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, and JULIA L. JOHNSON, 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

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

INITIAL BRIEF OF APPELLANT

FLORIDA CABLE TELEVISION ASSOCIATION, INC.

Florida Cable Television
Association, Inc.
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PRELIMINARY STATEMENT

The following abbreviations are used in this brief. Appellant, Florida Cable Television Association, Inc., is referred to as "FCTA." Appellee, Florida Public Service Commission, is referred to as the "Commission" or "Appellee." United Telephone Company of Florida is referred to as "United." GTE Florida Incorporated is referred to as "GTEFL." BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company is referred to as "Southern Bell." Citations to the Record on Appeal are designated (R.). Citations to the transcript of the March 10-11, 1993 hearing are designated (Tr.).

STATEMENT OF THE CASE AND OF THE FACTS

The subject of this appeal is a very narrow legal issue arising out of Florida Public Service Commission Docket No. 910757-TP and the Commission's interpretation of the language used in Chapter 364, Florida Statutes (1991)[1]. Throughout Chapter 364, the terms "competitive," "subject to effective competition," and "effectively competitive" are used to describe telecommunications services provided by local exchange telecommunications companies (hereinafter referred to as "LECs"). The specific issue before this Court is whether the Legislature intended the terms "competitive," "subject to effective competition," and "effectively competitive" to have separate and distinct meanings.

This is not an academic exercise in statutory interpretation but rather a question with significant impact on the future viability of competition in the telecommunications industry in Florida. Specifically, if the Court agrees with the FCTA that these terms each have a separate meaning under Chapter 364, Florida Statutes, then the Court must conclude that the cross-subsidization protections of Section 364.3381, Florida Statutes, apply to all "competitive" services as written in the statute - not to "effectively competitive" services as the statute is interpreted by the Commission.

The 1990 revisions to Chapter 364, Florida Statutes, giving rise to the proceeding below include a clear statement of the

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[1]All statutes cited herein reference Florida Statutes (1991). The 1990 revisions to Chapter 364, Florida Statutes, discussed in this Brief also are found in Florida Statutes (1991).

legislative intent. (R. 98, 354, 403). Among other things, the Commission must exercise its exclusive jurisdiction to:

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

Section 364.01(3)(d), Fla. Stat. The Commission must also recognize the continuing emergence of a competitive telecommunications environment and provide for the flexible treatment of competitive services:

> if doing so does not reduce the availability of adequate local exchange service to all citizens of the state at reasonable and affordable prices, if competitive telecommunications services are not subsidized by monopoly services, and if all monopoly services are available to all competitors on a non-discriminatory basis. [Emphasis supplied.]

Section 364.01(3)(e), Fla. Stat.

The Commission opened Docket No. 910757-TP to examine what regulatory safeguards are required under Chapter 364 to prevent cross-subsidization of competitive services by the LECs. (R. 164). Section 364.3381, Florida Statutes, among other provisions of law, prohibits cross-subsidization of LEC competitive services with LEC monopoly revenues. (Tr. 16). This Section was promulgated in concert with the foregoing statements of legislative intent. (R. 403). Accordingly, Section 364.3381 establishes a mechanism to effectuate the legislative intent that LEC competitive services be provided in a fair and open marketplace and that LEC providers of monopoly services not be permitted to structure the rates, terms or conditions for such monopoly services in a manner that would

disadvantage those who seek to compete with the LEC in the provision of competitive services. (R. 205, 355-356).

Members of the FCTA are both customers of LEC telecommunications services and competitors of the LECs in the provision of certain telecommunications and video services. (R. 9, 641).

By Order No. 24842, issued July 25, 1991, the Commission granted the FCTA intervention in Docket No. 910757-TP. (R. 16). Intervention was also granted to AT&T of the Southern States, BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company, Central Telephone and Telegraph Company of Florida, the Florida Ad Hoc Telecommunications User's Committee, the Florida Pay Telephone Association, Inc., the Florida Interexchange Carriers Association, GTE Florida Incorporated, MCI Telecommunications Corporation, United Telephone Company of Florida, US Sprint Telecommunications Company Limited Partnership, ALLTEL Florida Incorporated, and the Office of Public Counsel. (R. 163, 25, 34, 145, 15, 39, 22, 154, 40, 38, 149, 17).

On September 20, 1992, the intervening parties submitted briefs addressing the legal requirements of Chapter 364 with regard to the prevention of cross-subsidization. (see, R. 41-144). Based upon the entrenched positions of the parties and discussions at the February 4, 1992 Agenda Conference, the Commission decided to set the matter for hearing. (R. 155-157).

A prehearing conference was held on February 26, 1993. In seeking to apply the statutory prohibition against cross-

subsidization, it became necessary to first define the term "cross-subsidization" and then determine which LEC services are subject to the prohibitions against cross-subsidy. (R. 640, 654-655). Accordingly, the following issues were among those identified for disposition in the proceeding below:

> Issue 1: What is the appropriate definition of cross-subsidization, as contained in Section 364.3381, Florida Statutes?;
>
> . . .
>
> Issue No. 5: Is there a distinction between the terms "effectively competitive," "subject to effective competition," and "competitive" as used in Chapter 364?; and
>
> Issue No. 6: Does the application of the provisions of Section 364.3381 first require a determination that a service is effectively competitive, pursuant to the provisions of 364.338? If not, what criteria should be used to identify those services subject to the provisions of 364.3381?

(R. 164).

The hearing was held on March 10-11, 1993. The parties submitted posthearing briefs on or before April 23, 1993. (See, R. 401-603). The Commission's Final Order No. PSC-93-1015-FOF-TP was issued on July 12, 1993 (hereinafter referred to as the "Final Order"). (R. 607-635). Due to a clerical error, the Final Order was officially reissued on July 28, 1993 by virtue of Administrative Order No. PSC-93-1105-FOF-TP which reissued and affirmed the Final Order in every respect. (R. 636-665). A certified copy of the Administrative and Final Orders are attached hereto as Appendix A.

The relevant portions of the Commission's decision with respect to the above issues are set out in the Final Order as follows:

(1) In response to Issue 1, the Commission determined that "cross-subsidization exists when competitive services are priced below their incremental costs, and the resulting revenue shortfall is recovered through the rates for monopoly services." (R. 643);

(2) In response to Issue 5, the Commission determined that the terms ("competitive," "subject to effective competition," and "effectively competitive") "have identical meanings when used in Sections 364.338 and 364.3381." (R. 654). It was also found that the statute "provides for only two types of services: monopoly and effectively competitive services. No provision is made for a service that is potentially competitive." (R. 653). Hence, the Commission concluded that "competitive" services and services "subject to effective competition" do not exist under Chapter 364, Florida Statutes; and

(3) In response to Issue 6, the Commission determined that "the provisions of Section 364.3381 apply only after a determination is made, pursuant to Section 364.338, that a service is effectively competitive." (R. 655). Additionally, it was found that "the statute only prohibits cross-subsidization of LEC effectively competitive services by monopoly services, but is silent as to whether or not cross-subsidization is appropriate or acceptable in any other cases." (R. 663).

No parties sought reconsideration of the Final Order.

The FCTA does not challenge the Commission's definition of the term "cross-subsidization" found in subparagraph (1) above. Rather, this appeal focuses upon whether the Commission correctly concluded (1) that the terms "competitive," "subject to effective competition," and "effectively competitive" do not have separate meanings under the Statute but are all to be construed as "effectively competitive"; and (2) that Section 364.3381, Florida Statutes, only prevents the cross-subsidization of "effectively competitive" services.

SUMMARY OF ARGUMENT

In 1990, the Legislature revised Chapter 364, Florida Statutes. These revisions were intended to augment the growth of competition in the telecommunications industry in Florida. A critical component of that new legislation was the express mandate imposed on the Commission to ensure that the LECs' monopoly revenues are not used to support or cross-subsidize the LECs' competitive services. The Commission's decision ignores and is contrary to the Legislature's intent as it renders the cross-subsidization protection enacted by the Legislature for the purpose of fostering competition meaningless.

In the Final Order, the Commission erroneously interpreted the provisions of Chapter 364, Florida Statutes, which prohibit the cross-subsidization of LEC "competitive" services with monopoly revenues. Specifically, the Commission determined that the statutory terms "competitive," "subject to effective competition," and "effectively competitive" are used synonymously in the statute and that all three terms mean "effectively competitive." The Commission further concluded that only those LEC services meeting the statutory criteria for "effectively competitive" services should receive guaranteed protections against cross-subsidization. The Commission's conclusions have no basis in law and must be reversed.

There can be no doubt that the Legislature deliberately chose the words "competitive," "subject to effective competition," and "effectively competitive," to ensure separate and distinct meanings

for these terms. These terms relate to the varying degrees of competition which exists for LEC telecommunications services. The plain and ordinary meaning of each term, the overwhelming weight of record evidence and fundamental principles of statutory construction permit no other conclusion. None of these terms are defined by statute. Accordingly, a plain and ordinary meaning of the term "competitive" service is a service offered by the LEC and at least one alternate provider. This definition is supported by the competent, substantial evidence of record. LEC services are not classified as "subject to effective competition" under the statute until an additional set of criteria is met.

The Commission concluded that only two types of LEC services exist under Chapter 364: monopoly and effectively competitive. Despite the plain language and overwhelming record evidence, the Commission has denied the existence of "competitive" services and services having the potential to become effectively competitive.

In the Final Order, the Commission essentially "re-writes" pertinent provisions of Chapter 364 in order to achieve what it perceives to be a preferred result. That result would permit the LECs to cross-subsidize all competitive services with monopoly revenues unless and until a specific service is determined by the Commission to be effectively competitive. That result would impose severe handicaps on potential and existing competitors who do not have a residual pool of guaranteed monopoly revenues available to support their businesses nor to support the pricing of services below incremental cost. That result triggers cross-subsidization

protection only after a service is determined to be effectively competitive at which point cross-subsidization protection may not be of any benefit, use or necessity to competitors due to the fully competitive status of the service. Clearly, these results were not intended by the Legislature when it enacted the 1990 revisions to Chapter 364.

The practical effect of the Commission's decision is that it renders meaningless the statutory protections expressly designed to prohibit cross-subsidization of LEC "competitive" services with monopoly revenues. The Commission's order would permit the LECs to use monopoly revenues to subsidize their competitive services which are offered by alternative suppliers who attempt to compete with the LEC. Rather than promoting competition by ensuring that competitors are not adversely affected by LEC cross-subsidization, the Commission's decision impedes competition and harms ratepayers. The Commission's decision therefore departs from essential requirements of law because it ignores the plain meaning of the statute and conflicts with the legislative intent underlying Chapter 364, which is to foster telecommunications competition in the public interest.

ARGUMENT

I. THE APPLICABLE STANDARD OF REVIEW AND GENERAL PRINCIPLES OF STATUTORY CONSTRUCTION

The applicable standard of review requires this Court to determine whether the Commission's interpretation of Chapter 364, Florida Statutes, (1) departs from essential requirements of law and (2) is supported by competent, substantial evidence. International Telecharge, Inc. v. Wilson, 573 So.2d 816, 819 (Fla. 1991); Aloha Utilities, Inc. v. FPSC, 376 So.2d 850, 851 (Fla. 1979); Deltona Corp. v. Mayo, 342 So.2d 510, 512 (Fla. 1977). The essential requirements of law governing this Court's consideration of the Final Order arise from judicial decisions outlining the general tests to be applied in reviewing an agency's construction of a statute which it is charged to enforce.

Ordinarily, the construction of a statute by an agency charged with its enforcement and interpretation is entitled to great weight. However, the law is also clear that a court must depart from an agency's construction of its statute where the agency's construction is clearly erroneous or in conflict with the intent of the statute. See, e.g., Tri-State Systems, Inc. v. Department of Transportation, 491 So.2d 1192, 1193 (Fla. 1st DCA 1986); Sans Souci v. Division of Land Sales and Condominiums, 421 So.2d 623, 626, (Fla. 1st DCA 1982); Department of Environmental Regulation v. Goldring, 477 So.2d 532, 534 (Fla. 1985). Further, the agency's interpretation must be supported by competent, substantial evidence. Tri-State Systems, supra.

The Commission has incorrectly interpreted the statutory terminology and misapplied the provisions of Chapter 364, Florida Statutes, relating to the prevention of cross-subsidization. Specifically, the Final Order rejects the plain and ordinary meaning of the statutory terms "competitive," "subject to effective competition," and "effectively competitive" and concludes that the terms have identical meanings. (R. 654). The Final Order determines that there are only two types of LEC services: monopoly and effectively competitive services. (R. 653). The Final Order ensures that only those services deemed "effectively competitive" receive protection against cross-subsidization by monopoly revenues. No provision is made for any other types of services. (R. 653). Hence, the Final Order circumvents the legislative intent and statutory prohibitions against cross-subsidization that were established to foster competition in the telecommunications marketplace.

The Commission's erroneous interpretation of the statute fails to effectuate the plain meaning of the statutory language, ignores the overriding legislative intent, overlooks the great weight of record evidence, and disregards well-established principles of statutory construction. Therefore, the Commission's decision that the terms "competitive," "subject to effective competition," and "effectively competitive" are synonymous and that the statute only protects "effectively competitive" services from cross-subsidization must be set aside or modified, or remanded to the Commission for further action under a correct interpretation of the

law. Section 120.68(9), Fla. Stat.

II. THE COMMISSION'S DECISION DEPARTS FROM THE ESSENTIAL REQUIREMENTS OF LAW BY IGNORING THE PLAIN LANGUAGE OF THE STATUTE, FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION AND RECORD EVIDENCE WHICH DICTATE THAT THE STATUTORY TERMS "COMPETITIVE," "SUBJECT TO EFFECTIVE COMPETITION," AND "EFFECTIVELY COMPETITIVE" HAVE SEPARATE AND DISTINCT MEANINGS.

A. The term "competitive" must be plainly and broadly construed, as there is no indication that the Legislature intended otherwise.

The term "competitive," which is used in Sections 364.01[2], 364.036[3], 364.338[4] and 364.3381[5], Florida Statues, is not defined by statute. Therefore, a plain and ordinary meaning must be given to the term consistent with the legislative intent. That plain meaning, supported by the evidence of record, is that the statutory term "competitive" refers to a broad class of LEC services provided by a LEC and at least one other provider.

There is no indication that the Legislature intended the term "competitive" to be narrowly construed. One of the most fundamental tenets of statutory construction requires that statutory language, unless specifically defined, must be given its plain and ordinary meaning consistent with the legislative intent.

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[2]Section 364.01 addresses the powers of the Commission and legislative intent.

[3]Section 364.036 addresses alternate regulatory methods for local exchange telecommunications companies.

[4]Section 364.338 addresses competitive services provided by local exchange telecommunication companies.

[5]Section 364.3381 prohibits cross-subsidization of competitive services by local exchange telecommunications companies.

Southeastern Fisheries Ass'n., Inc. v. Dept. of Natural Resources, 453 So.2d 1351 (Fla. 1984); Citizens v. Public Service Commission, 425 So.2d 534, 541-542 (Fla. 1982); St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1078 (Fla. 1982); Tatzel v. State, 356 So.2d 787, 789 (Fla. 1978). The plain meaning of a term can be determined by reference to a dictionary. Gardner v. Johnson, 451 So.2d 477, 478 (Fla. 1984).

The term "competitive" is defined in Webster's dictionary as:

> relating to, characterized by, or based on competition ....

Webster's Ninth Collegiate Dictionary 268 (1989). "Competition" is defined as:

> 1: the act or process of competing: rivalry;
> 2: a contest between rivals;
> 3: the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms.

Id. [Emphasis supplied.] Based upon these definitions, the plain and ordinary meaning given to the word "competitive" is a broad one that relates to any service offered by the LEC and at least one other provider. (T. 32, 115). Had some specific or narrow meaning been intended, the Legislature would have expressly defined "competitive" to ensure that it would be narrowly construed.

B. The competent, substantial evidence of record supports the use of the plain meaning of the term "competitive" in interpreting the statute.

The reasonableness and logic of giving effect to the plain meaning of "competitive" is overwhelmingly recognized by the record evidence. The LECs' witnesses fully acknowledge that there exists

in the marketplace a broad class of LEC services experiencing competition somewhere on the continuum between monopoly and full blown competition. Southern Bell Witness Emerson, an expert economist, testified:

> I think we all do recognize that there are varying degrees of competitiveness, and -- at some point . . . Well, I think one could imagine a literal spectrum of possibilities, from one end being monopoly, the other end being as competitive as one could imagine. And, virtually, everything is going to sit somewhere on that spectrum. And I believe that it's this Commission's charge to determine when something is far enough towards the, quote, "competitive end of the spectrum," to warrant relaxed regulation. And that, to me, is what the statute is all about.

(Tr. 307-308). Witness Emerson also testified:

> In fact, I think the statute anticipated that competition is already there. There is alternative providers; there is interexchange carriers; there is a variety of competing services out there.

(Tr. 314). Similarly, GTEFL Witness Beauvais, also an expert economist, testified as follows:

> Q. I have a statement that I would like to read to you, and I would like to know if you agree with it. I'll read it slow. "The market for LEC services is best represented by a continuum, anchored by a monopoly on one end and perfect competition on the other. LEC offerings can be placed on this continuum, based on the relative availability of substitutes, with residential local access falling near the monopoly end of the spectrum and billing and collection near the perfect competition end. All other LEC services lie somewhere in between, with each service migrating toward perfect competition at a different rate." Would you agree with that?
>
> A. In terms of the definitions of economic market structures or perfect competition at one

extreme and monopoly at the other, yes.

(Tr. 525). Witness Beauvais also testified:

> A. We normally think about competition as rivalry between firms, different advertising, quality differentials, different price structure. And that is referred to as rivalry. There is certainly a rivalrous behavior between local exchange companies and numerous other parties, but is doesn't approach the lack of market power that would be implied by perfect competition. So, I do believe that there is rivalry among parties in regulated markets, yes, I do . . . . If by "competition," you mean the rivalry between firms, the, yes, there is competition in regulated markets.
>
> Q. In the common ordinary meaning of the term "competition" -- let me ask you this question: What do you believe the common everyday meaning of competition is, your opinion?
>
> A. I believe the common everyday definition -- most people would say when two firms compete with each other they are behaving as rivals.

(Tr. 549-550). See also, Hearing Exhibit No. 20, United Response to D'Haeseleer Letter, at 4. ("Competition exists for many of the products and services provided by United. Whether competition for these services rises to the level of "effective competition" in terms of Section 364.338 is a question of fact." [Emphasis supplied.])

Based upon the plain and ordinary statutory language and record evidence, services in the middle of the competitive continuum are neither pure monopoly services nor are they experiencing full competition. Nevertheless, these services are appropriately labeled "competitive" services in the plain and ordinary sense of the term because they are offered by the LEC and at least one other provider attempting to compete with the LEC.

The Commission has failed to recognize this distinction by denying that any "competitive" services exist on the competitive spectrum between "monopoly" and "effective competition."

C. The terms "effectively competitive" and "subject to effective competition" are clearly distinguishable from the term "competitive."

The Commission erroneously concludes that the terms "competitive," "subject to effective competition," and "effectively competitive" are intended to identify one type of service - effectively competitive services. The Final Order states:

> [A] simple analysis of Sections 364.02 and 364.338 makes it clear that the Legislature did not differentiate the meaning of "competitive," "effectively competitive," and "subject to effective competition."
>
> . . .
>
> [The statute] provides for only two types of services: monopoly and effectively competitive services. No provision is made for a service that is potentially competitive.
>
> . . .
>
> [T]he provisions of Section 364.3381 apply only after a determination is made, pursuant to Section 364.338, that a service is effectively competitive.

(R. 653,655). To conclude, as the Commission has, that the terms "competitive" and "effectively competitive" are synonymous and refer only to "effectively competitive" services is to ascribe no meaning to the word "competitive", despite its repeated use in Chapter 364, and to import no meaning to the words "subject to" which precede the words "effective competition" in the statute. This conclusion presumes that the Legislature intended no purpose

for its selection of these words. Such an assumption is clearly erroneous and contrary to fundamental principles of statutory construction.

Those interpreting statutory language are bound by the plain words of the statute. A court is required to (1) presume that the Legislature put every provision in a statute for a purpose, and (2) to construe the statute to give each of the statute's provisions effect. DeSisto College, Inc. v. Town of Howey-in-the-Hills, 706 F.Supp. 1479 (M.D. Fla. 1989), affirmed, 888 F.2d 766 (11th Cir. 1989). Speculation concerning the meaning of the statutory language by adding a word or words is not permissible:

> The courts cannot and should not undertake to supply words purposely omitted. When there is doubt as to the legislative intent or where speculation is necessary, then the courts should be resolved against the power of the courts to supply missing words.

Armstrong v. City of Edgewater, 157 So.2d 422, 425 (Fla. 1963); See also, Vocelle v. Knight Bros. Paper Company, Inc., 118 So.2d 664, 667 (Fla. 1st DCA 1960) (Statutes are to be construed to give meaning to every word and phrase it and, if possible, so as to avoid the necessity of going outside the statute for aids to construction).

The Commission has failed to apply the above principles. The Commission's interpretation would erroneously insert the term "effectively" before each use of the term "competitive" in the statute. The Commission then deletes express terminology (the words "subject to") when construing what the terms "effectively competitive" and "subject to effective competition" mean. There

can be no doubt that had the Legislature intended the terms to have the same meaning, it simply would have inserted the word "effectively" before the word "competitive" and excluded the words "subject to" from the statute. See, Sumner v. Board of Psychological Examiners, 555 So.2d 919, 921 (Fla. 1st DCA 1990); Johnson v. Feder, 485 So. 2d 409, 411 (Fla. 1986); Dept. of Professional Regulation, Bd. of Medical v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984). On the contrary, the Legislature's deliberate use of different terms - "competitive", "subject to effective competition" and "effectively competitive" - in different portions of Chapter 364 is strong evidence that the Legislature intended different meanings for these terms. Department of Agriculture v. Quick Cash, 609 So.2d 735, 739 (Fla. 1st DCA 1992); Durrani, supra, 455 So. 2d at 518; Ocasio v. Bureau of Crimes, Etc., 408 So. 2d 751, 753 (Fla. 3d DCA 1982). There was no competent, substantial evidence presented below nor does the Final Order provide any legal basis to overcome this strong presumption that the Legislature's selected use of different terms in the statute should not be disturbed.

The terms "effectively competitive" and "subject to effective competition" also are not defined by statute. However, the plain language of the statute evidences an intent that these terms be construed according to a list of criteria set forth in Section 364.338(2)(a)-(g), Florida Statues, that must first be met before a LEC service can be so classified. Section 364.338(2)(a)-(g) provides:

> In determining whether a specific service provided by a local exchange telecommunications company is subject to effective competition, the commission shall consider the following:
>
> (a) The effect, if any, on the maintenance of basic local exchange services at comparable rates, terms, and conditions.
>
> (b) The ability of consumers to obtain functionally equivalent services at comparable rates, terms, and conditions.
>
> (c) The ability of competitive providers in the relevant geographic or service market to make functionally equivalent or substitute services available at competitive rates, terms and conditions.
>
> (d) The overall impact of the proposed regulatory change on the continued availability of existing services.
>
> (e) Whether the consumers of such service would receive an identifiable benefit from the provision of the service on a competitive basis.
>
> (f) The degree of regulation necessary to prevent abuses or discrimination in the provision of such service.
>
> (g) Such other relevant factors as are in the public interest. [Emphasis supplied.]

The criteria and scheme in the statute for determining whether a service is "subject to effective competition" demonstrates that the Legislature intended to establish four classes of telecommunications services: (1) monopoly services; (2) "competitive" services; (3) competitive services capable of becoming effectively competitive ("subject to effective competition"); and (4) "effectively competitive" services. (Tr. 31-32). Section 364.338(2) begins by stating: "In determining

whether a specific service ... is subject to effective competition ...." [Emphasis supplied.] The critical question is: what "specific service" is referred to in the opening language of the statute? The answer lies in the next section of the statute. Section 364.338(3)(a) states:

> If the commission determines, after notice and opportunity to be heard, that a service provided by a local exchange telecommunications company is subject to effective competition, the commission may:
>
> 1. Exempt the service from some of the requirements of this chapter and prescribe different regulatory requirements that are otherwise prescribed for a monopoly service; or
>
> 2. Require that the competitive service be provided pursuant to a fully separated subsidiary or affiliate. [Emphasis supplied.]

The Legislature's use of the term "competitive service" in Section 364.338(3)(a)2 undermines the Commission's interpretation and conclusion that Chapter 364 contemplates only monopoly and effectively competitive services. Obviously, the term "monopoly service" was not used by the Legislature in Section 364.338(3)(a)2 to describe the type of service subject to effective competition. If the Court inserts the Commission's transformation of a "competitive" service into an "effectively competitive" service, the result is ludicrous. Under that interpretation, the introductory language of Section 364.338(2) would read: "In determining whether ~~a specific~~ [an effectively competitive] service provided by a local exchange telecommunications company is subject to effective competition ...." Similarly, the introductory

language of Section 364.338(3)(a) would read: "If the commission determines ... that ~~a~~ [an effectively competitive] service provided by a local exchange telecommunications company, is subject to effective competition ...." It must be presumed that the Legislature did not intend to create such an absurd result. Ferre v. State ex. rel. Reno, 478 So.2d 1077, 1082 (Fla. 3d DCA 1985) and cases cited therein.

This Court has determined that trial courts (and administrative agencies) are not free to replace distinct and different terms used in a statute in order to render a perceived preferred interpretation. Heredia v. Allstate Insurance Company, 358 So.2d 1353, 1355 (Fla. 1978). The Commission's Final Order violates this principle in order to derive what the Commission perceives to be a preferable interpretation of the pertinent provisions of Chapter 364, Florida Statutes. The Commission's decision ignores the plain meaning and deliberate use of the term "competitive" in the statute and, in so doing, undermines the criteria and mechanism established in the statute for determining if certain "competitive" services: (1) may become "effectively competitive" and thereby subject to flexible regulatory treatment or provided pursuant to a fully separate subsidiary under Section 364.338(3)(a); and (2) will be afforded protection against cross-subsidization by the LECs' monopoly revenues pursuant to Section 364.3381 until such services are determined to be effectively competitive. For these reasons, the Commission's Final Order departs from the essential requirements of law.

III. THE COMMISSION'S DECISION DEPARTS FROM ESSENTIAL REQUIREMENTS OF LAW BY COMPLETELY OVERLOOKING THE LEGISLATIVE PURPOSE UNDERLYING CHAPTER 364, FLORIDA STATUTES, WHICH IS TO FOSTER TELECOMMUNICATIONS COMPETITION IN THE PUBLIC INTEREST.

A. The plain language and legislative history of Chapter 364 demonstrate an intent to foster telecommunications competition in the public interest.

To the extent the statutory terms "competitive," "subject to effective competition," and "effectively competitive" are susceptible to differing interpretations, fundamental principles of statutory construction require that the legislative intent must be determined and given effect. Smith v. City of St. Petersburg, 302 So.2d 756, 757 (Fla. 1974); Deltona Corporation v. Florida Public Service Commission, 220 So.2d 905, 907 (Fla. 1969). The legislative intent is the polestar to construing a statute, and that intent must be given effect even though it may contradict the strict letter of a statute. State v. Webb, 398 So.2d 820, 824 (Fla. 1981); State, Dept. of Envir. Regulation v. S.C.M. Glidco Org., 606 So.2d 722, 725 (Fla. 1st DCA 1992). The intent of the Legislature is primarily determined from the plain language of the statute. S.R.G. Corp. v. Department of Revenue, 365 So.2d 687, 689 (Fla. 1978). The reason for the rule is that the Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute. Id.

The Commission has failed to apply the overriding legislative intent behind Chapter 364. The Commission's Final Order does not dispute the rules of statutory construction cited by FCTA and others but, instead, reasons that "more compelling rules of

statutory interpretation exist as well." (R. 652). An analysis of the overriding legislative intent is clearly not included among the "more compelling" rules, despite the fundamental principle that there is no more compelling rule of statutory construction than giving effect to the intent of the Legislature. The Final Order contains absolutely no mention of the overriding legislative intent of Chapter 364, Florida Statutes, which is clearly to encourage telecommunications competition in the public interest. This omission is especially egregious in light of the fact that this legislative purpose has been a familiar goal of the Commission for some time.

Prior to the enactment of the revised Chapter 364 in 1990, the Commission authorized competition in such telecommunications markets as interexchange telecommunications services[6], pay telephone service[7], alternate access vendor services[8], and shared tenant services[9] upon a showing that the public interest was served by competition for such services. (Tr. 556-557). Further, this Court recognized the legislative intent to promote competition for telecommunications services in the public interest prior to enactment of the revised Chapter 364, Florida Statutes, in 1990. See, i.e., Microtel, Inc. v. Fla. Public Service Commission, 464 So.2d 1189, 1191 (Fla. 1985); Microtel, Inc. v. Fla. Public Service

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[6]Order No. 11095, August 23, 1982.

[7]Order No. 14132, February 27, 1985.

[8]Order No. 19687, July 19, 1988.

[9]Order No. 17111, January 15, 1987.

Commission, 483 So.2d 415, 418-419 (Fla. 1986); U.S. Sprint Communications Co. v. Marks, 509 So.2d 1107 (Fla. 1987); AT&T Communications v. Marks, 515 So.2d 741, 743-747 (Fla. 1987).

It can be assumed that the Legislature knew that a degree of competition for certain specific LEC services existed when Chapter 364 was enacted and that the Legislature was aware of this Court's affirmation that telecommunications competition in the public interest should be fostered by the Commission. See, Times Publishing Co. v. Williams, 222 So.2d 470, 473 (Fla. 2d DCA 1969). The provisions of the revised Chapter 364 are entirely consistent with these assumptions. The statute not only seeks to encourage competition for new telecommunications services in the public interest but, for the first time, expressly prohibits anti-competitive behavior, including cross-subsidization, in the provision of services offered by those attempting to compete with the LECs.

Provisions of Chapter 364, Florida Statutes, revealing the legislative intent include the following:

1. Section 364.01 --Powers of the Commission, Legislative Intent.

These provisions give overriding policy direction and expressly direct the Commission to foster competition in the public interest and prevent anti-competitive abuses, including cross-subsidization, by the monopoly provider of telecommunications services. Section 364.01(3) provides, in pertinent part:

> 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.

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

(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, if competitive telecommunications services are not subsidized by monopoly telecommunications services, and if all monopoly services are available to all competitors on a nondiscriminatory basis. [Emphasis supplied.]

2. Section 364.338 -- Competitive Services Provided by Local Exchange Telecommunications Companies.

Section 364.338, Florida Statutes, sets forth the terms and conditions upon which a LEC may offer a "competitive" service determined by the Commission to be "subject to effective competition." As previously discussed, Subsection 364.338(2) lists the criteria for determining which "competitive" LEC services are to be classified as "subject to effective competition," and Subsection 364.338(3), Florida Statutes, addresses the relaxed regulatory treatment and safeguards for services determined to be "subject to effective competition."

3. Section 364.3381(1)-(2) -- Cross-subsidization.

Section 364.3381, Florida Statutes, specifically directs that

LEC "competitive" services may not be cross-subsidized with "monopoly" service revenues. Section 364.3381 provides:

> (1) The price of a competitive telecommunications service provided by a local exchange telecommunications company shall not be below its cost by use of subsidization from rates paid by customers of monopoly services subject to the jurisdiction of the commission.
>
> (2) A local exchange telecommunications company which offers both monopoly and competitive telecommunications services shall segregate its intrastate investments and expenses in accordance with allocation methodologies as prescribed by the commission to ensure that competitive telecommunications services are not subsidized by monopoly telecommunications services. [Emphasis supplied.]

It is undeniably clear from the above expressions of intent that the Legislature sought to encourage competition in the public interest. It is equally evident that the Legislature intended to establish safeguards against anti-competitive abuse to permit the transition of "competitive" LEC services into "effectively competitive" services. Such safeguards prevent the LECs from making unfair use of their certificated monopoly position to the detriment of developing competition and the benefits that full or "effective" competition can bring to consumers of telecommunications services. Despite the intentional repeated use of the term "competitive," the Commission refuses to recognize the existence of "competitive" LEC services and the importance of distinguishing such services from "effectively competitive" services.

B. The Commission's interpretation of Chapter 364 is contrary to the legislative intent and creates ludicrous results.

As previously discussed, statutes should not be interpreted in a manner which are contrary to the legislative intent or would lead to unreasonable or illogical results. The Commission's Final Order in this case violates both of these well-established principles.

With respect to the Legislature's intent to promote competition, Chapter 364 contains two specific passages stating that the Commission is required to prevent cross-subsidization of "competitive services." See Sections 364.01(3)(c) and 364.3381, Fla. Stat. Chapter 364 also requires cross-subsidization protection to be maintained if a "competitive" service is determined to be "subject to effective competition" and the Commission permits the service to be provided under different regulatory requirements. Section 364.338(3), Fla. Stat. The Commission's interpretation of Chapter 364, including Section 364.3381, ignores that mandate by determining that such cross-subsidization protections are only afforded once a service is determined to be "effectively competitive."

The effect of the Final Order is that LEC monopoly revenues would be permitted to subsidize competitive services offered by alternative suppliers who attempt to compete with the LEC. These competitive services would not be given the guaranteed protections against cross-subsidization that are intended to be afforded to all LEC "competitive" services. Rather than promoting competition by ensuring that competitors are not adversely affected by LEC cross-

subsidization, the Commission's decision impedes competition. By refusing to implement cross-subsidization protection until a LEC service is found to be effectively competitive, the Commission grants a license to the LECs to cross-subsidize countless competitive services thereby increasing the likelihood that any existing competition in the provision of such services will not reach full, effective competition.

The LECs' willingness to use the Commission's interpretation of Chapter 364 for their own competitive advantage and to the detriment of competition and the captive LEC ratepayers is readily apparent from the testimony of Southern Bell Witness Denton who stated:

> Q. So, you don't view price discrimination as anticompetitive behavior?
>
> A. If you don't have competition, it's not anticompetitive. And according to the statute, there are two types of services in this state, one is monopoly and one is effectively competitive. None are effectively competitive. So, therefore you can't have anticompetitive behavior of this kind of price discrimination, by definition of the statute.

(Tr. 218).

The practical effect of not reversing the Commission's interpretation is that statutory safeguards against anticompetitive behavior and the prevention of cross-subsidization would only be triggered for services already experiencing full blown competition. Even Witness Emerson acknowledged that the statute authorizes the Commission to set up a structure to allow the full benefits of competition to accrue to consumers. According to Witness Emerson,

the purpose of the additional criteria in Section 364.338(2)(a)-(g) is to determine whether competition is capable of achieving this task. (Tr. 336). If not capable of doing so and indeed no services have been deemed to meet Section 364.338(2), the safeguards against all anticompetitive behavior must be available to help foster effective competition for all "competitive" and potentially competitive services. Simply put, if the Commission permits fairness only when a service has reached the level of being effectively competitive, the LECs will have been granted a powerful tool to thwart competition for end users.

Such an effect does not benefit the public. The ratepayers are not "protected from regulated telecommunications services subsidizing competitive telecommunications services" if regulatory policy enables a LEC to harm ratepayers through the pricing of a competitive service below cost. Similarly, competition for end users will be impeded if regulatory policy permits the LEC to provide monopoly services to its own competitive services that are not also made available on similar terms to competitors.

The true paradox created by the Final Order is that cross-subsidization protection will be triggered in cases where it is no longer necessary or of any benefit to competitors. The Commission's decision triggers cross-subsidization protection only when a service is found to be effectively competitive. At that point, the Commission may order the LEC to provide the service pursuant to a fully separate subsidiary with separate books, records and accounts thereby rendering the need for cross-

subsidization protection moot. Obviously, there is no need for cross-subsidization protection for a service provided by a fully separate corporate entity which has no access to monopoly revenues previously available to support the "bargain basement" pricing of such service below its cost.

There should be no dispute that the 1990 revisions to Chapter 364 were intended to foster competition in the furtherance of the public interest. Statutory provisions enacted in the public interest are to be given a liberal construction in favor of the public. See Department of Environmental Regulation v. Goldring, supra, 477 So.2d at 534. The Commission's narrow interpretation of Chapter 364 serves to impede competition and deprive the public of the benefits gained through the promotion and advancement of competition in the telecommunications industry.

Moreover, the Commission's decision upsets the competitive balance established under the 1990 revisions to Chapter 364. Section 364.036(1), Florida Statutes, permits the LECs to seek alternative and relaxed methods of regulation from the Commission. This authority was granted by the Legislature in recognition of and to address the fact "that technology and competition in the telecommunications industry are developing rapidly." Section 364.036(1), Fla. Stat. The Legislature also viewed alternative methods of regulation as an appropriate means to provide "the local exchange telecommunications companies with sufficient incentives to implement new technologies and greater efficiency in operations and productivity, to the benefit of the public." Id. The Legisla-

ture's recognition of the need to permit the LECs to pursue alternative forms of regulation was accompanied by statutory safeguards requiring that the Commission prohibit the LECs from thwarting competition by cross-subsidizing competitive services. Section 364.3381, Fla. Stat. The Commission's decision destroys that balance. Under the Final Order, the LECs may continue to seek alternative methods of regulation but they are no longer prohibited from cross-subsidizing their competitive services. Again, this result is contrary to the Legislature's intent to foster competition in the provision of telecommunications services.

The Commission's interpretation of the relevant provisions of Chapter 364 conflict with the Legislature's intent to foster competition in the telecommunications industry. Any deference normally afforded by this Court to the Commission's interpretation of Chapter 364 must be set aside as it is clearly erroneous, in conflict with legislative intent and departs from the essential requirements of law.

CONCLUSION

Based upon the foregoing, the Court should (1) reverse the Commission's holding in Final Order No. PSC-93-1015-FOF-TO that the statutory terms "competitive," "subject to effective competition," and "effectively competitive" are synonymous and find that the terms have separate and distinct meanings as used in Chapter 364, Florida Statutes, (2) rule that the statutory protections against anti-competitive behavior, including cross-subsidization, apply to all LEC "competitive" services, and (3) take such further action as it deems necessary and appropriate pursuant to Section 120.68(9), Florida Statutes.

Respectfully submitted this 4th day of November, 1993.

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