IN THE SUPREME COURT OF FLORIDA

FLORIDA INTEREXCHANGE CARRIERS ASSOCIATION,

Appellant,

v.

CASE NO. 80,007
PSC DOCKET NO. 910179-TL

FLORIDA PUBLIC SERVICE COMMISSION,

Appellees.

_____/

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

INITIAL BRIEF OF APPELLANT

THE FLORIDA INTEREXCHANGE CARRIERS ASSOCIATION

Vicki Gordon Kaufman
Fla. Bar No. 286672

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

904/222-2525

Attorney for the Florida
Interexchange Carriers
Association

TABLE OF CONTENTS

TABLE OF CITATIONS

Page No.

Cases (Cont'd)

Florida Statutes

Page No.

Florida Statutes (Cont'd)

Florida Administrative Code

Commission Orders

PRELIMINARY STATEMENT

The following abbreviations are used in this brief. Appellant, Florida Interexchange Carriers Association, is referred to as FIXCA. Appellee, 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 (R.).

STATEMENT OF THE CASE AND OF THE FACTS

Background

The issue raised on appeal is a very narrow legal question regarding the Commission's interpretation of section 364.335, Florida Statutes (1990). This legal issue arises in the context of the complicated and highly technical telecommunications industry. Understanding the telecommunications industry is made more difficult by the terminology used to describe its operations, services and participants. However, the intricacies of the telecommunications industry should not obscure the issues of law which the Court must consider. To assist the Court, FIXCA provides the following brief overview of the telecommunications industry.

The telecommunications network in the United States is owned and operated by a number of companies. Most consumers are familiar with two types of telecommunications providers: their local telephone company (such as GTEFL, Southern Bell or Centel), and their long distance telephone company (such as AT&T, MCI and others). There is some overlap between the services provided by these companies. The dispute raised by this appeal occurs within this area of overlap.

The *local telephone company* operates a telecommunications network that interconnects each home and business located in the local telephone company's service territory. 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. Local telephone companies, however, also provide *interexchange services* which allow subscribers in one exchange to call subscribers in another exchange. Prices for this service usually depend upon the time the call is made, the duration of the call, and the distance between the exchanges (or some combination).

The area of common interest between local and long distance telephone companies is the completion of interexchange calls of short distance. *Long distance companies* (also known as *interexchange carriers)* provide interexchange service using transmission facilities that go between exchanges. Local telephone companies also provide this service.

Case History

On January 29, 1991 GTEFL filed tariff T-91-037. The proposed tariff's purpose was to restructure the rates and dialing patterns relating to calls between the communities of Clearwater, Tampa, Tarpon Springs, and St. Petersburg. Order No. 25708 at 2. (R. 202).

Members of FIXCA[1] are certificated by the Commission to provide long distance telephone service between telephone exchanges. At the time of GTEFL's proposal, FIXCA members were authorized by the Commission to compete with GTEFL to provide

[1] FIXCA is a trade association composed of companies who provide interexchange telephone service.

service between the communities listed above.[2]

GTEFL's proposed tariff sought to substantially reduce the price for calling among the four exchanges and to change the dialing pattern used to initiate a call. At the time the new system was proposed, calls among the exchanges were priced on a per-minute basis that depended upon the distance and time-of-day the call was placed. To initiate the call, subscribers would dial 1+ the seven (7) digit number of the party being called. Under GTEFL's proposed service, usage prices are reduced by approximately seventy percent (70%) below existing rates and subscribers do not have to use the 1+ prefix to initiate calls. GTEFL's new pricing plan is referred to as Extended Calling Service (ECS).

On March 5, 1991, FIXCA filed a petition for rejection of GTEFL's proposed ECS tariff. FIXCA requested that the Commission reject GTEFL's tariff, or alternatively, that the Commission suspend the tariff and hold a hearing on the proposal. (R. 48-51). On May 7, 1991, the Commission granted FIXCA's request for hearing and held that it would take no further action on the proposed tariff pending the outcome of the hearing. Order No. 24488 at 2. (R. 53). Intervenor status was granted to the Office of Public Counsel, the Florida Pay Telephone Association, Inc., and Southern Telephone and

[2] Prior to January 1, 1992, FIXCA members were authorized to provide such service by resale. After January 1, 1992, FIXCA members were permitted to carry this traffic over their own facilities. Order No. 23540 at 32. (R. 32).

Telegraph Company. Order No. 25708 at 3. (R. 203).

The Commission issued two orders on prehearing procedure. Order No. 24577; Order No. 24687. (R. 203). A notice of hearing was issued by the Commission on June 21, 1991. The notice set out the purpose of the hearing:

> The purpose of this hearing is to permit parties to present testimony and exhibits relative to any and all issues regarding GTE Florida, Inc.'s proposal to offer Extended Calling Service in Florida.

(R. 56).

The hearing was held before the Commission on September 11, 1991. Post-hearing briefs were filed by the parties on October 21, 1991. (R. 123-200). On February 11, 1992, the Commission approved a modified version of the ECS plan. Order No. 25708 at 27. (R. 227).

Order No. 25708 holds:

> We find that the routes for which ECS has been approved shall be classified as local and held to fall within the ambit of "local exchange service," as that term is employed in Section 364.335. This is consistent with our treatment of EAS as local service. The necessary result of our action shall be to preclude competition on these routes.

Order No. 25708 at 34. (R. 234).

The Commission based its absolute prohibition on competition on the ECS routes on section 364.335(3), Florida Statutes (1990). Section 364.335 states:

> The commission may grant a certificate, in whole or in part or with modifications in the public interest, but in no event granting authority greater than that

> requested in the application or amendments thereto and noticed under subsection (1); or it may deny a certificate. The commission may not grant a certificate for a proposed telecommunications company, or for the extension of an existing telecommunications company, which will be in competition with or duplicate the local exchange services provided by any other telecommunications company unless it first determines that the existing facilities are inadequate to meet the reasonable needs of the public and it first amends the certificate of such other telecommunications company to remove the basis for competition or duplication of services.

It is the legal question of the Commission's statutory interpretation of section 364.335 that is the subject of this appeal.

On December 18, 1991, GTEFL filed a motion for reconsideration of the Commission's oral decision.[3] The Commission issued Order No. 25709 as to that motion on February 11, 1992. (R. 237-239).

On February 26, 1992, the Office of Public Counsel filed a motion for reconsideration of Order No. 25708. On May 11, 1992, the Commission issued Order No. PSC-92-0323-FOF-TL disposing of that motion. (R. 240-242). On June 9, 1992, FIXCA filed its notice of appeal of Order No. 25708. (R. 243).

---

[3] The Commission routinely decides matters brought before it orally at Agenda Conferences. After the oral vote in this case, but before the filing of the written order on February 11, 1992, GTEFL filed a motion for reconsideration of the Commission's decision.

SUMMARY OF ARGUMENT

In Order No. 25708, the Commission erroneously interpreted section 364.335(3), Florida Statutes (1990), so as to deprive currently licensed telephone interexchange carriers from serving long distance routes they were heretofore certificated by the Commission to serve. This erroneous decision has no legal basis and must be reversed.

The Commission based its decision to prohibit competition on ECS routes and to preclude currently certificated carriers from serving those routes on section 364.335(3). However, a review of this statute (which applies to the granting of new certificates to carriers who will compete with or duplicate local exchange services) makes its clear that the statute on its face applies only to new market entrants--that is entities who are applying for a new certificate or seeking to expand the territory covered by a current certificate. It is an uncontroverted legal principle that the plain meaning of a statute must govern its interpretation. Application of this legal maximum renders the Commission's decision erroneous and requires reversal.

The Commission's decision also violates the numerous statutory sections pertaining to amendment and revocation of telecommunications certificates as well as the Commission's own rules on certificate cancellation. FIXCA does not dispute that the Commission has the statutory authority to revoke or amend a telecommunications certificate. However, the Commission may do

so only for explicitly stated statutory reasons--failure to comply with a Commission rule, order or statutory provision or failure to provide adequate service. Sections 350.127(1), 364.285(1), 364.345(1), Florida Statutes (1991). None of these situations exists in this case and therefore the Commission has no authority to amend or revoke the interexchange carriers' (IXCs) certificates as it has done here. The Commission's action is also inconsistent with its own rules on certificate cancellation which permit the Commission to cancel a certificate only for the reasons delineated above. Rule 25-24.474(1), Florida Administrative Code.

Additionally, the Commission's action violates the license revocation requirements of section 120.68, Florida Statutes (1991). An IXC's certificate falls within Chapter 120's definition of license. Section 120.52(9). The Commission may not revoke a license without first serving the licensee with an administrative complaint and providing adequate opportunity for a hearing. Section 120.60(7). It is undisputed that section 120.60(7)'s requirements were not followed in this instance.

Even if it is assumed that section 364.335 has applicability to the present case, the Commission has greatly exceeded any discretion delegated to it by applying the classification of "local exchange service" to the ECS routes but refusing to define what falls in that category. This "we'll know it when we see it approach" gives the Commission unfettered discretion to make piecemeal ad hoc determinations which have

the effect of divesting IXCs of their licenses to do business without defining appropriate categories and classifications beforehand. Such unlimited discretion cannot be permitted.

Lastly, once the Commission has determined that certain routes are subject to competition, Chapter 364 provides it with no authority to "remonopolize" such routes. After the Commission decides that competition is in the public interest on certain routes, it may not alter that decision.

The Court should rule that the Commission has erroneously interpreted section 364.335 and restore to the IXCs their right to serve the routes the Commission previously certificated them to serve.

ARGUMENT

I. THE STATUTORY STANDARDS OF SECTION 364.335, FLORIDA STATUTES (1990), APPLY ONLY TO NEW MARKET ENTRANTS.

A. Standard of Review

Section 120.68(9), Florida Statutes (1991), states:

> If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:
>
> (a) Set aside or modify the agency action, or
>
> (b) Remand the case to the agency for further action under a correct interpretation of the provision of law.

Emphasis supplied. This standard of judicial review requires the Court to reverse or remand an agency order which incorrectly interprets a provision of law. See, i.e., Johnson & Johnson, Inc. v. Florida Department of Transportation, 371 So.2d 495 (Fla. 1st DCA 1979) (order of Department of Transportation requiring appellant to remove four outdoor advertising signs if it did not remove certain lighting from the signs reversed and remanded due to lack of statutory authority); Cundy v. Division of Retirement, 353 So.2d 967 (Fla. 1st DCA 1978) (agency order quashed and case remanded for agency to give effect to statutory presumption); Leonard v. Department of Administration, 352 So.2d 1273 (Fla. 1st DCA 1977) (order terminating disability benefits remanded due to erroneous interpretation of statute). In this case, the Commission has erroneously interpreted section 364.335, Florida Statutes (1990), to prohibit IXCs from serving

the ECS routes. However, section 364.335 does not empower (much less require) the Commission to prohibit currently certificated carriers from serving the approved ECS routes. Therefore, the Commission's interpretation of section 364.335 is erroneous and must be reversed.

B. The plain language of section 364.335 applies only to applications for new certificates.

The language of section 364.335, Florida Statutes (1990), upon which the Commission relied in Order No. 25708, is clear and unambiguous. By its very terms, section 364.335 applies only to applications for new certificates. While the Commission has attempted to rely on section 364.335 to support its order prohibiting competition on the ECS routes and in effect giving it the authority to amend a previously granted certificate, the plain language of the statute makes it applicable only to entities who are applying for a new certificate or who are seeking authority to expand the territory covered by a currently held certificate. That is, the statutory section relied upon by the Commission governs the authority of the Commission to permit the expansion of competition. The statute makes no reference whatsoever to any authority of the Commission to unilaterally amend a current certificate.[4]

It is a well-established principle of statutory construction that the plain meaning of a statute must govern:

---

[4] The Commission's statutory authority to amend or cancel a certificate is discussed in Section II.

> [T]he meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.

Caminetti v. United States, 242 U.S. 470, 484 (1917). Put another way,

> There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction.

Swarts v. Siegel, 117 F. 13, 18 (8th Cir. 1902). See also, Sutherland, Statutory Construction § 46.01 (4th Ed.).

This well-settled rule has frequently been enunciated and followed in Florida. Regarding the effective date for file and suspend orders of the Commission, this Court stated:

> The rule in Florida is that where the language of the statute is so plain and unambiguous so as to fix the legislative intent and leave no room for construction, the courts should not depart from the plain language used by the legislature. Carson v. Miller, 370 So.2d 787 (Fla. 1978).

Citizens of State v. Public Service Commission, 425 So.2d 534, 541-2 (Fla. 1982). See also, Lee v. Gulf Oil Corporation, 4 So.2d 868, 870 (Fla. 1941). The same well-settled rule must apply in this case.

That the provisions of section 364.335 have no applicability to the case before the Court is obvious. First, the title of section 364.335 is "Application for certificate." Emphasis supplied. Subsection (1) specifies the information

which "[e]ach applicant for a certificate shall [provide]." The statute requires each applicant to furnish all information required by Commission rule or order,[5] to file rate schedules and contracts relating to the services it will provide, to remit an application fee, and to provide an affidavit swearing that notice of the application has been given. All of these requirements and procedures can, by their very terms, apply only to new market entrants. To interpret the statute in any other way makes no sense.

Subsection (2) provides that "[i]f the commission grants the requested certificate" (emphasis supplied) a substantially affected person may object and request a hearing or the Commission may on its own motion, hold a hearing to determine if the grant of the certificate is in the public interest. This subsection specifies where the hearing on the application shall be held and makes the transcript of the hearing and related material part of the application. These provisions on their face can apply only to new market entrants.

More specifically, the Commission explicitly bases its decision on subsection 364.335(3). Subsection 364.335(3) provides:

> The commission may grant a certificate, in whole or in part or with modifications in the public interest, but in no event granting authority greater than that

[5] Such information may include detailed inquiry into the applicant's ability to provide service, the territory and facilities involved, and the existence of service from other sources.

> requested in the application or amendments thereto . . . ; or it may deny a certificate. The commission may not grant a certificate for a proposed telecommunications company, which will be in competition with or duplicate the local exchange services provided by any other telecommunications company unless it first determines that the existing facilities are inadequate to meet the reasonable needs of the public and it first amends the certificate of such other telecommunications company to remove the basis for competition or duplication of services.

Emphasis supplied. As with the earlier subsections, subsection 364.335(3) speaks explicitly in terms of the grant of a new certificate or the expansion of a current certificate. It gives the Commission the authority to grant new certificate applications in whole or part or to deny such applications. It does not, however, provide the Commission with authority to divest a previously granted certificate holder of present authority.

The Commission interprets subsection 364.335(3) as:

> a prohibition against duplication of or competition with the local exchange company, absent a specific exception provided by statute or authorized by this Commission.

Order No. 25708 at 34. (R. 234). Such a prohibition can be found nowhere in the statute vis-a-vis currently certificated carriers.

In this case, there was no request pending before the Commission for a certificate of authority which triggered the requirements of subsection 364.335(3). Only when there is an

application for a new certificate does the Commission reach the question of whether the new provider will "be in competition with or duplicate the local exchange services . . . ." In this case, this question is irrelevant. No certificate application was before the Commission. Both GTEFL and the IXCs hold certificates authorizing them to provide interexchange service along these routes.[6]

Section 364.335, by its plain meaning, has no applicability to the facts of this case. The plain language of subsection 364.335, which is triggered only when there is an application for a certificate, is directly contrary to the Commission's construction of the statute. The Commission's order must be reversed.

II. ORDER NO. 25708'S ABSOLUTE PROHIBITION ON COMPETITION ON THE ECS ROUTES VIOLATES THE STATUTORY SECTIONS PERTAINING TO AMENDMENT AND REVOCATION OF TELECOMMUNICATIONS CERTIFICATES AND IS INCONSISTENT WITH THE COMMISSION'S RULES ON CERTIFICATE CANCELLATION.

A. Standard of Review

Section 120.68(12)(b), Florida Statutes (1991), states that:

> The court shall remand the case to the agency if it finds the agency's exercise of discretion to be:
>
> . . .

[6] All certificated IXCs have already gone through the application process contemplated by section 364.335 and received certificates to serve designated exchanges.

(b) Inconsistent with an agency rule;

. . .

(d) Otherwise in violation of a . . . statutory provision.

The record in this case demonstrates that Order No. 25708, which absolutely prohibits FIXCA members from serving routes which they were previously certificated to serve, violates the Commission's statutory authority to amend, suspend or revoke telecommunications certificates, and is inconsistent with the Commission's rules on certificate cancellation.

If an administrative agency acts in a manner that violates a statute or is inconsistent with its own rules, the Court must remand the case to the agency. Decarion v. Martinez, 537 So.2d 1083 (Fla. 1st DCA 1989). In addition, section 120.68(13)(a)1 gives this Court the authority to set aside the Commission's action and decide the rights of the parties.

B. Order No. 25708's Ban on Competition on ECS Routes Violates the Statutory Provisions Which Give the Commission Authority to Amend or Revoke A Certificate.

The undisputed result of Order No. 25708 is to prohibit IXCs from serving routes which the Commission previously certificated them to serve. The practical effect of the Commission's decision is to alter or amend the interexchange certificates held by FIXCA members so as to decrease the geographical territory in which they may provide service.

FIXCA recognizes that the Commission has the authority to revoke, amend or cancel the certificate of any authorized

telecommunications provider. However, such an action is penal in nature and the statutory standards pertaining to such action must be strictly construed. Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So.2d 164, 165 (Fla. 1st DCA 1990); Taylor v. Department of Professional Regulation, 534 So.2d 782, 784 (Fla. 1st DCA 1988). Further, the Commission's authority to take such action may be exercised only pursuant to explicit statutory standards.

The explicit standards pertaining to certificate amendment and revocation are set out in the following statutory sections. Chapter 350, Florida Statutes (1991), describes the general powers and duties of the Commission. Section 350.127(1), Florida Statutes (1991), emphasis supplied, provides:

> (1) The commission may impose upon any regulated company that is found to have refused to comply with or willfully violated any lawful rule or order of the commission, or any statute administered by the commission, a penalty for each such offense . . . or the commission may, for any such violation, amend, suspend, or revoke any certificate issued by the commission.

Chapter 364, Florida Statutes (1991), is specifically applicable to telecommunications providers. Section 364.285(1), Florida Statutes (1991), which is entitled "Penalties", contains a provision very similar to the one quoted above:

> The commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter which is found to have refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty. . . ; or the

> commission may, for any such violation, amend, suspend, or revoke any certificate issued by it.

Emphasis supplied.

Finally, section 364.345(1), Florida Statutes (1991), specifically addresses the amendment of certificates so as to delete territory which a carrier is authorized to serve. It provides:

> Each telecommunications company shall provide adequate and efficient service to the territory described in its certificate within a reasonable time as prescribed in the commission order. If the telecommunications company fails or refuses to do so, for whatever reason, the commission, in addition to other powers provided by law, may amend the certificate to delete the territory not served or not properly served, or it may revoke the certificate.

Emphasis supplied.

These statutory references make it clear that the Commission may revoke or amend a telecommunications certificate which it has previously granted for only two reasons: failure to comply with a Commission rule, order or statutory provision or failure to provide adequate or efficient service in the certificated territory. Neither of those situations is present in this case. There has been no allegation, let alone any proof, that any IXC has violated any Commission statute, rule or order or that any IXC will not appropriately serve the territory in question. Rather the Commission has gone outside its statutory authority and amended the certificates of FIXCA

members in violation of the specific statutory standards applicable to such action. This unauthorized action must be reversed.

C. Order No. 25708's Ban on Competition on ECS Routes Is Inconsistent with the Commission's Rules on Certificate Cancellation.

It is well settled that an agency must follow its own substantive rules and may take no action inconsistent with such rules. An agency has no discretion to disregard its own rules.

One of the primary reasons for requiring agencies to engage in rulemaking is so that persons affected by an agency's rules, such as FIXCA members, will be on notice of those rules and how the rules will be applied in a particular situation. McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 580 (Fla. 1st DCA 1977).

This principle has been frequently and consistently enunciated. For example, in Decarion v. Martinez, 537 So.2d 1083 (Fla. 1st DCA 1989), the court reversed and remanded a final order of the Board of Trustees of the Internal Improvement Trust Fund (Trustees). In that case, appellants sought to build a dock as part of a residential development and applied to do so pursuant to the provisions of the governing rule of the Trustees. However, appellants' request was inappropriately treated as a lease request and denied. The court found that the Trustee's treatment of the request was inconsistent with its rules and reversed and remanded the case.

Similarly, in Woodley v. Department of Health and

Rehabilitative Services, 505 So.2d 676 (Fla. 1st DCA 1987), a final order of the Department of Health and Rehabilitative Services (HRS) was reversed and remanded due to action inconsistent with agency rules. In Woodley, the appellant appealed a denial of her application for Aid to Families with Dependent Children due to HRS' failure to seek a policy exception request as required by its rules. The court found that HRS' rules clearly required the submission of such a request and that HRS' failure to do so violated its own rules, thus requiring reversal. See also, Price Wise Buying Group v. Nuzum, 343 So.2d 115 (Fla. 1st DCA 1977) (an agency cannot ignore an adopted rule).

The Commission's action in Order No. 25708 amounts to the de facto cancellation of a portion of the certificates of FIXCA members. Such action is inconsistent with the Commission's own rules governing certificate cancellation. Those rules provide that the Commission may cancel a company's certificate for any one of the following four reasons:

> (a) Violation of the terms and conditions under which the authority was originally granted;
>
> (b) Violation of Commission Rules or orders;
>
> (c) Violation of Florida Statutes; or
>
> (d) Failure to provide service for a period of six (6) months.[7]

[7] The rule also provides that a carrier may request cancellation of its certificate.

Rule 25-24.474(1), Florida Administrative Code. The rules explicitly describe the precise circumstances under which a certificate may be canceled. None of these circumstances are present in this case. By prohibiting competition on the ECS routes as it did in this case, the Commission has failed to follow and has gone beyond the bounds of its own rules on certificate cancellation in violation of the requirements of Chapter 120.

III. ORDER NO. 25708'S DE FACTO REVOCATION OF A PORTION OF THE IXCS' CERTIFICATES OF NECESSITY VIOLATES THE LICENSE REVOCATION REQUIREMENTS OF CHAPTER 120, FLORIDA STATUTES (1991).[8]

As discussed earlier in this brief and as clearly set out in Order No. 25708, the Commission's order precludes certificated IXCs from serving the ECS routes which their previously granted certificates authorize them to serve. The Commission has effected a partial revocation of the IXCs' certificates of necessity through the entry of Order No. 25708. The Commission took this action without complying with the requirements of Chapter 120, Florida Statutes (1991), which delineates the procedure which must be followed in license revocation proceedings.

First, section 120.52(9), Florida Statutes (1991), broadly defines a "license" as:

> a franchise, permit, certification, registration, charter, or similar form of

[8] The standard of review is the same as that set out in Point IIA.

authorization required by law . . . .

A certificate of necessity from the Commission is required by law before an entity may provide interexchange services. A person may not operate or construct a telecommunications facility without a certificate of necessity granted by the Commission after review of an applicant's application filed pursuant to Commission rules. See, sections 364.33, 364.335, Florida Statutes (1991); rule 25-24.471, Florida Administrative Code. Therefore, the certificate of necessity which the Commission issues to an IXC pursuant to section 364.335, Florida Statutes (1991), falls within the definition of license contained in section 120.52(9) quoted above.

Second, because the IXCs' certificates fall within Chapter 120's definition of "license", the Commission may not amend or revoke the certificates without following the license revocation proceedings outlined in section 120.60(7), Florida Statutes (1991):

> No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to s. 120.57.

In the circumstances of this case, it is undisputed that the Commission did not follow the mandatory requirements of section

120.60(7), Florida Statutes (1991). The Commission did not provide the licensees (that is, the individual IXC carriers holding IXC certificates) with notice by personal service or certified mail of its intended action before withdrawing their authority to serve the ECS routes.[9]

Once a license which is necessary to do business in the state of Florida is issued, it has the quality of property. Wilson v. Pest Control Commission of Florida, 199 So.2d 777, 779 (Fla. 4th DCA 1967).[10] As the Wilson court noted, a party is justified in spending considerable sums of money in reliance upon the right to continue to engage in a specific business once licensed. As holders of licenses to provide interexchange services, the IXCs were justified in such reliance upon their certificates of necessity which the Commission issued. Therefore, these licenses may not be partially revoked if the

---

[9] The only "notice" the Commission gave of the GTEFL proceeding was the Commission's Notice of Hearing. This was not served by personal service or certified mail on the certificate holders. Even if it had been, the language of the notice was insufficient to put the IXCs on notice that their certificates were in jeopardy. The hearing notice said:

> The purpose of this hearing is to permit parties to present testimony and exhibits relative to any and all issues regarding GTE Florida, Inc.'s proposal to offer Extended Calling Service in Florida.

(R. 56). This language is insufficient to put parties on notice of their rights. See, Quay Development, Inc. v. Elegante Building Corporation, 392 So.2d 901, 903 (Fla. 1981) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed.2d 865 (1950)").

[10] A citizen's right to pursue any lawful business is property. State v. Ives, 167 So. 394, 399 (Fl. 1936).

Commission fails to follow the Administrative Procedure Act. See, Robinson v. Florida Board of Dentistry, 447 So.2d 930, 932 (Fla. 3d DCA 1984) ("The Department of Professional Regulation, as well as the specific professional boards coming under its purview, must remember that the suspension of a license which is essential in the pursuit of livelihood involves state action. Such licenses may not be revoked or suspended without procedural due process." (citations omitted).) The Commission indisputably did not follow the appropriate procedure in this case.

When an agency fails to follow the requirements of section 120.60(7) in revoking a license, its action must be reversed. See, Highsmith v Department of Professional Regulation, Board of Opticinary, 499 So.2d 19 (Fla. 1st DCA 1986) (suspension of an optician's license reversed for agency's failure to provide reasonable notice of charges); Florida Real Estate Commission v. Frost, 373 So.2d 939 (Fla. 4th DCA 1979) (hearing officer's dismissal of complaint against real estate broker upheld where agency did not give notice of complaint to petitioner); Capeletti Brothers, Inc. v. Department of Transportation, 362 So.2d 346 (Fla. 1st DCA 1978) (agency's suspension of contractor's certificate of qualification reversed and attorneys' fees awarded where agency failed to follow administrative procedure). The Commission's failure to follow section 120.60(7) requires reversal in this case.

IV. EVEN ASSUMING, ARGUENDO, THAT SECTION 364.335 IS APPLICABLE, THE COMMISSION'S INTERPRETATION OF THE STATUTE IS BEYOND THE DISCRETION DELEGATED TO IT.

A. Standard of Review

Section 120.68(12)(a), Florida Statutes (1991), requires the Court to remand a case to the agency if the Court finds that the agency's exercise of discretion is outside the range of discretion delegated to it by law. See, General Development Utilities, Inc. v. Hawkins, 357 So.2d 408, 409 (Fla. 1978), where this Court reversed an order of the Commission based on section 120.68(12)(a) because the Commission's selection of an equity/debt ratio was outside its range of delegated discretion. In interpreting section 364.335 as it did in Order No. 25708, the Commission far exceeded the discretion delegated to it by the legislature.

B. The Commission's Interpretation of Section 364.335(3) is An Abuse of Its Discretion.

Even assuming, *arguendo*, that section 364.335(3), Florida Statutes (1990), is applicable to the circumstances of the case before the Court[11], by its terms, the statute applies only if the

> proposed telecommunications company, . . . or extension of an existing telecommunications company,. . . will be in competition with or duplicate the local exchange services provided by any other telecommunications company. . . .

[11] See section I for the reasons why this section has no applicability to the case at bar and may be applied only when an entity first seeks a certificate or wants to expand the territory covered by a currently held certificate.

Emphasis supplied. Thus, the requirement of section 364.335(3), that the Commission determine that there is inadequate service before granting a certificate to another telecommunications carrier, does not apply to all services that a local exchange company may offer--it applies only to local exchange services.

However, in a gross abuse of discretion, the Commission has refused to define "local exchange service." The Commission has provided absolutely no guidance as to what services fall in the "local" category:

> We find that the routes for which ECS has been approved shall be classified as local and held to fall within the ambit of "local exchange service," as that term is employed in Section 364.335. . . . We do not find it necessary to fully define "local exchange service" at this time in order to take this action. Rather, we find only that these routes constitute "local exchange service" as contemplated in Section 364.335.

Order No. 25708 at 34, emphasis supplied. (R. 234). Thus, the Commission has adopted a "we'll know it when we see it" approach to the definition of "local exchange service." Such an exercise of "discretion" is not contemplated by the statute and goes far beyond the Commission's authority. If not overturned by this Court, the Commission's approach would give it unbridled latitude to define "local exchange service" in any manner at any time.

The Commission's posture on this issue provides carriers with no idea of what the Commission may consider to be "local exchange service" at any particular point in time. Carriers are

therefore subject to an arbitrary and piecemeal approach to a critical definitional issue which permits the Commission to "revoke" a certificate without revealing the basis for the revocation to the certificate holder. This abuse of discretion must be reversed.

In its ECS offering, GTEFL has proposed a change in how a particular service is priced.[12] A change in price cannot change the nature of a service formerly determined to be a toll service (and for which the local exchange carrier was required to compete) into a "local exchange service."

If the Commission's (and GTEFL's) logic were followed to its conclusion, a local exchange company could reprice basic exchange service, move it to a different tariff section, and thereby exempt it from the requirements of section 364.335. Under this scheme, the service would no longer be "local exchange service" but would become toll service subject to competition.

Pricing proposals or mechanisms do not determine the nature of a telecommunications service. A pricing plan can not render a telecommunications service provided under that plan "local exchange service"; it simply changes the price at which the service is offered. Pricing does not give the Commission any statutory basis to "de-authorize" competition. The Commission's "labelling" cannot change the nature of a service. The

[12] GTEFL's ECS plan reduces prices on these routes to 70% below current toll rates. Order No. 25708 at 2. (R. 202).

labelling and pricing of a particular service cannot extend the local exchange company's monopoly beyond that granted to it by statute and the Commission's attempt to do so in Order No. 25708 is beyond its discretion.

V. CHAPTER 364, FLORIDA STATUTES (1990), DOES NOT GIVE THE COMMISSION AUTHORITY TO REMONOPOLIZE ROUTES ON WHICH IT HAS DETERMINED THAT COMPETITION IS IN THE PUBLIC INTEREST.[13]

The Commission cites, and relies exclusively upon, section 364.335 as authority for its decision to remonopolize the previously competitive ECS routes served by IXCs. And in fact, the Commission suggests in its order that section 364.335 in some way requires the result which Order No. 25708 achieves.[14] Not only does the statutory section relied upon by the Commission in this case not mandate the result the Commission seeks, it (as well as other parts of Chapter 364) prohibit such a result.

First, section 364.33, Florida Statutes (1990), provides that a person may not operate a telecommunications facility to provide telecommunications services to the public without

---

[13] The standard of review is the same as that set out in Point IA.

[14] The Commission's entire "rationale" is set out in one sentence:

> We have consistently interpreted this provision (renumbered from Section 364.335(4)(1989)) as a prohibition against duplication of or competition with the local exchange company, absent a specific exception provided by statute or authorized by this Commission.

Order No. 25708 at 34. (R. 234).

Commission approval. Thus, once the Commission grants approval via a certificate (for example, to an IXC to provide interexchange service), the certificated carrier is authorized pursuant to statute to operate a facility to provide such telecommunications services to the public. More specifically, section 364.337, Florida Statutes (1990), provides that a certificate may be granted for interexchange telecommunications services.

Second, when the Commission grants a carrier a certificate to provide interexchange telecommunications services (or any other telecommunications service), the Commission must find that the provision of such service is in the public interest. See, section 364.335(2); rule 25-24.471(3). Once an IXC certificate has been issued and the finding made that the provision of such service is in the public interest, there is no statutory authority in section 364.335 (or elsewhere) which permits the Commission to alter or amend an IXC's certificate under the circumstances before the Court here.[15] Once the Commission has determined that competition is appropriate, is in the public interest, and certificates a carrier to provide a service, it has no statutory authority to remonopolize a competitive

[15] See section II for circumstances which would permit the Commission, pursuant to statutory authority, to revoke or amend an IXC's certificate.

service.[16]

Third, the Commission's action is contrary to the legislative intent expressed in section 364.01(3), Florida Statutes (1991). Section 364.01(3)(d) requires the Commission to exercise its jurisdiction to:

> Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.

The Commission's order in this case could result in IXC facilities, upon which IXCs may have spent substantial amounts of money, being rendered useless based on the Commission's arbitrary finding that certain routes should be reclassified as local. Such actions flies in the face of the legislature's intent.

The Commission order is also in conflict with section 364.01(3)(e) which requires the Commission to:

> [r]ecognize the continuing emergence of a competitive telecommunications environment through the flexible regulatory treatment of competitive telecommunications services . . . .

The order under review is contrary to that legislative mandate as well.

---

[16] In the past, the Commission, as a matter of policy, temporarily prohibited IXCs from using their <u>own</u> transmission <u>facilities</u> when providing service within "toll transmission monopoly areas" (TMA). (IXCs could always provide service <u>between</u> TMAs.) This was known as the "toll transmission monopoly area" prohibition. The TMA policy never prohibited IXCs from providing <u>service</u> within a TMA, it only prohibited them from using their <u>own</u> facilities to complete the calls. Further, the TMA policy had no relationship to section 364.335 and was not based on that section. Effective January 1, 1992, Order No. 23540 at 17. (R. 17) removed the TMA restriction and IXCs currently do not have to use local exchange company facilities to complete toll calls.

As discussed in Section I, the standards of section 364.335 apply in the first instance, before a carrier is certificated. Once there are multiple carriers providing a certain service, there is no provision in section 364.335 for "narrowing the field", that is, for selecting among the competitive carriers and choosing only one to provide the service.[17] The Commission's attempt to do so in this case is not permitted by any provision of Chapter 364, is an erroneous interpretation of law, and must be reversed by this Court.

[17] This is the task of the public who are free to choose the long distance carrier they prefer.

CONCLUSION

Based upon the foregoing, the Court should reverse the Commission's holding in Order No. 25708 which prohibits currently certificated IXCs from providing service on the ECS routes and rule that currently certificated IXCs may continue to provide such service.

Respectfully submitted,

Vicki Gordon Kaufman
Fla. Bar No. 286672
McWhirter, Grandoff & Reeves
522 East Park Avenue
Suite 200
Tallahassee, Florida 32301

904/222-2525

Attorney for the Florida
Interexchange Carriers
Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief of Appellant, the Florida Interexchange Carriers Association, has been furnished by U.S. Mail to the following parties of record, this 18th day of August, 1992:

David Smith
Division of General Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399

Thomas R. Parker
Associate General Counsel
GTE Florida Incorporated
Post Office Box 110 MC 7
Tampa, FL 33601

Charles J. Beck
Assistant Public Counsel
Office of the Public Counsel
c/o The Florida Legislature
111 W. Madison Street
Pepper Building, Rm. 812
Tallahassee, FL 32399-1400

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

Floyd Self
Messer, Vickers, Caparello, Madsen, Lewis, Goldman & Metz
Post Office Box 1876
Tallahassee, FL 32302

Bruce W. Renard
Law Offices of Bruce Renard
120 E. Jefferson Street
Tallahassee, FL 32301

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

Vicki Gordon Kaufman