IN THE SUPREME COURT OF FLORIDA

THE FLORIDA INTEREXCHANGE
CARRIERS ASSOCIATION

Appellant,

v.

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

FLORIDA PUBLIC SERVICE COMMISSION,

Appellee.

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ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

REPLY BRIEF OF APPELLANT

THE FLORIDA INTEREXCHANGE CARRIERS ASSOCIATION

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PRELIMINARY STATEMENT

This reply brief will confine its response to the main arguments raised in Appellees' answer briefs.

ARGUMENT

I. IF FIXCA PREVAILS, GTEFL'S ECS PLAN WILL REMAIN INTACT.

In FIXCA's Initial Brief, FIXCA commented that the issue before the Court in this appeal is a very narrow one--that is, whether the Commission's interpretation of section 364.335(3), Florida Statutes (1990), so as to prohibit interexchange carriers (IXCs) from providing service on routes they are currently certificated to serve is legally incorrect. Despite Appellees' efforts to obscure this straightforward question, it remains the issue before the Court in this case. It is FIXCA's position that the statute the Commission seeks to apply is clear on its face and does not permit the action the Commission has taken.

Appellees spend pages in their answer briefs discussing "community of interest" concerns in an attempt to divert the Court's attention from the central issue of statutory construction. The Court's attention should remain focused on the issue at hand.

Just as important as delineating what the issue is in this appeal, is delineating what the issue is <u>not</u>. This appeal is <u>not</u> about whether the Commission has authority to approve GTEFL's ECS plan nor is it about whether the plan should be

approved. The relevant question before the Court is can the Commission prohibit IXCs from also serving the ECS routes, not whether the ECS plan can or should be approved. If the Court agrees with FIXCA and holds that section 364.335(3) does not permit the Commission to prohibit competition where competition currently exists, the ECS plan will remain in place; the Commission's approval of the plan will not be disturbed; consumers will have access to GTEFL's ECS plan if they choose to use it. Approval of FIXCA's position will simply mean that consumers will be able to continue to choose who will carry their calls--a choice they currently have available. If the Commission's action is not reversed, IXCs will be placed in the anomalous position of having to refuse to comply with consumers' requests to carry the traffic based on a legal prohibition found nowhere in the statute upon which the Commission attempts to rely. The Court should not permit this result.

II. THE COMMISSION'S ABILITY TO SET TELECOMMUNICATIONS POLICY MAY NOT EXCEED ITS STATUTORY AUTHORITY.

The main theme of Appellees' briefs is that the Commission must have the ability to make policy decisions in the area of telecommunications which are in the public interest.[1] From that premise, Appellees leap to the conclusion that the Commission

[1] A corollary to that theme is found in GTEFL's brief--the Commission's orders must be interpreted from the consumers' perspective. FIXCA believes this corollary has nothing to do with the legal question before the Court. However, application of this principle supports FIXCA's position that consumers should have the ability to choose the carriers they prefer.

will somehow be hindered in its policymaking duties if it adheres to the plain meaning of the statute upon which it based its decision in this case (section 364.335, Florida Statutes)--the very statute which the Legislature enacted to guide the Commission in the performance of its duties.

It is important to understand what the Commission has done in this case. The undisputed effect of the Commission's order is to legally prohibit competition where competition previously existed.[2] Before the Commission's decision in this case, consumers could choose the carrier they wanted to carry calls between the exchanges in question (including GTEFL); the Commission has now eliminated that choice and has required consumers to use GTEFL to carry the calls in question in the future. That is, the Commission has removed consumer choice where that choice previously existed.

The situation before the Court in this case must be clearly distinguished from the cases relied on by Appellees.[3] The cases cited by Appellees demonstrate the legislative policy in this state has always been to favor competition. Microtel, Inc. v. Florida Public Service Commission, 483 So.2d 415, 418 (Fla. 1986), discusses the "clear legislative intent to foster

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[2] The Commission agrees that the effect of its decision is to eliminate competition on the ECS routes. (Commission brief at 14).

[3] AT&T Communications of the Southern States, Inc. v. Marks, 515 So.2d 741 (Fla. 1987); U. S. Sprint Communications Co. v. Marks, 509 So.2d 1107 (Fla. 1987); Microtel, Inc. v. Florida Public Service Commission, 483 So.2d 415 (Fla. 1986); Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985).

competition. . . ." This legislative policy has been ignored in this case.

In each of the cases upon which Appellees rely, the Commission (and the Court) was concerned with phasing in competition in a marketplace which had previously been a monopoly. The Commission was properly engaged in insuring a smooth transition from monopoly to competition before full competition was achieved. Such is not the case here.[4]

The instant situation stands in stark contrast to the factual situations in the cases upon which Appellees rely. In the case before the Court, competition has been achieved. The Commission now--for the first time--wants to use section 364.335 to move in the opposite direction, back to a monopoly. That is, the Commission wants to use the statute to restrict competition where it exists as a result of the carefully planned transition from monopoly to competition. Such a posture is not only inconsistent with the cases Appellees cite, it finds no support in section 364.335 and must be rejected.

The Commission notes that section 364.335 does not require it to allow "unbridled competition"; FIXCA does not disagree.[5] In considering whether to grant an application pursuant to this

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[4] Similarly, the TMA order, Order No. 23540, has the same focus. Its purpose was to phase in competition. Further, it in no way addressed certificate modification.

[5] In making this argument, the Commission misapplies Microtel, Inc. v. Florida Public Service Commission, 483 So.2d 415 (Fla. 1986), to FIXCA's position. FIXCA is not suggesting "instant competition." Competition already exists; the Commission's order creates "instant remonopolization."

section, the Commission must consider whether approval of the application is in the public interest.[6] However, once that decision has been made, the statute provides no authority for the Commission to remonopolize the routes. The Commission's interpretation of section 364.335 is an "end run" around the statute's plain meaning.

FIXCA is not saying, as discussed in Section I, that the Commission may not approve the GTEFL ECS plan. GTEFL may lower, and the Commission may approve, its prices.[7] What the Commission may not do is retroactively prohibit certificated carriers from providing a competitive service they are currently authorized to provide.

Further, FIXCA does not dispute that the Commission has authority to set policy in the telecommunications arena. However, such policymaking authority is not unlimited, and the limits of the Commission's authority are contained in the statute from which the Commission draws its authority in the first instance.[8] The Commission must exercise its policymaking

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[6] Nor does FIXCA disagree with GTEFL that section 364.337 allows the Commission to impose certification conditions. However, those conditions are to be imposed "[w]hen the commission grants a certificate . . . ." Section 364.337(1).

[7] While FIXCA disagrees with the Commission's approval of GTEFL's ECS pricing plan, FIXCA has not made that decision the subject of this appeal.

[8] It is interesting to note that Appellees totally ignore FIXCA's discussion of the requirement that section 364.335 be interpreted according to its plain meaning. (FIXCA Initial Brief at 11-15). Rather, they go to great lengths to direct the Court's attention everywhere but the statute at issue.

authority in accord with the statute's directions and mandates.[9] AT&T Communications of the Southern States, Inc. v. Marks, 515 So.2d 741, 743 (Fla. 1987). While GTEFL may choose to characterize the Commission's statutory authority in the area of the certification of IXCs as "narrow certification provisions" (GTEFL brief at 28), this is the law which governs the Commission's actions in this case and upon which the Commission has relied as justification for the order under appeal. The Commission has certificated the IXCs which serve the routes in question and has deemed their provision of a competitive service to be in the public interest.

In this case, the statute upon which the Commission relies to justify its action does not give it authority to prohibit competition on routes where it has previously approved competition. Section 364.335 clearly applies in the first instance--when the Commission decides whether or not to issue a certificate. Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189, 1191 (Fla. 1985) (Section 364.335 requires the Commission to "make an initial decision whether to issue a certificate, guided by the discretionary proviso that certification be in the public interest.") In fact, there seems to be no disagreement among the parties on this point. (See Commission brief, pp. 15-16; GTEFL brief, p. 18). The Commission

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[9] Fundamental and primary policy decisions are made by the legislature who are elected to perform this function. Askew v. Cross Key Waterways, 372 So.2d 913, 925 (Fla. 1978).

may not ignore the plain meaning of the statute at issue (which plain language indicates that the statute does not apply in this circumstance) in the guise of executing its "policymaking" duties when the legislature has not given it the authority to take the action it seeks to implement.

Appellees take several tacks to circumvent the statute's plain meaning. First, they attempt to rely on a host of Commission orders in which the Commission has approved optional calling plans.[10] However, there is a critical difference between the order under appeal and the Commission orders Appellees cite. While prior optional calling plan cases may have had the practical effect of making competition economically impossible due to the extremely low pricing proposals of local exchange companies, they did not interpret section 364.335 as a prohibition on competition where competition was previously permitted. Nor do these orders state, as Order No. 25708 does, that section 364.335 requires that competition be eliminated on these types of routes.

Next, the Commission suggests that the Court disregard the statute's plain meaning. The Commission agrees that section 364.335(3) applies when the Commission "grant[s] a certificate

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[10] FIXCA notes that despite the length of the Commission's discussion of EAS plans, the plan proposed by GTEFL is not EAS. "[T]he calling volumes on the routes under consideration in this docket do not warrant implementation of traditional flat rate EAS under existing Commission rules." Order No. 25708 at 3-4. (R. 203-04). Further, while the Commission spends much of its brief describing the EAS process, nothing in the EAS rule (rule 25-4.042, Florida Administrative Code) legally prohibits competition where it has previously been authorized.

of public convenience and necessity . . . " (Commission brief at 15), but then goes on to inconsistently state that "confining" the statute to situations involving certificate applications would "turn a blind eye to the statute in any context but certificate application." (Commission brief at 16). What the Commission seeks to do is ignore the clear meaning of the statute, extend its application to other areas, and apply it to situations where it clearly has no application.[11]

Appellees also suggest that because IXCs are authorized by certificate to serve the entire state this somehow permits the Commission to revoke portions of that certificate at any time. Nowhere does the statute give the Commission this authority. Once the Commission has authorized competition, it may not remonopolize areas where competition has been permitted.

GTEFL asks the Court to look to other Commission orders for authority to disregard section 364.335's plain meaning. GTEFL argues that the Commission's authority to take the action it has in Order No. 25708 emanates from the Commission's own subsequent orders and that those orders can somehow modify the law which governs the Commission's actions. However, the orders of an administrative agency cannot change the statute under which the agency operates. Division of Family Services v. State, 319 So.2d

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[11] Even assuming the statute applies, it does not apply to all services that a local exchange company offers. See FIXCA Initial Brief at 25-27. Followed to its logical conclusion, the Commission's ability to expand "local exchange service" as it sees fit would spell the end of competition in the Florida telecommunications industry--a result clearly contrary to the public interest expressed by the legislature.

72, 76 (Fla. 1st DCA 1975) ("[A]n agency, being a creature of statute, has only those powers given to it by the legislature.") (footnote omitted); State v. Greenberg, 297 So.2d 628, 636 (Fla. 1st DCA 1974) ("Administrative bodies have no common law powers. They are creatures of the Legislature and what powers they have are limited to the statutes that create them.") (citations omitted).

Section 364.335 is the statute upon which the Commission has relied to support its order. That section contains no justification for the Commission's action.

III. THIS CASE DOES NOT INVOLVE MODIFICATION OF A PRIOR COMMISSION ORDER.

GTEFL argues that this case involves modification of a Commission order and that because the Commission has the ability to modify previously entered orders under certain limited circumstances, its action in this case is appropriate. It is abundantly clear that this was not a proceeding in which the Commission announced its intent to modify the orders granting IXCs authority to serve. If it had been, the Commission would have been required to follow the procedures contained in section 120.60, Florida Statutes (1991), discussed in FIXCA's Initial Brief (p. 21-24).[12] This was a docket in which GTEFL proposed a new pricing plan. IXCs were never put on notice that the

[12] The Commission would have been required to follow these procedures despite the fact that GTEFL regards them as "hypertechnical."

Commission would use the proceeding in which GTEFL's new pricing plan was considered to revoke their right to provide service pursuant to their lawfully held certificates.

The cases GTEFL cites in support of its novel position concern specific situations in which the Commission considered specific orders pertaining to specific situations directly concerning a named company. For example, in Peoples Gas System, Inc., v. Mason, 187 So.2d 335 (Fla. 1966), the Court considered whether the Commission could invalidate a service agreement it had previously approved between two companies. The Court ruled it could not. In Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979), the Court refused to invalidate the Commission's prior order which approved the transfer of a certificate of public convenience and necessity from one carrier to another. In Reedy Creek Utilities v. Florida Public Service Commission, 418 So.2d 249 (Fla. 1982), the Court considered the Commission's order requiring Reedy Creek Utilities to refund certain tax savings monies. All of these cases involved the Court's (and the Commission's) consideration of specific orders. No such situation is involved here and the cases GTEFL relies on are inapplicable.

IV. THE COMMISSION'S AUTHORITY TO ACT WAS RAISED BELOW.

Appellees argue that FIXCA did not raise the issue of whether the Commission had the authority to take the action it did in this case during the proceeding below. However, the

issue of the Commission's statutory authority to act was clearly raised and even designated as a separate issue in the Commission proceeding.

First, despite protestations of Appellees to the contrary, the authority of the Commission to preclude IXCs from serving the ECS routes in question due to the Commission's classification of those routes has always been an issue in this case. This issue was clearly designated as a "legal issue." Issue 10 of the Prehearing Order states:

> Does Section 364.335, Florida Statutes, preclude interexchange carriers from providing service over their own facilities on routes which are determined to be local? (LEGAL ISSUE)

Order No. 25006 at 21. (R. 116).[13]

Second, it has always been FIXCA's position that not all service provided by a local exchange company is local exchange service. Thus, there clearly was disagreement below over whether the Commission could take the action it did in Order No. 25708 based on section 364.335. And that question, as discussed early in this brief, turns on the Commission's interpretation of the statute.

V. ORDER NO. 25708 DID AMEND IXCs' CERTIFICATES OF AUTHORITY.

Both Appellees admit the Commission's order prohibits competition on the ECS routes. However, despite this, the

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[13] The Commission's argument that FIXCA never raised the revocation argument below must be rejected. The revocation is the undisputed result of the Commission's decision--IXCs can no longer serve routes they could serve before the decision.

Commission says that FIXCA can point to no part of the order in which the Commission "purports" to amend or revoke IXCs' certificates and denies that the Commission's order had that effect. However, the practical effect of the Commission's order does just that--Order No. 25708 states: "The necessary result of our action shall be to preclude competition on these routes." Order No. 25708 at 34. (R. 234). Since prior to Order No. 25708, IXCs were authorized to serve the ECS routes and subsequent to Order No. 25708 they may not, the result of the Order can be nothing less than a de facto revocation of their certificates. This action has been taken by the Commission without following the appropriate procedures and is therefore void.

CONCLUSION

The Commission has rescinded the authority of FIXCA members to provide service over routes they were previously certificated to serve without statutory authority. Therefore, this Court should reverse Order No. 25708 and rule that IXCs may continue to serve the ECS routes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of Appellant, the Florida Interexchange Carriers Association, has been furnished by U.S. Mail to the following parties of record, this 9th day of October, 1992:

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