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, 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

FLORIDA CABLE TELEVISION ASSOCIATION, INC.'S REPLY TO RESPONSE BRIEFS OF THE FLORIDA PUBLIC SERVICE COMMISSION, SOUTHERN BELL, AND GTEFL

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Appellant, Florida Cable Television Association, Inc. ("FCTA"), pursuant to the Court's Order of November 23, 1993, files this Reply to the Response Briefs of the Florida Public Service Commission ("Commission"), BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell") and GTE Florida Incorporated ("GTEFL").

INTRODUCTORY STATEMENT

The Court should not allow the Answer Briefs of the Appellee Commission, Southern Bell and GTEFL (hereinafter referred to as the "Answer Briefs") to distract it from consideration of the very narrow legal issue which is the focus of this appeal. Specifically, the Commission's conclusions in Final Order No. PSC-93-1015-FOF-TP (1) that the terms "competitive," "subject to

effective competition," and "effectively competitive" do not have separate meanings but are all intended to refer to "effectively competitive" services; and (2) that Section 364.3381, Florida Statutes only prevents the cross-subsidization of "effectively competitive" services are not entitled to the weight normally afforded to an agency's interpretation of the statute which it is charged to enforce and interpret. The Commission's conclusions are clearly erroneous and contrary to the legislative intent. There can be no other conclusion but that 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, FCTA should be granted the relief requested in its Initial Brief.

ARGUMENT

I. THE ANSWER BRIEFS MISCONSTRUE FCTA'S ARGUMENT CONCERNING THE APPLICABLE STANDARD OF REVIEW.

Appellee, the Commission, misconstrues FCTA's argument with respect to the applicable standard of review. FCTA neither "supposes that the meaning of statutory terms poses a factual question which the Commission must decide on the basis of testimony and dictionary definitions;" nor is the essence of FCTA's argument "that this Court must determine whether the Commission's interpretation of terms departs from the essential requirements of law and is supported by competent, substantial evidence." Commission Brief at 5.

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

The testimony and record evidence cited in FCTA's Initial Brief are used to demonstrate that the Commission's decision is clearly erroneous or in conflict with the legislative intent. Such evidence is proper to demonstrate that the Final Order departs from the plain meaning of the statutory language, ignores the overriding legislative scheme, overlooks the great weight of record evidence concerning the plain meaning of the terms "monopoly," "competitive," and "effectively competitive," and disregards well-established principles of statutory construction.

II. THE RESPONSE BRIEFS ONLY HIGHLIGHT THE COMMISSION'S ERRONEOUS CONSTRUCTION OF THE STATUTORY TERMS.

Appellee, the Commission, has offered no persuasive argument in support of its conclusion that the terms "competitive," "subject to effective competition," and "effectively competitive" are synonymous. To the contrary, the Commission's Response Brief only enhances FCTA's position that the term "competitive" must be plainly and broadly construed.

The law is very clear that statutory language, unless specifically defined, must be given its plain and ordinary meaning and that it is entirely proper to determine the plain and ordinary meaning of a statutory term by reference to a dictionary. See, Gardner v. Johnson, 451 So.2d 477, 478 (Fla. 1984) and cases cited at FCTA's Initial Brief at 14. The terms "competitive," "subject to effective competition," and "effectively competitive" are not defined. It is, therefore, incumbent upon the Commission to provide logical supporting rationale as to why an undefined term

such as "competitive" should be narrowly construed. Rather than provide such rationale, the Commission ascribes its own meaning to the broad and undefined statutory terminology to render a perceived preferred interpretation. In so doing, the Commission incorrectly supposes that

> "(h)ad the Legislature intended to create different categories of competitive services, it could have done so simply by specifically defining those terms in Section 364.02. The fact that it did not do so must lead this Court to conclude that it did not intend the result urged by FCTA."

Commission Brief at 14. FCTA submits that the Commission's rationale is backwards and completely contrary to principles of statutory construction that are well-established by this Court.

The Commission's statement that "FCTA sets up the existence of three separate categories of competitive services, which may be described as slightly competitive, somewhat competitive, and truly competitive" incorrectly characterizes FCTA's argument. Commission Brief at 6. The Court should not allow itself to be mislead on this point. The undefined term "competitive" can only be given its plain and ordinary meaning consistent with the legislative intent. Clearly, the term "competitive" broadly relates to any service experiencing rivalry, i.e., any service offered by the LEC and at least one other provider. FCTA's Initial Brief refers to interexchange telecommunications services, pay telephone service, alternative access vendors and shared tenant services as examples of "competitive" services since the Commission has previously made a public interest determination that at least one other provider

should be permitted to compete with the LECs in the provisioning of such services. FCTA's Initial Brief at 24. Only upon a showing that such "competitive" LEC services are capable of meeting the additional criteria of Section 364.338(2)(a)-(g), Florida Statutes, can such services be placed into the classification of "subject to effective competition" or "effectively competitive."

GTEFL's position that the statutory definition of "monopoly" service sets up a regulatory scheme that contemplates only two types of LEC services, i.e., monopoly and effectively competitive, is misplaced and self-serving. GTEFL correctly restates the definition of "monopoly" service found in Section 364.02(3), Florida Statutes, as follows:

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

GTEFL then leaps to the absurd conclusion that since a "monopoly" service cannot be an "effectively competitive" service, therefore, "competitive" services and services "subject to effective competition" are non-existent. GTEFL's conclusion is tantamount to ascribing no meaning to the word "competitive," despite its repeated use in Chapter 364, and imparts no meaning to the words "subject to" which precede the words "effective competition" in the statute. Clearly, the Legislature's deliberate use of different terms 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); Dept. of Professional Regulation, Bd. of Medical v.

Durrani, 455 So.2d 515, 518 (Fla. 1st DCA 1984); Ocasio v. Bureau of Crimes, Etc., 408 So.2d 751, 753 (Fla. 3d DCA 1982).

GTEFL's and Southern Bell's Answer Briefs are self-serving in that the LECs are able to use the Commission's interpretation of Chapter 364 to their own competitive advantage and to the detriment of competition as well as the captive LEC ratepayers. As Southern Bell's Answer Brief concedes, the legislative intent is the polestar to construing a statute. Southern Bell Brief at 9. That intent must be given effect even though it may contradict the strict letter of a statute. See State v. Webb, 398 So.2d 820, 824 (Fla. 1981) and cases cited at p. 23 of FCTA's Initial Brief. The effect of GTEFL's and Southern Bell's assertions is that statutory safeguards against anti-competitive behavior and the prevention of cross-subsidization would only be triggered for those LEC services experiencing full competition.

In addition, in an apparent effort to discredit FCTA before this Court, Southern Bell asserts that the Commission previously determined in Order No. PSC-93-0289-FOF-TL that the statutory terms "competitive," "subject to effective competition," and "effectively competitive" are synonymous, and Southern Bell implies that FCTA should have appealed the Order. Southern Bell Brief at 14. Order No. PSC-93-0289-FOF-TL was issued February 13, 1993 in consolidated Docket Nos. 920255-TL and 910590-TL. Southern Bell's Answer Brief concludes:

> "Even though FCTA was a party to the consolidated proceedings that resulted in this Order, it elected not to appeal the Commission's ruling."

Southern Bell Brief at 14, footnote 6. Southern Bell's conclusions are in error. FCTA was not a party in Docket Nos. 920255-TL and 910590-TL which involved an investigation into LEC pay telephone service.

III. THE FINAL ORDER IS INCAPABLE OF ACHIEVING A LOGICAL RESULT THAT IS CONSISTENT WITH THE LEGISLATIVE INTENT.

By giving effect to each of the statutory terms "competitive," "subject to effective competition," and "effectively competitive," a logical result is achieved that effectuates the legislative intent to encourage competition in the public interest. To the extent that these statutory terms are susceptible to differing interpretations, fundamental principles of statutory construction dictate that the legislative intent must be determined and given effect. See e.g., 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).

Notwithstanding the above, the Answer Briefs fail to address the fact that the Commission's Final Order contains no mention of the overriding legislative scheme of Chapter 364, Florida Statutes. The Answer Briefs merely attempt to explain away the Commission's perceived interpretation by resort to other principles of statutory construction. Such principles are subordinate to the principle that the legislative intent is the polestar to construing a statute. By omitting an analysis of legislative intent, the Commission has put the cart before the horse by essentially ascribing meaning to undefined statutory terminology before first

determining what the "whole" of Chapter 364 is designed to accomplish. There can be no doubt that the Legislature intended to foster telecommunications competition in the public interest by prohibiting anti-competitive behavior, including cross-subsidy.

The Final Order achieves a result that is contrary to the legislative intent by allowing the subsidization of competitive services with monopoly service revenues and by affording cross-subsidization protection in instances where it is no longer necessary because full competition has been achieved. Thus, rather than promoting competition by ensuring that competitors are not adversely affected by LEC cross-subsidization, the Commission's decision impedes competition. It cannot be refuted that the Commission's Final Order grants a license to the LECs to cross-subsidize countless competitors out of the marketplace and/or substantially increase the likelihood that any existing competition in the provision of LEC services will not reach full, effective competition that is capable of meeting the criteria of Section 364.338(2)(a)-(g), Florida Statutes.

Because the Commission's Final Order triggers cross-subsidization protection only in cases where it is no longer necessary or of any benefit to LEC competitors, the Commission's interpretation of the relevant provisions of Chapter 364 directly conflicts with the Legislature's intent to foster telecommunications competition. Any deference normally afforded by this Court to the Commission's interpretation of Chapter 364 must be set aside as the Final Order is clearly erroneous, in conflict

with legislative intent and departs from the essential requirements of law.

CONCLUSION

Based upon the foregoing, the Court should grant the relief requested by FCTA in its Initial Brief.

Respectfully submitted this 21st day of January, 1994.

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