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IN THE FLORIDA SUPREME COURT

MCCAW COMMUNICATIONS OF FLORIDA, INC. Appellant, v. SUSAN F. CLARK, etc. et al., Appellee.	)	CASE NO. 86,866

REPLY BRIEF OF APPELLANT McCAW COMMUNICATIONS OF FLORIDA, INC.

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INTRODUCTION

This Reply Brief of McCaw Communications of Florida, Inc. ("McCaw") responds to the arguments presented in the answer briefs filed by the Florida Public Service Commission ("Commission") and BellSouth Telecommunications, Inc. ("BellSouth").

References to the parties, record on appeal, and appendix to McCaw's Initial Brief will follow the same format as that set forth in McCaw's Initial Brief. References to McCaw's Initial Brief will be designated as "McCaw Br. __." References to the Commission's Answer Brief will be designated as "PSC Br. __," and references to BellSouth's Answer Brief will be designated as "BST Br. __."

Unless otherwise understood from the context, references to mobile service provider usage charges pertain only to those usage charges that are the subject of this appeal -- i.e., the mobile-to-land usage rates (known as Types 1, 2A, 2A-CCS7, 2D, and 2D-CCS7) and the land-to-mobile optional rate.

ARGUMENT

I. There is no competent substantial evidence of record to support the findings and conclusions made by the 1995 Order, and this Court cannot rely upon the identification of evidence that does not support the findings of fact and conclusions of law made by the 1995 Order.

The Commission and BellSouth take the position that McCaw's Initial Brief is predicated upon its desire to have this Court reweigh the evidence and conclude in its favor. Absolutely not. Indeed, the opposite is actually the truth: it is the Commission and BellSouth that are now attempting to overcome the fatal deficiencies of the 1995 Order by advancing evidence in support of alternative findings and conclusions rejected or abandoned by the 1995 Order. This Court should examine the record for competent substantial evidence that supports the findings of fact and conclusions of law accepted by the 1995 Order. If, as here, no such evidence exists, the 1995 Order should be set aside.

It is well settled that an agency speaks through its orders. A fundamental requirement of the Florida Administrative Procedures Act and administrative due process is the agency's obligation to reduce to writing its "findings of fact and conclusions of law" so that all the world will know both the agency's action and the basic reasons for such action. §120.59(1), Fla. Stat. (1995). See also §120.52(11) Fla. Stat. (1995); McDonald v. Department of Banking and Finance, 346 So. 2d 569, 583-84 (Fla. 1st DCA 1977). Thus, this appeal is governed by the 1995 Order and what it identifies as findings of fact and conclusions of law. §120.68(10) & (12), Fla. Stat. (1995). The question of competent substantial evidence of record goes only to such evidence as relates to the accepted findings and conclusions, and not what was rejected or abandoned by the 1995 Order.

Contrary to this fundamental legal requirement, the Commission's brief devotes several pages to reviewing the competing evidence of record proffered for retaining and rejecting the link

with access charges. PSC Br. 7-12. Similarly, BellSouth devotes a large part of its Statement of the Case and Facts and the argument sections of its Answer Brief to recounting repeatedly the evidence supporting elimination of the link with access charges. BST Br. passim. Both briefs undertake this rehash of the record to argue that there is a considerable basis for the decision below. However, none of this evidence supports what the 1995 Order itself states is its basis for breaking the link with access charges. Moreover, may of the statements in the opposing briefs are not even correct statements regarding the record.

The Commission's Answer Brief recognizes these problems with the 1995 Order. When it finally turns to its primary argument, the Commission acknowledges that Ms. Sims proffered the only evidence relating to the influence of the mobile interconnection formula on reductions to the local switching and local transport rate elements. PSC Br. 12. However, Ms. Sims' testimony was speculative and uncorroborated hearsay, it does not supplement or explain any other evidence, and as such is not competent substantial evidence of record. McCaw Br. 14-15; §120.58(1)(a)1, Fla. Stat. (1995). To the extent that Ms. Sims' testimony was competent substantial evidence, this testimony urged the Commission to retain the link for the toll component of the formula. McCaw Br. 15-16.

Despite the requirements of chapter 120, the Commission asserts that the 1995 Order remains legally correct even if this isolated, uncorroborated testimony does not constitute competent substantial evidence. The Commission claims that it may make up any evidentiary omissions by applying its own regulatory experience and common sense, based upon the decision in General Telephone Co. of Florida v. Florida Public Service Commission, 446 So.2d 1063 (Fla. 1984) (the Court's decision was incorrectly identified in the Commission's Brief as Gulf Power Company v.

Florida Public Service Commission). PSC Br. 13. But the proceedings in the General Telephone case involved rulemaking, not an evidentiary rate case. General Telephone, 446 So.2d at 1065. In an evidentiary proceeding such as this, the Commission may apply its expert experience only to evaluating and weighing the evidence; the Commission's expert experience cannot replace the lack of competent substantial evidence of record. United Telephone Co. v. Mayo, 345 So.2d 648, 654 (Fla.1977); General Development Utilities, Inc. v. Hawkins, 357 So.2d 408, 409 (Fla. 1978); §120.68(10), Fla. Stat.(1995).

The Commission next misdirects the Court by inappropriately using two undisputed facts. McCaw agrees that access charges will continue to decline and cellular usage has grown substantially, two facts also repeated several times by BellSouth. PSC Br. 13; BST Br. 22 and 27 at n.24. But standing alone, as they do, they do not prove that the LECs are reluctant to reduce the local switching and local transport rate elements of access charges. Nor do these two facts prove that continuation of the formula will result in undesirably large LEC revenue reductions.[1] Yet these were the only findings made in the 1995 Order.

Taking a different approach, BellSouth canvasses the record for the novel purpose of supporting its new "any evidence" review standard: "If there is any evidence to support the

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[1]Appellees cannot deny that the 1995 Order found that there is no current problem. A. 15 (1995 Order, at 15). Indeed, there is no basis for concluding there will be a future problem since the record confirms that for each prior access charge reduction LEC revenues continued to grow. A. 15 (1995 Order, at 15); R. Hearing Exh. 18, at 12 and 31; R. Hearing Exh. 24, at 12. And with respect to future access charge reductions, the Staff Recommendation specifically stated that subsequent rates still will be above cost, thus posing no future problems. R. 788 (Staff Memorandum, at 17). Quite simply, the 1995 Order does not provide any analysis, nor is there any evidence, to support a finding that there will be, or is even likely to be, a future major market distortion, when it will or may occur, or who will or may be adversely affected and to what extent. A. 15 (1995 Order, at 15). There is no basis for the two findings that constitute the basis for breaking the link.

Commission's determination, . . . then that determination must be affirmed." BST Br. 23, 31, and 35. This is not the correct evidentiary standard on appeal. §120.68(1), Fla. Stat. (1995). BellSouth apparently undertakes this approach since it cannot dispute the absence of competent substantial evidence of record to support the findings of fact and conclusions of law stated in the 1995 Order.

As with the evidence recited by the Commission, the fundamental problem with the evidence dredged up by BellSouth is that it does not go to the specific findings present in the 1995 Order. In addition, BellSouth misrepresents the record and refers to evidence that is inconsistent, irrelevant, immaterial, and specifically rejected by the 1995 Order. A few examples will illustrate these problems.

The first example of BellSouth's misrepresentation of the facts pertains to McCaw's 1993 agreement to break the link with access, which was predicated upon unique circumstances. BST Br. 29-30 and 35 at n.29. McCaw never opposed, and affirmatively supported, this 1993 agreement. BellSouth's claim to the contrary is flat out wrong. R. 138-39; PSC Br. 18.

BellSouth also mischaracterizes the testimony regarding LEC depooling, ostensibly with regard to the influence of the formula on access charges or the magnitude of the flow through on LEC revenues. BST Br. 28. Although difficult to discern from its brief, depooling has nothing to do with these findings. Depooling relates to the issue of insufficient cost recovery, which the 1995 Order expressly rejected. A. 15 (1995 Order, at 15); R. Hearing Tr. 429 and 525-26.

Similarly, BellSouth claims that the 1988 Order has produced prices substantially below other local provider rates. BST Br. 12, 22, and 32. The problem here is that the transcript reference cited by BellSouth does not state that there is an imbalance between mobile rates and other local providers. R. Hearing Tr. 489-90. Indeed, at the time of the hearing, the rates in BellSouth's tariff

were roughly equivalent, whereas for the other LECs the prices in their mobile interconnection tariffs were substantially higher than the rates in the tariffs that applied to other local interconnectors.[2]

BellSouth persistently tries to sway this Court by frequently charging that mobile carriers have received a "windfall" under the 1988 Order's formula that they have not shared with their customers. BST Br. 1, 5 at n.6, 22, 26 at n.22, 27 at n.23, and 29-30. But the windfall is to BellSouth -- with respect to the usage rates that are the subject of this appeal, mobile carriers continue to pay in excess of two times cost. Although BellSouth argues that mobile carriers are not entitled to rates at cost, BellSouth cannot refute the fact that it has been longstanding Commission policy that interconnection rates should move closer to cost in order to avoid uneconomic bypass -- even the orders appended to its Answer Brief reflect this direction. By severing the link with access at a time when access charges are statutorily mandated to decline, when other local interconnectors have rates significantly lower than mobile interconnection rates, and when for the foreseeable future mobile service providers will likely remain the largest local interconnector to the local network, the true effect of the 1995 Order is to provide a substantial windfall for BellSouth and the other LECs.

As for another misstatement of BellSouth, the company states there is no evidence indicating that rate levels are excessive. BST. Br. 5 at n.6. However, there was evidence that rates were in excess of costs and that rates should be reduced toward cost. R. Hearing Tr. 94 and 527-28.

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[2] This discrepancy is exacerbated by revised chapter 364, which authorizes for pay telephone service providers flat rate service that has no usage charges. §364.3375(2)(e), Fla. Stat. (1995). More recent events only compound this distinction. BellSouth has agreed to mutual compensation with the new alternative local exchange companies ("ALECs") at $0.01052 per minute of use. Order No. PSC-96-0036-FOF-TL (Jan. 10, 1996). On March 5, 1996, the Commission approved mutual traffic exchange between BellSouth and the ALECs, which means that BellSouth will terminate ALEC calls also for no usage charge. Florida Public Service Commission Docket No. 950985-TL.

Therefore, there was evidence from which it can only be concluded that the prevailing price levels are too high. BellSouth is wrong again.

Finally, as for the "evidence" regarding the "failure" to share prior access charge reductions fully with the mobile carriers' customers, this was cross examination predicated solely on uncorroborated hearsay that was inconsistent with other properly supported and credible testimony. R. Hearing Tr. 108-112. Indeed, the whole mathematical predicate for the 17%/42% numbers gleefully repeated by BellSouth, at pages 10-11 and 22, simply does not exist.[3]

Overall, both the Commission and BellSouth devote a significant portion of their answer briefs to reviewing incorrect or irrelevant evidence in an effort to support what is in the 1995 Order. This Court must look solely to the findings of fact and conclusions of law articulated in the 1995 Order and whether there is supporting competent substantial evidence of record for such matters. Evidence that goes to findings rejected or not accepted by the 1995 Order cannot be considered in this appeal. Accordingly, this Court should so conclude and reverse.

II. The doctrine of administrative finality applies to this case and requires reversal because the evidence, if any, of changed conditions or circumstances is insufficient to support departing from established rates.

The Commission and BellSouth misstate the requirements of the doctrine of administrative finality. They would have this Court believe that in a rate case, the Commission writes on a blank slate. It does not. A continuing entitlement to established rates exists until it is proven that the

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[3]Consider, for example, a carrier that charges its customer a rate of $10.00, with the cost of one of the underlying components being $2.00. If this cost is reduced by 50%, meaning a $1.00 reduction in cost, and the entire $1.00 reduction in cost is passed along to the carrier's customers, the customers' rate will be reduced from $10.00 to $9.00, or by only 10%. Thus, even if the percentages stated in the cross-examination are correct, the conclusion that the cost savings are not being fully passed through is not an appropriate mathematical deduction.

existing rates should be changed. Merely showing that the rates could be different does not satisfy the doctrine of administrative finality. The Commission cannot, as it has here, totally ignore longstanding, existing rates.

The doctrine of administrative finality requires that once an agency has lawfully acted, the agency may not undertake a new policy or different action at a future date absent "adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified." Peoples Gas v. Mason, 187 So.2d 335, 339 (Fla. 1966); McCaw Br.17-18. In other words, if there is competent substantial evidence supporting continuation of the original action and competent substantial evidence supporting an alternative action, the agency may not choose the alternative action unless there is also competent substantial evidence that changing to the alternative is necessary in the public interest because of changed conditions or other circumstances not present when the original decision was made.

The Commission and BellSouth claim that since the Commission is setting rates prospectively, it is not bound by the existing and still effective 1988 Order or the rates established thereunder. PSC Br. 17; BST Br. 20-21. Indeed, they find ratemaking to be a "continuing and forward looking process," which does not provide any "entitlement" to such rates in the future. PSC Br. 18; BST Br. 25. McCaw agrees that no rate is fixed forever. But the doctrine of administrative finality ensures that rates, once fixed, will not be changed absent competent substantial evidence of record that a different rate is necessary in the public interest due to changed conditions or other circumstances.

At best the 1995 Order articulates only two possible findings to support breaking the link

with access charges, both of which fail this standard. First, there is the new mandate in revised chapter 364 to reduce access charges to parity with the December 31, 1994 interstate access charges. § 364.163(6), Fla. Stat. (1995). This is not part of the record. Moreover, the 1995 Order specifically rejected revised chapter 364 as having any effect on the Commission's ability to decide the proceedings. A. 6-7 (1995 Order, at 6-7). Apparently the Commission and BellSouth agree with McCaw on this issue since neither dispute this point in their answer briefs.

Second, there is no competent substantial evidence to support the other stated finding that flowing through future access charge reductions may create market distortions due to an unwillingness to reduce the local switching and local transport rate elements. McCaw Br. 14-15. The Commission and BellSouth apparently concede this point as well since they both raised alternative findings and other evidence not contained within, or which was otherwise rejected by, the 1995 Order. Other than self-serving conclusory statements, neither brief addresses the fact that within the context of analyzing whether the link with access should be broken, the 1995 Order never mentions the 1988 Order, its findings and objectives, or the inappropriateness of its findings and objectives in the future. Admittedly, the Commission is not bound to wait until after some problem develops. In 1994 the Commission specifically found that the formula was working exactly as intended. There is nothing in the 1995 Order that explains how or why, based upon the record, this fact is no longer true.

Finally, BellSouth tries to argue that the doctrine of administrative finality is less applicable when an agency is setting policy. BST Br. 20. But the quotation BellSouth relies upon from the Peoples Gas case does not say this. The passage quoted by BellSouth (and also the Commission) states that agencies should not be subject to the same kind of finality that attaches to judicial

decisions. Peoples Gas, 187 So.2d at 339. Consequently, agencies may later determine that a different course is appropriate -- a new policy may be undertaken, a license may be granted or revoked, a different rate may apply. Read fully in context and in its entirety, the Commission may later take a different course, unlike a court, but only upon "a specific finding" that such different action "is necessary in the public interest because of changed conditions or other circumstances" Id. The quotation relied upon by BellSouth simply does not contain the limitation BellSouth claims.

This is a rate case, as BellSouth admits. BST Br. 21. This fact undercuts BellSouth's attempt to alter the principles of administrative finality as they pertain to "policy" decisions. It is undisputed that the purpose of the proceeding below was to set the rates to be collected by BellSouth and the other LECs from McCaw and all of the other mobile carriers. In setting rates the Commission conducted an evidentiary proceeding pursuant to section 120.57(1), Florida Statutes. Thus, even assuming there is more than a semantic distinction between a rate issue and a policy issue, it is irrelevant here because this is a rate case.

Existing rates are entitled to a presumption of justness and reasonableness. BST Br. 33. This is the heart of the doctrine of administrative finality: rates continue in effect until there is competent substantial evidence of record to demonstrate changed conditions or other circumstances in the public interest not present in the original proceeding. The 1995 Order completely fails this standard, requiring reversal and reinstatement of the 1988 Order's formula for those rates that are subject to this appeal.

III. It was an arbitrary and capricious abuse of discretion to direct the parties to negotiate new rates within 60 days subject to default rates that were different from the preexisting rates.

Both the Commission and BellSouth argue that the 1995 Order was not arbitrary because it (1) set rates and (2) provided the parties the option to negotiate something different. McCaw agrees that this is the bottom line decision of the 1995 Order. But the decision to order the parties to negotiate new usage rates, or else subject the mobile carriers to default rates that were no longer linked to access charges, can only be classified as arbitrary and capricious. Neither the presence of competent substantial evidence nor compliance with administrative finality overcomes the fact that the LECs have arbitrarily benefited from this decision.

McCaw does not dispute the fact that negotiations have been and can be a meaningful method of resolving conflicts, introducing new services, and otherwise conducting business. McCaw's witnesses, and essentially all of the witnesses, testified that under the 1988 Order negotiations had brought forth all of these results. A prime example is McCaw's 1993 agreement with BellSouth to break the link with access charges. The fact that McCaw made this agreement also demonstrates that the 1988 Order successfully encouraged negotiation on all matters, notwithstanding BellSouth's assertion to the contrary. BST Br. 22-23.

The 1995 Order found there is no need to abandon the status quo. A. 11 (1995 Order, at 11). However, the 1995 Order also directed the parties to negotiate new rates within 60 days. If the parties were unsuccessful, the Commission ordered the LECs to file new tariffs with a default rate that was no longer linked to access charges. A. 18 (1995 Order, at 18). This is not a continuation of the status quo. The default rate was essentially what BellSouth wanted. By building that result into the default rate, the 1995 Order effectively discouraged true negotiations by arbitrarily favoring

one side over the other.[4]

This is especially important since under revised chapter 364 the Commission is divested of jurisdiction to set "network access" rates for price regulated LECs. §364.163, Fla. Stat. (1995); McCaw Br. 22. BellSouth suggests that the Commission will continue to have jurisdiction to set mobile interconnection rates. BellSouth predicates its position on the fact that mobile carriers are not a "telecommunications company" within in the meaning of section 364.02(12), Florida Statutes. BST Br. 36-37. BellSouth's approach is again to selectively and incompletely read the statute -- the rest of the network access definition states such service includes service provided to carriers licensed by the FCC, which includes all wireless providers. See §364.163, Fla. Stat. (1995). Since all of the four largest LECs have now elected price regulation, the Commission's authority to set mobile interconnection prices in a new proceeding has been removed.

The 1995 Order found that mobile interconnection rates will remain a LEC monopoly even with the introduction of local competition. A. 10 (1995 Order, at 10). Now that the four largest LECs have elected price regulation, the Commission is restrained in its ability to regulate this monopoly service. In this context, ordering the parties to negotiate new rates in the face of a default rate severed from access charges can only be classified as arbitrary and capricious.

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[4]The Commission points out in its Answer Brief that the 1995 Order cannot be arbitrary since under the 1995 Order McCaw has successfully negotiated a new interconnection rate agreement with GTE Florida. PSC Br. 22 at n.1. However McCaw has disputed whether there were true negotiations and the propriety of any agreement with GTE Florida. But even if there is a valid agreement with GTE Florida, BellSouth and the other LECs never contacted McCaw during the 60 day negotiation window, and during this period BellSouth failed to respond to McCaw's request to negotiate.

IV. Whether the Commission acted without competent substantial evidence in the record, violated the doctrine of administrative finality, or acted arbitrarily and in abuse of its discretion, the 1995 Order should be set aside and the 1988 Order reinstated.

The Commission's Answer Brief fails to adequately justify why, if this case is reversed, the Commission should be given another chance to put its decision into effect -- in any other rate case, if there is no proper basis for a change in rates, the established rates continue in effect. Southern States Utilities, Inc. v. Beard, 602 So.2d 944 (Fla. 1st DCA 1992) (affirming Order No. 24715, June 26, 1991). Accordingly, the proper remedy in this case is to set aside the decision and have the Commission reinstate the 1988 Order with respect to the usage charges formula that is the subject of this appeal. McCaw Br. 24-25.

CONCLUSION

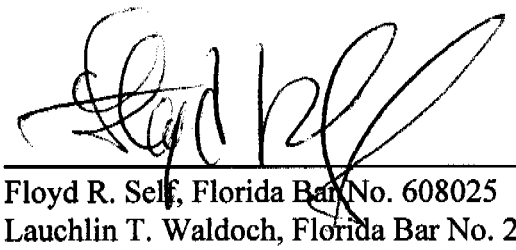
The Commission and BellSouth have tried to hide the failings of the 1995 Order behind a smokescreen of evidence that is irrelevant to the findings of fact and conclusions of law set forth in the 1995 Order. The briefs filed by the Commission and BellSouth are not the Order. It is the 1995 Order that is being challenged. Looking solely to the 1995 Order, and the record upon which it was required to be based, there is no competent substantial evidence to support the decision to break the link with access charges for the usage rates on appeal, and absolutely no evidence to support breaking the link for the toll component.

In addition, even if there is competent substantial evidence of record, the 1995 Order violates the doctrine of administrative finality because the it does not demonstrate changed conditions and circumstances in the public interest. Finally, it was an arbitrary and capricious abuse of discretion to direct the parties to negotiate new rates within 60 days subject to default rates that were different

from the preexisting rates.

On the basis of the foregoing and the argument presented in its Initial Brief, McCaw respectfully submits that this Court should set aside the 1995 Order with respect to the usage rates on appeal, reinstate the 1988 Order, and direct the Commission to order the LECs to bring their tariffs into compliance with usage rates requirements of the 1988 Order except for Type 2B service.

Respectfully submitted this 12th day of March, 1996.



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CERTIFICATE OF SERVICE

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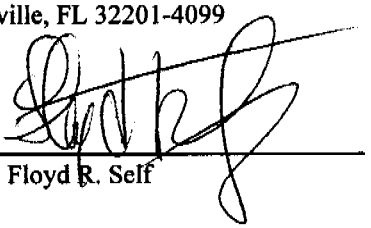
By: 
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