that there was an insufficient factual showing to support the evaluation of the ECS plan as local. (R. 90). FIXCA did not

question the Commission's authority to make that determination. FIXCA's position is also reflected in Order No. 25006, the Prehearing Order issued in the docket. (R. 96 at 101, 102.)

Similarly, in its post-hearing brief and statement of issues and positions, FIXCA neither contested the Commission's authority to determine the ECS plan to be local nor requested a definition:

> What factors determine if GTE's extended calling service (ECS) plan should be evaluated as a local or toll plan?
>
> There is virtually no disagreement on the record concerning this issue. All parties agree that the Commission should allow the selective exemption from access charges [which results if the plan is determined to be local] only if **community of interest considerations** justify this action.

(R. 128, emphasis supplied).

There was no disagreement at the hearing that the ECS plan should be considered local if there was a sufficient factual basis for doing so. The Commission noted in its order:

> The evidence shows that the ECS plan should be considered a local plan if certain community of interest factors are sufficient to merit some form of nonoptional EAS. All of the parties agreed that if a sufficient community of interest exists, the Plan should be considered a local plan. **The only disagreement among the parties relative to this issue regards whether or not a sufficient community of interest exists.**

Order No. 25708 at 4, R. at 204, emphasis supplied. Thus, although there was disagreement over whether the Commission **should** consider the plan to be local, there was no question whether the Commission **could** consider the plan local, and no discussion whatsoever of

whether the Commission must define local exchange service.

The Commission's policy of tailoring the scope of local exchange services to meet the needs of telephone subscribers dates back to 1949 and is clearly in the public interest. The Commission's decision herein is entirely consistent with that long-standing policy.

Historically, the boundaries of local exchange service were established based on available technology as well as population centers and shared communities of interest. However, over time, demographics and communities of interest change, the needs of telephone subscribers change, and it is in the public interest that the scope of local exchange services change also.

In the process of growing, many formerly discrete communities have blended into metropolitan areas and have become virtually indistinguishable from one another. As populations and communities of interest grow and change, so too do the ordinary day-to-day communication requirements of telephone users. A local calling area which was once sufficient to meet the needs of most subscribers may not always continue to meet their needs.

The local calling scope provided to meet yesterday's needs must not become a straitjacket to freeze the calling scope for today's citizens. When the evidence warrants a change, as it did here, the Commission must have the power to implement the new calling scope by ordering expansion of local exchange service.

Recognizing the dynamic nature of subscribers' telephone usage patterns, Commission rules impose an affirmative duty on local

exchange companies to investigate local calling needs and explore the feasibility of expanding local calling areas:

> Extended Area Service. Each telephone company shall undertake to anticipate, on a continuing basis, the communication requirements of its subscribers for expanded local calling privileges and shall, upon Commission request, conduct appropriate surveys and studies of the feasibility of providing extended area service, an optional calling plan, or other extended calling concept that would better serve subscriber communication needs between contiguous exchanges, or portions thereof in those instances where there appears to be more than a normal degree of a community of interest, high toll usage, and a sufficient desire by the subscribers to warrant the establishment of the service. The results of such surveys and studies shall be reported promptly to the Commission.

Rule 25-4.042, Florida Administrative Code.

The Commission can order expansion of local calling privileges in several ways. The EAS plan is generally the first alternative considered by the Commission. EAS is defined in Rule 25-4.057(2), Florida Administrative Code as:

> a switching and trunking arrangement which provides for a non-optional, unlimited, two-way, flat-rate calling service between two or more exchanges, provided at exchange rates where cost is minimal, or at an increment to exchange rates, rather than at toll message charges.

The Commission will order implementation of EAS if there is a sufficient degree of community of interest between exchanges. Rule 25-4.057, et. seq., Florida Administrative Code. If the calling rates and community of interest considerations do not justify traditional EAS, the Commission nevertheless may order some other

method of expanding local calling scope. Once an EAS plan or other expanded calling plan is approved for particular routes, the routes are classified as local. Service on those routes thus becomes local exchange service. In the past year alone, the Commission has expanded the scope of local exchange service by approving EAS in five cases[2], requiring some alternative to traditional EAS in eight cases[3], ordering expanded local exchange service in a rate case[4],

---

[2] In re: Petition by 597 prefix subscribers for extended area service from Indiantown exchange to Stuart exchange, 91 F.P.S.C. 10:38 (1991);

In re: Request by Liberty County Board of County Commissioners for extended area service to the Tallahassee exchange, 92 F.P.S.C. 4:262 (1992);

In re: Petition for extended area service between Wellborn and Lake City, 92 F.P.S.C. 5:29 (1992);

In re: Petition by Bonita Springs residents for extended area service between Bonita Springs and the Fort Myers and Naples exchanges, 92 F.P.S.C. 5:163 (1992);and

In re: Request by Pasco County Board of County Commissioners for extended area service between all Pasco County exchanges, 92 F.P.S.C. 4:67 (1992).

[3] In re: Request by Gilchrist County Commissioners for extended area service throughout Gilchrist County, 91 F.P.S.C. 11:317 (1991);

In re: Petition for countywide extended area service by the Board of County Commissioners of Gulf County, 91 F.P.S.C. 11:386 (1991);

In re: Petition by Boynton Beach subscribers for extended area service to the Boca Raton, Deerfield Beach, Coral Springs, Pompano Beach, and Ft. Lauderdale exchanges, 91 F.P.S.C. 12:308 (1991);

In re: Request for extended area service between the Glendale and Paxton Exchanges by Walton County Commission, 92 F.P.S.C. 2:140 (1992);

In re: Request by Putnam County Board of County Commissioners for extended area service between the Crescent City, Hawthorne, Orange

requiring a boundary change[5], and by combining two local calling areas into one local rate group[6]. In all of these cases, long distance service was reclassified as local exchange service.

The determination of a route as local is not just an academic distinction. The designation as local carries with it certain responsibilities for LECs and certain rights for subscribers. For example, local routes are converted from 1+ dialing to seven-digit dialing where technologically possible. The LEC is ordered to provide subscribers with directories for all published numbers within the expanded local exchange area, and pay phone providers must charge end users for a local call and pay the standard measured usage rate to the LEC. Confidential traffic data for the

---

Springs, and Melrose exchanges, and the Palatka exchange, 92 F.P.S.C. 2:152 (1992);

In re: Request by St. Johns County Commissioners for extended area service between the Ponte Vedra and St. Augustine exchanges, 92 F.P.S.C. 3:101 (1992);

In re: Resolution by Bradford County Commission requesting extended area service within Bradford County and between Bradford County, Union County and Gainesville, 92 F.P.S.C. 5:10 (1992); and

In re: Resolution for extended area service between the Vernon, Bonifay and Westville exchanges by Washington County Commission, 92 F.P.S.C. 7:327 (1992).

[4] In re: Application for a rate increase by United Telephone Company of Florida, 92 F.P.S.C. 7:555 (1992).

[5] In re: Request by Country Club of Miami Community Improvement Council for a Miami/North Dade boundary line change, 92 F.P.S.C. 4:125 (1992).

[6] In re: Resolution by St. Lucie Board of County Commissioners for extended area service between Ft. Pierce and South Port St. Lucie, 92 F.P.S.C. 7:286 (1992).

routes (which was previously granted confidential status under Section 364.183, Florida Statutes (1991) because the routes were subject to competition) is released to the public. Thus, the route becomes part of the telephone company's local exchange service for all purposes.

As noted above, Rule 25-4.042, Florida Administrative Code, which authorizes optional calling plans or other extended calling concepts, identifies three factors upon which the need for expanded local services shall be based: the community of interest, high toll usage, and subscribers' desires for the service. The Commission examined all three factors in this case.

The primary factor upon which the Commission relied in this case was the community of interest of subscribers. The term, which is widely used throughout the United States in connection with expansion of local exchange service, describes not only the way people use their telephones, but also their patterns of living within their community.

A sufficient community of interest for EAS may be deemed to exist based on the number of calls made on particular routes. Rule 25-4.060(2), Florida Administrative Code. However, the community of interest required for other types of expanded services is not measured solely by the number of calls. Rather, the Commission investigates the community of interest on a factual basis, as it did in this case. (Order No. 25708 at 6 -7, R. 201 at 206 - 207.

The sufficiency of the evidence upon which the Commission based its findings is uncontroverted herein. As finder of fact in

this hearing, the Commission reviewed the evidence and found that GTEFL met its burden of proving that community of interest factors were sufficient to justify expanding the scope of local calling:

> Upon consideration, we find that GTEFL has demonstrated that there is a sufficient community of interest to warrant some form of toll relief. The calling patterns on these routes partially satisfy the criteria for flat rate EAS and GTEFL has shown numerous examples of fundamental dependencies between the ECS exchanges. These fundamental dependencies involve the satisfaction of everyday needs such as jobs, health care, education, governmental services, and recreation. For these reasons, we find that a modified version of the ECS plan shall be offered on these routes.

Order No. 25708 at 11, R. 201 at 211.

II. IT IS WITHIN THE COMMISSION'S STATUTORY AUTHORITY TO EXPAND THE SCOPE OF PROTECTED LOCAL EXCHANGE SERVICE, WHEN TO DO SO IS IN THE PUBLIC INTEREST.

The legislature has determined that unrestrained competition in the telephone industry is not in the public interest. Section 364.01(3)(c) and (e), Florida Statutes (1991). FIXCA correctly argues that the effect of approving GTEFL's ECS plan, and the resultant expansion of GTEFL's local exchange service, is to eliminate competition for the ECS routes. The effect is the same in all of the myriad instances in which the Commission approves any form of extended area service. However, FIXCA's argument is irrelevant. The Commission is not required by Section 364.335, Florida Statutes (1991) to allow unbridled competition within the telecommunications industry, and has never allowed competition for

local exchange service.

Competition in the telephone industry is generally deemed to be in the public interest because it contributes to better service at lower prices. However, the legislature has directed the Commission to balance the benefits of competition with the needs of the public:

> (3) The Commission shall exercise its exclusive jurisdiction in order to:
> (c) Encourage cost-effective technological innovation and competition in the telecommunications industry **if doing so will benefit the public by making modern and adequate telecommunications services available at reasonable prices.**
> (e) Recognize the continuing emergence of a competitive telecommunications environment through the flexible regulatory treatment of competitive telecommunications services, **where appropriate, if doing so does not reduce the availability of adequate basic local exchange service to all citizens of the state at reasonable and affordable prices. . . .**

Section 364.01(3)(c) and (e), Florida Statutes (1991) (emphasis supplied). Thus, the Commission is not required to allow all possible forms of competition.

Further, the legislature has determined that it is not in the public interest to allow competition for local exchange services. Thus, Section 364.335(3), Florida Statutes, (1991) prohibits the commission from granting a certificate of public convenience and necessity for the operation of a telecommunications company which would compete with or duplicate existing local

exchange services.[7]

FIXCA argues that this statutory prohibition against competition for or duplication of local exchange services applies only in the context of certificate applications, and must be strictly limited to those instances. However, it is a fundamental tenet of statutory construction that statutes must be read to effectuate rather than nullify their purpose. FIXCA's reading nullifies the purpose of the statute by allowing competition for local exchange services. Apparently, FIXCA believes that the Commission must turn a blind eye to the statute in any context other than a certificate application.

The Commission does not believe it is free to circumvent the clear purpose of Section 364.335 by allowing competition for newly expanded local exchange service when it could not authorize such competition in the context of a certificate application. As the Commission noted in its order, the real issue here is not whether the Commission's action is anticompetitive, but whether the Commission has the authority to determine that the ECS routes are "local exchange service":

> In their positions, the parties do not genuinely dispute that [Section 364.335] reserves the provision of "local exchange service" to local exchange companies. The

---

[7]The stated exception to the general prohibition involves cases where the Commission determines that existing facilities are inadequate to meet the reasonable needs of the public. Even then, the Commission must amend the certificate of the other company "to remove the basis for competition or duplication of services", which results in continued protection from competition. Section 364.335 (3), Florida Statutes, (1991).

> heart of the disagreement, rather, revolves around the meaning of the term "local exchange service".

Order No. 25708 at 34, R. 201 at 234.

The current version of the statute, Section 364.335, Florida Statutes (1991), clearly indicates a legislative intention to protect local exchange service from competition. The former version, Section 364.335, Florida Statutes (1981), protected telephone companies from any competition, but was amended by Chapter 82-51, (3), Laws of Florida, to specify protection only for local exchange services. Thus, the legislature specifically indicated its intention to promote competition only in the long distance market, with local exchange services remaining a monopoly. This Court has interpreted the statute accordingly.

In 1986 this court reviewed an interexchange carrier's claim that the Commission had no authority under Section 364.335, Florida Statutes, (1982) to establish Toll Monopoly Areas. Microtel, Inc. v. Florida Public Service Commission, 483 So.2d 415 at 417 (Fla. 1986). Not only did this Court recognize Section 364.335 as providing general authority for monopoly local exchange service, but it even found that the statute did not require "instant, unlimited competition in all long distance services." Microtel, 483 So.2d at 418. The case did not involve a certification proceeding , and this Court did not limit the statute's application to that context.

Later, this Court again stated cited Section 364.335 as the Commission's authority for continuing the monopoly on local

exchange service. AT&T Communications v. Marks, 515 So.2d 741 (Fla. 1987). AT&T, an interexchange carrier, had challenged the Commission's bypass restriction policy, by which the Commission prevented interexchange carriers from building direct access lines to local customers. This Court found that the Commission's actions advanced "the three fundamental and primary legislative policies" which were relevant therein: the legislative decision that there should be long-distance competition, the legislative determination that there should be no competition for local phone services, and the legislative direction that the Commission act in the public interest when permitting any form of competition. AT&T, 515 So.2d at 743. Significantly, this Court cited Section 364.335, Florida Statutes (1985), as the authority for the local exchange service monopoly, although the case was not a certification proceeding. Additionally, this Court noted that Section 364.14(2), Florida Statutes (1985) provided authority for the Commission to impose restrictive orders and rules.

Finally, FIXCA itself has agreed that IXCs are prohibited from providing local exchange service -- it simply does not believe that the ECS routes constitute such service. (R. 93).[8]

---

[8] See, also, Order No. 25708, R. 201 at 234:

> In their positions, the parties do not genuinely dispute that [Section 364.335(4) (1989)] reserves the provision of "local exchange service" to local exchange companies. The heart of the disagreement, rather, revolves around the meaning of the term "local exchange service".

Acceptance of FIXCA's argument[9] would mean either that the Commission would have no authority to determine what local exchange service each LEC should offer (because the Commission's designation of a route as local exchange service would carry with it no protection from competition), or that the Commission would be forced to allow competition for local exchange services, which clearly violates the legislative intention to protect such services. Acceptance of FIXCA's argument would freeze each LEC's local exchange service and would forever fix long distance routes as they currently exist, regardless of future population or technology changes, and regardless of the needs and desires of future subscribers. The Commission would be divested of the ability to carry out its statutory responsibility to determine when competition was in the public interest.

The legislative intent to protect local exchange service is clear, and the Commission's directive to do so is not limited to certificate proceedings. The Commission is the proper authority to determine the scope of local exchange services to be offered by Florida telephone companies, and the public interest demands that it have the flexibility to enlarge the scope of local exchange services to meet the changing needs of Florida telephone subscribers.

---

[9](that Section 364.335 provides no authority for the Commission's prohibition of competition on the ECS routes and even if it did, the Commission abused its discretion by not comprehensively defining "local exchange service")

III. FIXCA CANNOT CONTEST ON APPEAL THE ALLEGED AMENDMENT, REVOCATION OR CANCELLATION OF INTEREXCHANGE CERTIFICATES OR THE ALLEGED FAILURE TO COMPREHENSIVELY DEFINE "LOCAL EXCHANGE SERVICE" WHEN THE ISSUES WERE NOT RAISED BELOW AND FIXCA'S OWN WITNESSES TOOK POSITIONS FAVORING THE COMMISSION'S AUTHORITY TO DESIGNATE ECS ROUTES AS LOCAL

It is axiomatic that a reviewing court will not review points raised for the first time on appeal. In order to preserve a question for appeal, a party must object and obtain a ruling on the alleged error. This is a basic principle of fairness which encourages judicial economy and prevents abuse of the appellate process. Castor v. State, 365 So.2d 701 (Fla. 1978). FIXCA asks this Court to violate this long-standing appellate principle. Not only did FIXCA fail to raise any issue relating to the alleged amendment, revocation or cancellation of interexchange certificates, but their own witnesses took positions contrary to the claims they now make on appeal. This they cannot do. See, City of Jacksonville Beach v. Public Employees Relations Commission, 381 So.2d 283 (Fla. 1st DCA 1980).

FIXCA devoted almost half of its appellate brief to the argument that defining the ECS routes as local exchange service (and the resulting protection from competition) violates the Commission's authority to amend, suspend or revoke certificates, is inconsistent with the Commission's rules on certificate cancellation, and violates the license revocation requirements of

Chapter 120, Florida Statutes.[10] Yet FIXCA wholly failed to raise this issue before the Commission. FIXCA was the petitioner in this case, yet it did not mention the issue in its petition (R. 48), did not mention it in either its original or its amended prehearing statements (R. 58 and 88), and did not find it important enough to touch upon in its posthearing brief and statement of positions. (R. 123).[11]

To the contrary, FIXCA's prehearing positions and testimony supported the Commission's ability to determine that the ECS proposal was local in nature:

> The ECS proposal is "local plan" only if a sufficient community of interest exists. GTE has failed to show such a community of interest. . . .

(R. 90, 210). FIXCA has clearly waived whatever right may have had to complain that the Commission's action in Order No. 25708 is inconsistent with the statutes and rules cited in its brief.

The foregoing applies with equal validity to FIXCA's newly voiced protestations that the Commission abused its discretion in

---

[10]The Commission notes that, even if applicable and properly raised, the licensing provisions of Chapter 120, Florida Statutes, would not be applicable herein, but would instead be superseded by the more specific certification procedures specified in Chapter 364 and Commission rules.

[11]FIXCA additionally claims that the notice given in this case was deficient because it wasn't served by personal service or certified mail and because it didn't state that interexchange certificates were at issue. (FIXCA Brief at 22.) This argument is particularly misguided, not just because FIXCA remained silent on this issue prior to the appeal, but because the Commission granted the hearing request for which FIXCA petitioned! It is difficult to conceive how FIXCA can be prejudiced by the Commission's alleged failure to serve FIXCA with a copy of its own petition.

not providing a universal, rigid definition of "local exchange service". Neither FIXCA, nor any other party herein, raised this issue prior to appeal or requested that the Commission create such a definition. Rather, FIXCA took the position that GTEFL simply had not met its burden of proving that a sufficient community of interest existed to justify toll relief. (R. 90 and 92, 127 - 130).

If the Commission's proceedings were somehow flawed because of the errors alleged on appeal, they are errors of which FIXCA was well aware and which it was willing to encourage and accept until the end result, a factual determination by the Commission that there was a sufficient community of interest to justify expansion of local exchange services, proved not to FIXCA's liking. FIXCA cannot complain of alleged errors which it never raised, and even invited. Wasden v. Seaboard Coastline Railroad Co., 47 So.2d 825 (Fla. 2nd DCA 1985). It has waived the right to review on these issues.

IV. ORDER NO. 25708 DID NOT AMEND OR REVOKE INTEREXCHANGE CARRIERS' CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

Even assuming, arguendo, that FIXCA's claims were adequately preserved for appeal, Order No. 25708 did not amend or revoke any interexchange carriers' certificates. FIXCA claims that the Commission's approval of GTEFL's ECS plan as local exchange service somehow amended or revoked its members' certificates of public convenience and necessity. FIXCA goes to great lengths to describe

the statutes and rules governing amendment and revocation of certificates and licenses, and argues that the Commission's designation of the ECS routes as local is procedurally deficient to revoke or amend certificates. The statutes and rules cited by FIXCA simply are not applicable.

Interexchange carriers have no certificated right to compete on any particular route within the state. An interexchange certificate carries with it no guarantee that the holder may compete forever on any route. FIXCA simply has no vested interest in the ECS routes.

In Order No. 25708 the Commission approved a modified version of GTEFL's ECS plan and classified the ECS routes as local calling service. FIXCA can point to no portion of the order in which the Commission purported to amend or revoke interexchange carrier certificates in general or those held by FIXCA members in particular. Further, there is no evidence in the record on appeal which would lead to the conclusion that the Commission's order had that effect. Rather, FIXCA invites this Court to find that classifying the ECS routes as local exchange service, which has the effect of prohibiting competition for traffic on those routes, is the same thing as amending or revoking interexchange carriers' certificates.[12] If this Court accepts FIXCA's argument, the

[12]In its brief, FIXCA asserts that the Commission's order had the result of prohibiting interexchange carriers "from serving routes which the Commission previously certificated them to serve", that "[t]he practical effect of the decision is to alter or amend the interexchange certificates . . . ." (FIXCA Brief at 16), and that the order "amounts to the de facto cancellation of a portion"

Commission would not be able to determine what routes constitute local exchange service, without first joining Florida's 201 certificated interexchange carriers in even the smallest EAS proceeding. Such a result makes no sense and would destroy the Commission's authority to determine the scope of local exchange service.[13]

Even if FIXCA members somehow acquired a property right in those routes for which they actually competed, they could show no such entitlement to the ECS routes. These routes were all contained in one Toll Monopoly Area, in which facilities-based competition was prohibited until January 1, 1992. At most, FIXCA members had the mere expectation of future facilities-based competition on these routes when FIXCA filed its petition on March 5, 1991. FIXCA made no showing that any of its members ever competed for traffic on any of the ECS routes.[14]

---

of FIXCA members' certificates. (FIXCA Brief at 20).

[13]Of course, if FIXCA's argument (that the Commission's action is invalid because it effectively amended interexchange carrier certificates) is to be accepted, it must cut both ways: the **expansion** of the scope of competition effected by the elimination of Toll Monopoly Areas would be similarly invalid for the same reason.

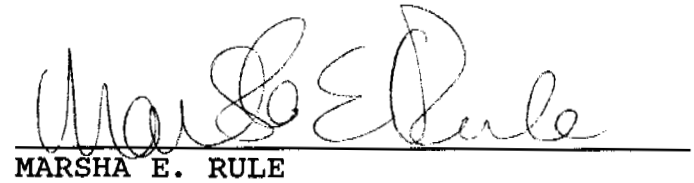
[14]FIXCA's argument that the Commission's order "could result in IXC facilities, upon which IXCs may have spent substantial amounts of money, being rendered useless. . . ." is pure supposition. Indeed, if such had been the case, one would assume that FIXCA would have presented proof at the hearing, and would not have limited its appeal to a legal issue.

CONCLUSION

It has long been held that the Commission's orders are clothed with the presumption of validity. Citizens of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982); City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981). No error appears on the face of Order No. 25708 which could overcome this presumption of validity, and FIXCA has not met its appellate burden of showing, by clear and satisfactory record evidence, that the orders are invalid, arbitrary, or unsupported by the evidence. Citizens of Florida v. Public Service Commission, supra. The Commission's decision should be affirmed.

Respectfully submitted,

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052



MARSHA E. RULE
Associate General Counsel
Florida Bar No. 302066

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

Dated: 14 September, 1992

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the ANSWER BRIEF OF APPELLEE has been furnished by U.S. Mail this 14th day of September, 1992, to the following:

Floyd R. Self
Messer, Vickers, Caparello, Madsen,
Lewis, Goldman & Metz, P.A.
215 South Monroe Street
Suite 701
Post Office Box 1876
Tallahassee, Florida 32302

Harris R. Anthony
c/o Marshall M. Criser, III
Southern Bell Telephone
& Telegraph Company
150 S. Monroe Street
Suite 400
Tallahassee, Florida 32301

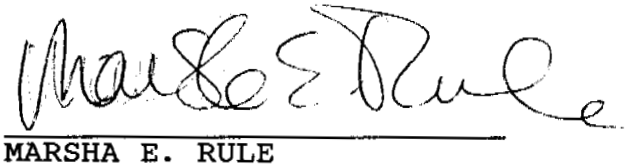
Charles J. Beck
Assistant Public Counsel
Claude Pepper Building
111 West Madison Street
Room 812
Tallahassee, Florida 32399-1400

Thomas R. Parker
Associate General Counsel
GTE Florida Incorporated
P.O. Box 110 MC 7
Tampa, Florida 33601

Bruce Renard
Law Offices of Bruce Renard
120 E. Jefferson St.
Tallahassee, Florida 32301

Lance Morris
Florida Pay Telephone
5121 Bowden Road #104
Jacksonville, Fl 32216-
5947

Vicki Gordon Kaufman
McWhirter, Grandoff and Reeves
522 East Park Avenue, Suite 200
Tallahassee, Florida 32301



MARSHA E. RULE