IN THE SUPREME COURT OF FLORIDA

FLORIDA CABLE TELEVISION ASSOCIATION, INC.,

Appellant,

v.

J. TERRY DEASON, Chairman, THOMAS M. BEARD, SUSAN F. CLARK, LUIS J. LAUREDO, Commissioners, as and constituting the FLORIDA PUBLIC SERVICE COMMISSION, an agency of the State of Florida,

Appellees.

CASE NO. 82,281

FPSC DOCKET NO. 910757-TP

FILED: NOVEMBER 29, 1993

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF GTE FLORIDA INCORPORATED

Thomas R. Parker
Florida Bar No. 449725
Joe W. Foster
Kimberly Caswell
M. Eric Edgington
P. O. Box 110, FLTC0007
Tampa, Florida 33601
Telephone: 813-228-3087

Attorneys for
GTE Florida Incorporated

TABLE OF CONTENTS

TABLE OF CITATIONS

I. INTRODUCTION

GTE Florida Incorporated ("GTEFL") submits this Answer Brief in response to the Initial Brief filed by the Florida Cable Television Association ("FCTA") on or about November 4, 1993. This appeal concerns an evidentiary proceeding held during the spring of 1993 in which the Florida Public Service Commission ("Commission") established the standard for detecting the presence of cross subsidization of effectively competitive services by monopoly services. In addition, the Commission made conclusions of law regarding the meaning of the terms competitive, subject to effective competition and effectively competitive. In this appeal, FCTA challenges the Commission's interpretation of the statutes it is authorized to enforce. GTEFL appears in support of the Commission's orders relevant to this appeal.

II. STATEMENT OF THE CASE AND OF THE FACTS

GTEFL generally accepts FCTA's "Statement of the Case". FCTA presents an objective procedural history setting forth the course of the proceedings below. However, the Initial Brief is devoid of any Statement of Facts discussing the evidence of record which led to the entry of the various Commission orders. FCTA discussed the evidence of record during the argument portion of its brief. GTEFL will adopt a similar approach. A discussion of the relevant evidence pertaining to the meaning of the terms competitive, subject to effective competition and effectively competitive is contained in section IV C of this brief.

III. SUMMARY OF ARGUMENT

The Florida Public Service Commission found in Order No. PSC-93-1015-FOF-TP that the words competitive, subject to effective competition and effectively competitive were synonymous terms. FCTA argues on appeal that the Commission's decision regarding the appropriate meaning of the foregoing terms is improper. This position is based solely on FCTA's own particularized interpretation of scattered statutory provisions contained in Chapter 364 and the application of assorted rules of statutory construction. FCTA's argument is meritless, as it wholly ignores a key statutory criteria contained in Chapter 364 that controls disposition of the issue raised. Section 364.02(3), Fla. Stat. (1991), defines a "monopoly service" as a telecommunications service for which there is no effective competition, either in fact or by operation of law. Thus, by definition, there are only two types of local exchange carrier (LEC) services under Chapter 364; monopoly and effectively competitive services. All LEC services that do not reach the level of being effectively competitive are monopoly services and the statutes do not allow for an intermediate classification. There is no other option under the statute. Section 364.02(3) renders FCTA's arguments meaningless.

The legislative intent contained in Chapter 364 reveals that LEC services are to be reclassified from monopoly to effectively competitive services only where certain statutory showings have been satisfied. Generally, these showings pertain to the various aspects of proving that the reclassification is in the public

interest. This legislative intent is consistent with the definitions contained in section 364.02(3). When this legislative intent is analyzed it proves that FCTA's position is incorrect.

The evidence of record also supports the conclusion that competitive, subject to effective competition and effectively competitive are synonymous terms. The evidence cited by FCTA pertains to discussions where the topic was general economic criteria associated with the term competition. FCTA does not point out to the Court that the witnesses were very careful in their testimony to point out that there is a difference between the traditional notion of competition and the definition created by the legislature under sections 364.338 and 364.3381. When the appropriate evidence is examined in context it supports the conclusion that the terms at issue have the same meaning.

Finally, because the terms competitive, subject to effective competition and effectively competitive are synonymous, the provisions of section 364.3381 do not apply until there has been a finding that a service is effectively competitive.

IV. ARGUMENT

A. CHAPTER 364 PROVIDES CONCISE PARAMETERS FOR DETERMINING THE MEANING OF COMPETITIVE, SUBJECT TO EFFECTIVE COMPETITION AND EFFECTIVELY COMPETITIVE SERVICES.

FCTA argues that the terms competitive, subject to effective competition and effectively competitive have different meanings and are terms that relate to the varying degrees of competition which exist for LEC telecommunications services. FCTA Brief at 8-9.

In support of its position, FCTA discusses various cases pertaining to statutory construction (FCTA Brief at 14, 18-19), cites incomplete evidence of record (FCTA Brief at 15-16) and alleges that the legislative intent of Chapter 364 does not support the interpretation found proper by the Commission (FCTA brief at 23-27). In addition, FCTA incorrectly asserts that none of the foregoing terms are defined by statute. FCTA Brief at 9.

The fatal flaw in FCTA's position is that it never brings to the Court's attention the specific statutory definition that controls this entire issue. When this statutory definition is consulted all of FCTA's arguments become irrelevant.

Section 364.02(3) defines monopoly service as follows:

> Monopoly means a telecommunications service for which there is no effective competition, either in fact or by operation of law.

(emphasis added).

Section 364.02(6) requires the term service to be considered in its broadest and most conclusive sense.

Thus, under the statute, every LEC telecommunications service is a monopoly service unless it has been found to be effectively competitive by the Commission under the provisions of section 364.338. There is no other alternative under the statute. Services are automatically assigned to the monopoly classification by law until the Commission takes affirmative action under section 364.338 to change a service to the effectively competitive category.

When the definition of monopoly service is consulted, all of FCTA's arguments regarding statutory construction, evidence and

general legislative intent become irrelevant. When a definition is provided in the statute the meaning ascribed to the term must be used unless a contrary intent appears. Nicholson v. State, 600 So. 2d 1101 (Fla. 1992). There is no contrary intent in Chapter 364. The meaning of the terms competitive, subject to effective competition and effectively competitive are clearly delineated through the definition of monopoly service. When the meaning of a statute can be clearly determined pursuant to the clear language of the statute there is no reason or need to go through the mental gymnastics contained in FCTA's brief. Here, the words are clear and unambiguous and it is not the function of the Court to speculate on other statutory constructions. Heredia v. Allstate Ins. Co., 358 So. 2d 1353 (Fla. 1978).

B. THE LEGISLATIVE INTENT CONTAINED IN CHAPTER 364 IS CONSISTENT WITH THE SPECIFIC STATUTORY REQUIREMENT THAT ALL SERVICES ARE MONOPOLY SERVICES UNLESS THEY HAVE BEEN DECLARED TO BE EFFECTIVELY COMPETITIVE BY THE COMMISSION.

In 1990 the Legislature granted the Commission a wider scope of authority to regulate certain competitive aspects of the telecommunications industry than previously existed under the old Chapter 364. If a service was found to be effectively competitive the Commission could substantially deregulate the service if it was found to be in the public interest.[1] However, the expansion of the Commission's authority was accompanied by specific legislative

[1] Section 364.338 (3a)(1) allows the Commission to exempt a service from "some" of the requirements of the Chapter.

intent in section 364.01 which placed a basic restriction on the Commission. That restriction requires the Commission to protect the general welfare by insuring that basic telecommunications services are available to all residents of the state at reasonable and affordable prices and that competition will be encouraged only if it benefits the public by making modern and adequate telecommunications services available at reasonable prices. Section 364.01 (2)(b-c). If the Commission deems further competition to be appropriate, it must insure that all providers of telecommunications services are treated fairly and may modify the regulatory treatment of the local exchange carrier (LEC) so it can compete if so doing does not reduce the availability of basic local exchange service to all citizens of the state at reasonable and affordable prices. Section 364.01(3)(e).

In addition to expressing its general legislative intent that competition should be pursued if it produces appropriate benefits to the public, the Legislature defined for the Commission what the term effective competition means in Section 364.02(3) as it pertains to LECs via the definition of monopoly services. That specific direction is all services which are not subject to effective competition remain monopoly services.

Section 364.338 gives a further statement of specific legislative intent regarding when and how monopoly services may become effectively competitive as follows:

> It is the legislative intent that, where the Commission finds that a telecommunications service is effectively competitive, market conditions be allowed to set prices so long as predatory pricing is precluded, monopoly ratepayer be protected from

paying excessive rates and charges, and both the ratepayer and competitors be protected from regulated telecommunications services subsidizing competitive telecommunications services. (emphasis added).

Thus, the specific legislative intent contained in Chapter 364 reveals that the establishment of effectively competitive services should only be done where there is a defined public benefit resulting from removing a service from the monopoly classification. Otherwise, all LEC services are to remain in the monopoly category. Thus, the legislative intent is consistent with the statutory definition of monopoly services.

C. THE EVIDENCE OF RECORD SUPPORTS THE STATUTORY DEFINITION THAT ALL SERVICES ARE MONOPOLY UNLESS THEY HAVE BEEN SPECIFICALLY DECLARED TO BE EFFECTIVELY COMPETITIVE SERVICES.

FCTA alleges that the evidence of record supports its position that there should be a different definition for competitive, subject to effective competition and effectively competitive services. FCTA brief at 14. The testimony of Southern Bell witness Emerson and GTEFL witness Beauvais are quoted at length in support of FCTA's position. FCTA brief at 15-16. However, they are not quoted accurately or in context.

What FCTA does not reveal to the Court is that the answers that are quoted in its brief are in response to generic questions from FCTA's counsel during cross examination regarding the general meaning of competition in an economic sense. The witnesses were very careful to distinguish between general economic discussions that pertain to the traditional views regarding competition and the definition of effective competition that is contained in section

364.338. Quite simply, traditional economic concepts do not fully mesh with the legislature's concept of effective competition as set forth in Chapter 364. (Tr. 476). For example, Dr. Beauvais testified as follows during cross examination from FCTA's counsel when it became apparent that the general definition of competition was trying to be forced into the statutory definition:

> A. I believe there is competition, then, for virtually every service a LEC provides today. But, again -- but that is different. That's not the same as the statutory definition.
>
> Q. Don't you think that is for the Commission to decide, Doctor?
>
> A. Well, I was asked to interpret the statute as well. Obviously, the Commission can decide --
>
> Q. I just asked you the common everyday day meaning.
>
> A. Well, I was just clarifying the common everyday meaning versus what I believe the statute says.

Tr. 550-551.

Accordingly, the evidence cited by FCTA refers to economists discussing competition in a general sense and not the particular definition of effective competition established by the legislature. When the relevant testimony is consulted the evidence of record matches the definition on monopoly service contained in section 364.02(3) and the legislative intent of the Chapter. That evidence states that the terms competition, subject to effective competition and effectively competitive are synonymous terms. (Tr. 206, 419, 482).

D. THE REQUIREMENTS OF SECTION 364.3381 ONLY APPLY TO EFFECTIVELY COMPETITIVE SERVICES.

FCTA argues that the provisions of section 364.3381 apply to all competitive services, not just those that have been declared to be effectively competitive services. FCTA Brief at 28. This argument ignores the clear language of Sections 364.338 and 364.3381. In addition, the argument is invalid for the same reasons already stated in demonstrating that competitive, subject to effective competition and effectively competitive are synonymous terms.

Section 364.3381 prohibits the LEC from cross subsidizing effectively competitive services with revenues obtained from monopoly services. The section requires a competitive service not to be priced below cost and mandates that there be an allocation of cost between monopoly services and competitive services to ensure that no cross subsidization occurs.

The application of section 364.3381 depends on the definition of competitive, subject to effective competition and effectively competitive. Since they are synonymous terms under the statute the provisions of section 364.3381 do not engage until a service has found to be effectively competitive under section 364.338.

V. CONCLUSION

Nothing in the Initial Brief of Appellant, Florida Cable Television Association, justifies a reversal of the orders under review. The Commission's decision is supported by statutory authority, case law, legislative intent and substantial evidence. GTEFL respectfully requests the Court to affirm the orders in all respects.

Thomas R. Parker
Florida Bar No. 449725
P. O. Box 110, FLTC0007
Tampa, Florida 33601
813/228-3087

Attorney for GTE Florida Incorporated

Dated: November 29, 1993

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Answer Brief of GTE Florida Incorporated in Case No. 82,281 (FPSC Docket No. 910757-TP) was sent via U. S. mail the 29th day of November, 1993, to the parties on the attached list.

Thomas R. Parker

Tracy Hatch
Division of Legal Svcs.
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

J. Phillip Carver
150 W. Flagler Street
Suite 1910
Miami, FL 33130

Lee L. Willis
John P. Fons
Ausley McMullen
P. O. Box 391
Tallahassee, FL 32302

Douglas Metcalf
Comm. Consultants, Inc.
P. O. Box 1148
Winter Park, FL 32790-1148

Joseph McGlothlin
McWhirter Grandoff & Reeves
315 S. Calhoun, #716
Tallahassee, FL 32301

Mary Jo Peed
4300 Southern Bell Center
675 W. Peachtree Street, NE
Atlanta, GA 30375

David B. Erwin
P. O. Box 1833
Tallahassee, FL 32302-1833

Joseph Gillan
FIXCA
P.O. Box 547276
Orlando, FL 32854

Alan Berg
United Tel. Co.
P.O. Box 5000
Altamonte Springs, FL 32716

Charles J. Beck
Asst. Public Counsel
Ofc. of Public Counsel
c/o The Fla Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

Lance C. Norris
Fla. Pay Tel. Ass'n.
315 S. Calhoun Street
Suite 710
Tallahassee, FL 32256

Kenneth A. Hoffman
Messer Vickers, Caparello, et al.
P. O. Box 1876
Tallahassee, FL 32301-1876

Michael J. Henry
MCI Telecomm. Corp.
780 Johnson Ferry Rd
Suite 700
Atlanta, GA 30342

Richard D. Melson
Hopping Boyd Green & Sams
P. O. Box 6526
Tallahassee, FL 32314

Chanthina Bryant
Sprint Comm. Co.
3065 Cumberland Circle
Atlanta, GA 30339

Laura L. Wilson
Florida CATV Assn.
P. O. Box 10383
Tallahassee, FL 32302

Michael W. Tye
AT&T
106 East College Ave
Suite 1410
Tallahassee, FL 32301

Harriet Eudy
ALLTEL Fla,Inc.
P. O. Box 550
Live Oak, FL 32060

C. Dean Kurtz
Centel
P. O. Box 2214
Tallahassee, FL 32316