IN THE SUPREME COURT OF FLORIDA

FLORIDA INTEREXCHANGE
CARRIERS ASSOCIATION,

appellant,

v.

SUSAN F. CLARK, etc.,
et al.

appellees.

Case No. 86,957

Public Service Comm'n
Docket No. 920260-TL

ANSWER BRIEF OF INTERESTED PARTY BELLSOUTH TELECOMMUNICATIONS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Legislative History

BellSouth Telecommunications, Inc. ("BellSouth"), an interested party in the proceedings below, hereby responds to the initial briefs of appellants, The Florida Interexchange Carriers Association ("FIXCA") and MCI Telecommunications Corporation ("MCI"), pursuant to Rule 9.210 of the Florida Rules of Appellate Procedure.

Appellants would have this Court change the rules in mid-stream, limiting the Commission's ability to implement a 1994 order -- to which they both agreed at the time -- which requires a $765 million reduction in BellSouth's telephone rates over a three year period. While Appellants continue to wholeheartedly endorse those portions of the 1994 order which enhance their own bottom lines, they claim that recent statutory revisions preclude the Commission from implementing other portions of the 1994 order except on Appellants' own terms. In so doing, Appellants not only seek to override the public's interest in more cost-efficient telephone service, they would have this Court ignore the plain provisions of the statutory revisions, which specifically exempt the 1994 order from the impact of the new law.

This is inappropriate. The 1995 statutory revisions specifically reserve the Commission's ability to administer its prior order under the rules in effect when the order was entered. No claim is made that the Order on Appeal is inappropriate under the prior rules. Therefore, this Court should defer to the Commission's determination of the public interest and affirm the Order on Appeal.

STATEMENT OF THE CASE AND FACTS

The Appellants' statements of the case and facts are unduly colored by argument, and BellSouth therefore submits its own.

Statement Of The Case

The Commission initiated Docket Number 920260-TL in 1992, to conduct a full revenue requirement analysis and to evaluate the Incentive Regulation Plan under which BellSouth had operated since 1988. A number of other proceedings were later consolidated into this docket, which came to be known as the BellSouth "Rate Case".[1]

On January 5, 1994, BellSouth and the Office of the Public Counsel (Public Counsel"), the citizens' *ad litem* representative before the Commission, executed a Stipulation and Agreement Between the Office of Public Counsel and Southern Bell Telephone and Telegraph Company (the "Stipulation"), pursuant to which they proposed to settle the Rate Case. Among other things, the Stipulation called for BellSouth to reduce its rates to Florida consumers by a cumulative total of $765 million over three years, from 1994 through 1996.

On January 12, 1994, BellSouth and a number of other participants in the Rate Case, including FIXCA and MCI, executed an Implementation Agreement For Portions of the Unspecified Rate Reductions In Stipulation and Agreement Between the Office of

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[1]Dockets 910163-TL, 910727-TL and 900960-TL all involved alleged improprieties in BellSouth's regulatory compliance practices. Docket 911034-TL involved a request by the Broward County Commission for extended area service between various South Florida communities. These dockets were all consolidated with the Rate Case and were resolved when the Rate Case was settled, under the terms of that settlement.

Public Counsel and Southern Bell Telephone and Telegraph Company (the "Implementation Agreement"). The Implementation Agreement sets forth the manner in which some (but not all) of the unspecified rate and revenue reductions should be accomplished.[2]

On February 11, 1994, the Commission issued Order PSC-94-0172-FOF-TL, entitled Order Approving Stipulation and Implementation Agreement (the "Settlement Order"), pursuant to which the Commission approved and adopted, in part, the Rate Case settlement structure created by the Stipulation and the Implementation Agreement.[3] The Settlement Order is attached as Appendix Exhibit A. The Stipulation and the Implementation Agreement are both attachments to the Settlement Order.

On May 15, 1995, as required by the Settlement Order, BellSouth filed a tariff proposal to reduce its revenues by $25 million.[4] BellSouth's proposal involved introducing a number of Extended Calling Service ("ECS") routes. The Communication Workers of America ("CWA") and McCaw Communications of Florida, Inc.

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[2]The Implementation Agreement provided that a portion of BellSouth's rate reductions should consist of reductions in its "switched access" charges to interexchange companies (i.e. long distance carriers such as Sprint and MCI) for interconnecting with and utilizing BellSouth's local network. The balance of the rate reductions were left "unspecified" by the Agreement, to be determined by the Commission at a later date.

[3]The Commission declined to adopt those portions of the Stipulation and the Implementation Agreement which purported to limit the Commission's prospective ability to make regulatory decisions.

[4]This was one of the "unspecified" revenue reductions, which was left for the Commission to decide upon at the time it was scheduled to occur.

("McCaw") also filed their own competing proposals as to how the 1995 revenue reduction should be structured. Neither of those proposals involved ECS. (Order at 4)

The Commission held a hearing on July 31, 1995, to consider the various proposals. On November 8, 1995, the Commission issued Order PSC-95-1391-FOF-TL (the "Order" or the "Order on Appeal"), which adopted BellSouth's ECS tariff proposal under the terms set forth therein. This is the order on appeal here.

Statement of Facts

The issue on appeal is simple and discrete. The February 4, 1994, Settlement Order spread $765 million in reductions to BellSouth's revenues over a three year period, from 1994 to 1996. Many of those reductions were "unspecified,", i.e. the Order did not detail how the revenues must be reduced but rather left that to be determined by the Commission at the time each reduction was scheduled to occur. The Order on Appeal is the Commission's determination as to how the unspecified revenue reduction for 1995 should be accomplished. The sole issue on appeal is whether this determination must be made pursuant to the statutory framework in effect in February 1994, when the Settlement Order was negotiated and entered, or the current, revised framework, which was unknown to the parties in 1994.

BellSouth's Rate Case. Docket Number 920260-TL, the proceeding from which this matter arises, has come to be known as BellSouth's "Rate Case". The Rate Case was (and remains) a huge proceeding, extending BellSouth's Incentive Regulation Plan for an

additional four years and providing for millions of dollars to be returned to BellSouth's ratepayers in form of prospective revenue reductions. Virtually every participant in the telecommunications industry in Florida, as well as numerous organizations representing various consumers or consumer groups, have participated in this docket.

The Commission initiated BellSouth's Rate Case in 1992 to conduct a full revenue requirements analysis, to evaluate the Incentive Regulation Plan, and to determine whether and in what form the Incentive Regulation Plan should be continued. After over a year of preparation by the Commission, BellSouth, Public Counsel and a vast array of interested parties, the Rate Case was finally ready to be tried and hearing was scheduled to commence in January 1994.

The Rate Case Settlement. Immediately prior to the hearing, however, the parties reached a settlement. On January 5, 1994, Public Counsel and BellSouth executed the Stipulation, calling for extending the Incentive Regulation Plan through, at the latest, December 31, 1997, and resolving by agreement all issues relating to BellSouth's earnings and revenue requirements during that time. (Settlement Order at 4-5, 12-13) In particular, the Stipulation called for BellSouth to reduce its revenues by an additional cumulative amount of $765 million, with the reductions to be phased in from 1994 through 1996. The extension of the Incentive Regulation Plan coupled with the additional revenue reductions was

expected to yield a total benefit to Florida's ratepayers of more than $2.3 billion over four years. (Settlement Order at 5)

While the Stipulation called for $765 million in additional revenue reductions, it did not specify the means by which a number of those reductions should be accomplished. Rather, the Stipulation provided a schedule for implementation, as provided in Paragraph Five:

> In lieu of specific adjustments, [Public Counsel] and Southern Bell further agree that Southern Bell shall implement the following revenue reductions and tariff changes at the times indicated.
>
> > A. During the first billing cycle 30 days after the adoption of this stipulation and agreement by the [Commission], Southern Bell shall eliminate all TouchTone charges throughout its service areas in Florida. The estimated impact of this tariff change is $55 million on an annualized basis.
> >
> > B. On July 1, 1994, Southern Bell shall further reduce its gross revenues by $60 million on annualized basis.
> >
> > C. On October 1, 1995, Southern Bell shall further reduce its gross revenues by $80 million on an annualized basis.
> >
> > D. On October 1, 1996, Southern Bell shall further reduce its gross revenues by $84 million on an annualized basis.

(Settlement Order at 15, stipulation at 5) The Stipulation also provided in paragraph ten that an appropriate structure for the revenue reductions should be determined by the Commission at the time of each reduction's effective date. (Settlement Order at 18, Stipulation at 8) The parties also specifically agreed that Docket 920260-TL -- the Rate Case -- should remain open for purposes of

implementing the unspecified rate reductions set forth therein and performing other, continuing regulation of the Settlement.

In the January 12, 1994, Implementation Agreement a number of participants in the Rate Case, including BellSouth, FIXCA and MCI, agreed on a structure for some, but not all, of the unspecified revenue reductions. The parties agreed to split the rate reductions which were not specifically identified in the Stipulation into two components -- "switched access" reductions (a total of $295 million over three years) and "unspecified" rate reductions.[5]

Switched access reductions are reductions in the access charges paid by interexchange carriers ("IXCs") such as MCI and the individual members of FIXCA, to local exchange companies ("LECs")

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[5]The Order on appeal outlines the switched access versus unspecified rate reductions set forth in the Implementation Agreement, after the fact (i.e. after the 1994 unspecified reductions had been "specified" as follows:

7/1/94 (completed)
* Switched access reductions - $50 million
* - $10 million (specified below)
  - Reduced mobile interconnection usage rates
  - Eliminated Billed Number Screening charge
  - Reduced DID trunk termination rates

10/1/95
* Switched access reductions - $55 million
* **Unspecified rate reductions - $25 million**

10/1/96
* Switched access reductions - $35 million
* Unspecified rate reductions - $48 million

(Order at 3, emphasis added) It is the $25 million dollar unspecified rate reduction for 1995 that was implemented via the Order on appeal.

such as BellSouth, when the IXCs interconnect with and utilize the LECs' local network facilities to initiate, transport and terminate toll traffic. Switched access charge reductions benefit IXCs by reducing their costs. By agreeing that specified portions of BellSouth's rate reductions should be comprised of switched access charge reductions, the IXCs agreed to a form of reduction that was to their own benefit.

The converse, however, was that the IXCs left the balance of the rate reductions -- the "unspecified" reductions -- to be determined by the Commission at the time they were scheduled to occur. Furthermore, the IXCs specifically agreed that they would not seek to benefit from the remaining unspecified rate reductions. (See e.g. Settlement Order at 32, Implementation Agreement at 5)

On February 11, 1994, the Commission entered its Settlement Order specifically approving the Stipulation and the Implementation Agreement, thereby settling the Rate Case subject to the Commission's continuing responsibility to implement the settlement over its three year term. In so doing the Commission was explicitly cognizant of the fact that all parties had made trade-offs in the spirit of compromise, and approved the settlement on that basis. (Settlement Order at 4) Because of the settlement the Commission canceled the Rate Case hearing set to commence January 24, 1994 and continuing thereafter.

The Order on Appeal. The Implementation Agreement, as approved and adopted by the Settlement Order, provides that at least 120 days prior to the scheduled effective date of each

unspecified revenue reduction BellSouth and any other interested person should submit proposals as to how those reductions should be accomplished. (Settlement Order at 38-39) The 1995 unspecified revenue reduction, in the amount of $25 million, had a scheduled effective date of October 1, 1995, and on May 15, 1995, BellSouth filed a tariff detailing how it proposed to reduce its revenues to meet this requirement. Two other parties, CWA amd McCaw, submitted their own, competing proposals.

Briefly, BellSouth proposed to implement a number of Extended Calling Service ("ECS") routes in order to reduce its revenues by the requisite $25 million.[6] ECS is an enhancement to local service, modifying what was formerly a toll structure for calls within the BellSouth toll calling area. It is a form of toll relief for calls between local exchanges which have a community of interest or an interdependence consisting of, e.g., common education, health, economic or governmental service, emergency (911) service, and/or social and recreational activities. An opportunity to provide county-wide calling also plays a part in the determination of whether to implement ECS on any particular route. Under ECS a residential rate payer in South Dade County, for example, would pay only a twenty-five cent flat fee for what was previously a toll call to North Dade County. Business customers continue to be charged on a per-minute basis but are charged only

[6]The estimated revenue effect of the proposed ECS routes, prior to considering stimulation, was a $43.5 million annual revenue. "Stimulation" refers to the fact that a decrease in rates may lead to an increase in usage, thereby tempering the amount of revenue reduction.

ten cents for the first minute and six cents for each additional minute. This constitutes a substantial reduction in BellSouth's local toll revenues and a substantial savings to those local ratepayers who most need the relief.[7] It does not, however, foreclose IXCs (including the Appellants) from continuing to offer competing service on these routes.

Following a hearing on July 31, 1995, the Commission adopted BellSouth's proposal, finding that it was the best of the three proposals for accomplishing the 1995 unspecified revenue reduction. The Commission specifically found that as between the three competing proposals, implementation of BellSouth's proposed ECS routes would best serve the public interest.[8] (Order at 15)

MCI and FIXCA opposed BellSouth's proposal. They claimed they could not compete on the ECS routes, and that intrastate toll service would therefore be "re-monopolized", because the price to be paid by BellSouth's ratepayers was too low, below the amount BellSouth charges competing IXCs to utilize BellSouth's local facilities. MCI and FIXCA contended that if BellSouth's revenues are to be reduced via ECS routes, the rates charged by BellSouth must be high enough to meet the "imputation" requirement of a 1995

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[7] Public Counsel, which participated in order to represent the interests of the citizens on an *ad litem* basis, supported BellSouth's proposal.

[8] The Commission held that the CWA proposal would be too costly to set up and administer, and would benefit only a select group of rate payers. The Commission held that the proposal submitted by McCaw, a mobile service provider, was in conflict with a prior order of the Commission pertaining to the rates to be paid by mobile service providers for interconnection with LECs' networks. Order at 19-20. These findings are not contested on appeal.

revision to the Florida Statutes -- which was not in effect when the Settlement Order was issued -- so that they can compete more effectively on those routes. See § 364.051(6)(c), FLA. STAT. (1995).

The Commission fully considered the Appellants' positions, but declined to adopt them. The Commission heard evidence, for example, that the ECS routes are but one aspect of IXCs' business and price is but one aspect of competition. IXCs can provide complete toll services -- intraLATA, interLATA, interstate and international -- while LECs are limited to toll service within the LATA.[9] The ability to offer "one stop shopping" is a competitive benefit that LECs cannot match. (Hearing Transcript at 225-26, hereinafter "Hrg. Tr.")[10] Moreover, IXCs can and do use "melded" access rates, blending both (lower) interstate and intrastate rates as a basis for establishing their toll floor, affording pricing flexibility sufficient to compete on ECS routes. (Hrg. Tr. at 371-72) The Commission had previously recognized the advantage this can afford IXCs in its Order 24859, issued in Docket 900708-TL. Finally, even if BellSouth were able to capture the entire intraLATA toll market -- which is clearly not realistic -- intraLATA toll service represents only 20% of total toll business

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[9]A "LATA" is a "local access and transport area", the extended local area within which an LEC maintains a number of exchanges. There are a number of LATAs throughout the state. LECs have historically been prohibited from carrying interLATA traffic, leaving that market for IXCs such as MCI and the members of FIXCA.

[10]Furthermore, many IXCs offer discounts based on a customer's total toll volume -- be it intraLATA or international. (Hrg. Tr. at 226) LECs have no way to match this competitive tool.

in Florida. IXCs would still control over 80% of the total market for toll service. (Hrg. Tr. at 61)

Having considered the evidence, the Commission specifically found that the IXCs could compete on these routes. (Order at 4, 13, 14, 20-21) Indeed, the Commission noted that in May 1994 it had approved the very same kind of ECS plan for other routes in South Florida in order to satisfy a prior unspecified revenue reduction required by the Settlement Order, and noted that prior ECS plan was proposed by FIXCA in agreement with BellSouth.[11] (Order at 7) The Commission also noted that after January 1, 1996, there can be even more competition on these routes, because a new kind of provider, an "Alternative Local Exchange Company", will also be able to compete for this business. (Order at 13, 15). Accordingly, the Commission specifically found that the proposed ECS routes posed no danger of "re-monopolization", as Appellants contended. (Order at 14).

The Commission also rejected the claim that in structuring revenue reductions under the Settlement Order it had to comply with the newly imposed imputation requirement. Briefly, under the law in existence when the Rate Case was settled, ECS was classified as a local service; the Commission had to specifically change its policies to allow IXC competition on those routes. Appellants

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[11]IXCs were not previously allowed to compete within the geographic area serviced by an LEC, and under prior Commission policy the implementation of an ECS route would have precluded IXCs from servicing the route. In Order PSC-94-0572-FOF-TL May 16, 1994), however, the Commission approved the FIXCA/BellSouth agreement to allow IXCs to continue to service the ECS route in competition with BellSouth.

contend, however, that the 1995 statutory revisions classify newly established ECS routes as a "non-basic" service, and require that the LECs' rates for non-basic services must include an "imputed" cost, to cover the price charged by the LEC to its competitors for any monopoly component utilized to provide a competitive service. See §§ 364.02(2) and 364.051(6)(c), FLA. STAT. (1995).[12] FIXCA and MCI contended that if the Commission implemented the Settlement Order by creating ECS routes, the new ECS rate structure must include an imputed cost factor under section 364.051(6)(c). In other words, Appellants claimed that the Commission could not, in implementing the Settlement Order, reduce the price charged for ECS service below a level equal to BellSouth's costs and an "imputed" cost equal to the price they pay for interconnection.

The Commission did not consider whether the proposed ECS rate structure satisfied the new imputation requirement because it determined that the 1995 statutory amendments did not apply to revenue reductions under the Settlement Order.[13] (Order at 8) The 1995 statutory revisions contain several "savings clauses" which exempt certain matters from the effect of the new laws. Section 364.385(3), for example, specifically provides that the Settlement Order shall remain in effect and that the Commission shall continue

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[12]BellSouth does not accede to Appellants' legal contentions in this respect, but supports the Commission's determination, as discussed below, that this issue is irrelevant here in any event because the statutory revisions do not apply.

[13]BellSouth presented evidence demonstrating that the rate structure for its ECS routes does in fact meet the imputation requirements of section 364.051(6)(c). (Hrg. Tr. at 364-68, 385-87)

in its implementation and regulatory oversight role under that Order unaffected by the new laws. The Commission -- the agency responsible for administering chapter 364 -- construed this statute and determined that the statutory revisions did not apply; that the Commission could reduce BellSouth's revenues under the Settlement Order according to the law in effect when the settlement was negotiated. (Order at 5-6) The Commission further noted that the Settlement Order is extremely complex, involving factors not extant within the new statutes, and requires a level of oversight by the Commission that is inconsistent with the new statutory framework:

> Order No. PSC-94-0172-FOF-TL details a comprehensive framework, imposing numerous requirements on Southern Bell including the following: the reduction of certain rates, the capping of local rates, the sharing of earnings, mandating the recording of expenses, the establishment of certain reserves, the elimination of additional charges for touchtone service, and a requirement that the company absorb "up to $11 million in revenue losses and costs that are expected to result from the implementation of a Dade/Broward County extended area service plan". These proposals are being considered to implement one of the requirements of Order No. PSC-94-0172-FOF-TL.
>
> Assuming that Southern Bell opts to be a price regulated local exchange company pursuant to [newly enacted] Section 364.051, Florida Statutes, the Commission's regulatory oversight will be limited. A comprehensive framework, as is operative with respect to this [Settlement] Order, is fundamentally inconsistent with the Commission regulatory mission pursuant to the revised statute.

(Order at 5, emphasis added) Therefore, given that section 364.385(3) specifically exempted the Settlement Order from the terms of the new statutes, the Commission reasonably concluded that it had (and had to have) the authority to implement the Settlement Order under the prior law.

SUMMARY OF THE ARGUMENT

The Order on Appeal implements one provision of the Settlement Order, the requirement that BellSouth implement $25 million in unspecified revenue reductions by October 1995. The dispositive issue on appeal is whether the 1995 revisions to Chapter 364 impair or limit the Commission's ability to administer its prior Settlement Order. If the statutory revisions do not impair the Commission's ability to reduce BellSouth's revenues under the Settlement Order -- i.e. if the law in effect when the Order was negotiated and issued governs its implementation -- then the Order on Appeal must be affirmed. If, on the other hand, the Legislature did indeed change the rules in mid-stream, then this matter should be remanded because the Commission did not consider the new imputation requirements in deciding how to reduce BellSouth's revenues.

The new statutes do not limit the Commission's ability to implement the Settlement Order because they specifically provide that the prior law shall apply to these proceedings. First, section 364.385(3) specifically exempts the Settlement Order from the effect of the revised statutes, and the legislative history makes clear that this was intended to leave unimpaired the Commission's ability to implement and administer that Order. This only makes sense. The Settlement Order is a negotiated settlement balancing the public interest and the vast array of considerations important to all of the various players within this industry. It involves hundreds of millions of dollars in revenue reductions. It

would be absurd to hold BellSouth to these monetary requirements yet at the same time change all of the rules by which they are to be implemented.

Second, section 364.385(2) provides that proceedings pending on July 1, 1995 shall be governed by the prior law. The proceeding below was initiated and pending prior to July 1, 1995, and is therefore not subject to the revised statutes. True, a different portion of section 364.385(2) speaks specifically to exempting "applications for . . . extended calling service", but the proceeding below was not an "application" for extended calling service; it was a proceeding to determine how to reduce BellSouth's revenues and thereby implement the terms of the Settlement Order.

The Commission's construction of section 364.385 is a reasonable one. It is consistent with both the literal terms of the statute and the legislative history. It also comports with logic and reason. The courts afford great weight to an agency's reasonable construction of the law it administers, and this Court should do so here. Prior law governs this proceeding and the Order on Appeal must therefore be affirmed.

ARGUMENT AND CITATION OF AUTHORITY

By this appeal MCI and FIXCA seek to obtain a competitive advantage at the expense of Florida's ratepayers. Despite having already benefitted from other BellSouth revenue reductions -- to the tune of BellSouth's $155 million switched access charge reductions in 1994 and 1995 -- Appellants now contend that the Commission must implement BellSouth's remaining unspecified revenue

reductions in a manner that will increase the rates to be paid by BellSouth's ratepayers simply to improve Appellants' competitive position. The Court should reject this claim out of hand.

I. The Instant Proceeding Is Governed By the Law Extant When The Settlement Order Was Issued, And Is Not Subject To The Imputation Requirement Of The 1995 Statutory Revisions

Neither MCI nor FIXCA challenge the Commission's decision under the Settlement Order to reduce BellSouth's revenues by implementing ECS routes. MCI and FIXCA claim only that if ECS routes are to be created, the 1995 legislative amendments require that they be classified as a "non-basic" service which must meet the "imputation" requirement of section 364.051(6)(c); a limitation that did not exist when the Settlement Order was issued. (See MCI Brief at 9; FIXCA Brief at 4, 9) Because it held that the 1995 amendments were inapplicable to this proceeding, the Commission held that the ECS routes at issue were "local" rather than "non-basic" service, and specifically declined to consider whether the ECS routes met the new imputation requirement. The dispositive issue on appeal, then, is what law applies, the new or the old?

This Court must determine whether the Commission's continued oversight and implementation of the Settlement Order in BellSouth's Rate Case -- which remains an open, ongoing docket from well prior to the statutory revisions -- remains subject to the laws extant when the Order was issued or whether the Settlement Order is now limited by the law as recently revised. As shown below, the answer is clearly the former and the Order on Appeal must be affirmed.

The general rule is that substantive statutory revisions apply prospectively only, while procedural or clarifying revisions will apply retroactively, to matters already pending. See Rothermel v. Fla. Parole and Probation Comm'n, 441 So.2d 663, 664 (Fla. 1st DCA 1983). A "savings clause", however, is a device by which the legislature specifically exempts certain matters from retroactive application of the new law. When a new law contains a savings clause, it is generally presumed that, be it substantive or procedural, the legislature intended the new law to have retroactive effect except as specifically provided by the savings clause. See generally Carpenter v. Florida Central Credit Union, 369 So.2d 935 (Fla. 1979).

The 1995 amendments to Chapter 364 contain a savings clause. See § 364.385, FLA. STAT. (1995). Therefore, the revised statutes should apply here unless this matter falls within the terms of the savings clause. As detailed in the following sections, these proceedings are exempted from application of the new statutes by not one but two provisions of the savings clause, and the Order should therefore be affirmed.

A. The proceedings below were exempted from the requirements of the 1995 amendments by the savings clause in section 364.385(3).

The proceeding below was not a discrete, insular undertaking, initiated in a vacuum. It was not initiated for the purpose of creating ECS routes. This proceeding was a part of the Commission's implementation of the Rate Case Settlement Order, and it must be viewed in that context. The proceeding below was

initiated for the express and sole purpose of determining how BellSouth's revenues would be reduced by $25 million in 1995, as required by the Settlement Order. ECS routes were but one of three separate proposals by which this could be accomplished. Accordingly, the question is not whether the new statutes' savings clause encompasses ECS proceedings, but whether the savings clause encompasses the Commission's administration of the Settlement Order and the means by which it reduces BellSouth's revenues under the terms of that Order. Viewed in this light, it is obvious that the prior version of Chapter 364 must govern these proceedings.

The Settlement Order comprised a negotiated, highly structured vehicle for reducing the amount paid by BellSouth's ratepayers, directly or indirectly, by hundreds of millions of dollars over a total of three years. It was (and remains) a massive undertaking which had to address the varied concerns of a large number of diverse parties, and clearly had to address them in the context of the legislative and regulatory framework then in existence. It is absurd to suggest that this framework -- the rules which all parties had in mind when they negotiated a settlement worth hundreds of millions of dollars, and the rules pursuant to which the first half of the settlement has already been implemented -- should now be changed in mid-stream.

The legislature certainly did not intend for that to be the case. The 1995 amendments specifically provide that the Settlement Order, and the Commission's responsibility to oversee and implement

that Order, shall remain unchanged until the end of the settlement term:

> Florida Public Service Commission Order No. PSC-94-0172-FOF-TL shall remain in effect, and BellSouth Telecommunications, Inc., shall fully comply with that order unless modified by the Florida Public Service Commission pursuant to the terms of that order.

§ 364.385(3), FLA. STAT. (1995). The Senate Committee staff report makes clear that this was intended to exempt the Commission's continued "duties and responsibilities" under the Settlement Order from the effect of the new law:

> The Legislature should state that the provisions in the bill do not preclude enforcement of the Southern Bell settlement agreement or affect the duties and responsibilities of the FPSC or the Public Counsel under that agreement.

Staff Report, Senate Committee on Commerce and Economic Opportunities, at 19 (emphasis added). See Also Senate Staff Analysis and Economic Impact Statement, April 6, 1995, at 10.[14] One of those "duties and responsibilities" is to determine the means by which BellSouth shall reduce its revenues as required by the Settlement Order, and the proceeding below was initiated specifically and solely for that purpose. It is therefore clear

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[14]The Staff Report and the Analysis and Economic Impact Statement are attached as Appendix Exhibits B and C, respectively. This kind of legislative history is appropriately considered on appeal, and is accorded "significant respect" by Florida courts. Ellsworth v. Insurance Co. of North America, 508 So.2d 395 (Fla. 1st DCA 1987).

that the proceeding below falls directly within section 364.385(3), and the Commission reasonably so held.[15] (Order at 5-6, 8)

An agency's reasonable construction of the statute it enforces is entitled to great weight and deference. PW Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988); Public Employees Relations Comm'n v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985); International Association of Machinists v. Tucker, 652 So.2d 842, 843 (Fla. 1st DCA 1995). It cannot be overturned unless shown to be clearly erroneous. PW Ventures, 533 So.2d at 283; International Association of Machinists, 652 So.2d at 843. That the Appellants can not do. As shown above, the Commission's construction of section 364.385(3) is not just a reasonable one; it is the appropriate construction. Accordingly, this Court should defer to the Commission's informed, reasonable construction of its own statute, and affirm the Order on Appeal.

FIXCA attempts to avoid the clear import of section 364.385(3) by pointing to the definition of a "basic local telecommunications service" in newly revised section 364.02(2). The Commission held the ECS routes at issue to be a local service under its previously established policy. FIXCA points out, however, that this is inconsistent with the new statutory definition, which provides that ECS routes installed after July 1, 1995 (the effective date of the new statutes) are to be considered "non-basic". This circular

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[15]Indeed, as the Commission noted, if the Settlement Order was truly subject to the newly revised statutes, the Commission would be substantially hindered in implementing it because the new statutes reduce the Commission's ability to require revenue reduction measures. (Order at 5)

logic adds nothing to the required statutory analysis; it simply begs the question. If the newly revised statute applies then, yes, ECS routes should be considered non-basic and their rate structure should be construed in light of the imputation requirements of section 364.051(6)(c). The question remains, however, does the revised Chapter 364 apply? As shown above, in this case, it does not.

FIXCA also contends that the Commission's order "permanently exempt[s] ECS from the new law's requirements". (FIXCA Brief at 15) That is simply wrong. The Order below announces the Commission's well-grounded opinion that its implementation of the Settlement Order's revenue reductions is not constrained by the new law. There is one unspecified rate reduction left to be implemented. Whether all or part of that reduction may take the form of ECS routes is unknown at this time[16], but it is clear that the Commission did not hold that ECS, generically, is exempted from the provisions of the new law.[17]

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[16]In the Southeast Florida LATA alone there are well over 600 BellSouth routes not subject to ECS. (Order at 12) None of those routes is at issue in these proceedings.

[17]MCI makes a similar argument, pointing to the fact that the ECS revenue reductions approved have an estimated impact of $48 million, well over the $25 million required by the Settlement Order. MCI cautions that BellSouth could implement its remaining revenue reductions to "monopolize long distance service throughout its territory", presumably by implementing more ECS routes than are required. This is wrong. The estimated impact of the ECS routes at issue here is an unstimulated impact. (Order at 10) Implementation of the ECS routes will have a revenue stimulation effect which will temper the actual revenue reduction.

MCI's arguments are similarly flawed. MCI claims in essence that a portion of section 364.385(2) is more specific that section 364.385(3), and therefore under the maxim of statutory construction that the specific controls the general, section 364.385(2) controls. The portion of section 364.385(2) upon which MCI focuses provides:

> All applications for extended area service, routes, or extended calling service pending before the commission on March 1, 1995, shall be governed by the law as it existed prior to July 1, 1995 [the date of the statutory revisions].

§ 364.385(2), FLA. STAT. (1995). MCI contends that the reference to ECS routes in this statute is more specifically applicable to the proceeding below than is section 364.385(3). The proceeding below, however, was not initiated to adjudicate an "application" for ECS routes; it was initiated to determine how BellSouth's revenues would be reduced under the Settlement Order. ECS routes were just one of three proposals proffered. MCI's focus on the fact that the proceedings involved ECS thus focuses on minutia rather than the operative issue. The proceedings below were about the Settlement Order and section 364.385(3) deals specifically with the Settlement Order. Section 364.385(3) is the more specifically applicable section, and it primes the more generic reference to ECS applications in section 364.385(2).[18]

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[18]Furthermore, the portion of section 364.385(2) upon which Appellants rely pertains to "applications" for ECS service. As discussed in the following section, the proceedings below do not involve such an "application". The following section demonstrates that even if section 364.385(3) were not controlling, a different clause in section 364.385(2) would apply instead of the clause pertaining to "applications" for ECS, and would exempt the

The Appellants would allow the Commission to continue to implement the revenue reductions, but would limit its options according to a new regulatory scheme which was not in the parties contemplation when the Settlement Order was negotiated and issued, and which is motivated by considerations entirely distinct from those which shaped the settlement. As shown above, this argument contravenes the clear legislative intent not to impact the administration of the Settlement Order. For this reason, the appeal should be rejected and the Order on Appeal affirmed.

B. Even if section 364.385(3) did not apply, the proceedings below were exempted from operation of the new statutes by section 364.385(2).

Even assuming section 364.385(3) does not apply (though it clearly does), section 364.385(2) requires that the proceeding below be governed by the prior statutes.

Section 364.385(2) contains two provisions potentially applicable below. First, "applications" for extended area services, including ECS, will be governed by the prior statutes if filed on or before March 1, 1995, and by the revised statutes if filed after that date. Second, "proceedings" initiated prior to July 1, 1995 will be governed by the prior statutes, while proceedings initiated after that date will be governed by the revised statutes. See § 364.385(2), FLA. STAT. (1995). The

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proceeding below from operation of the revised statutes. As between sections 364.385(2) and (3), however, it goes without saying that the reference in sub-section (2) to "applications" for ECS cannot apply more specifically to this matter than sub-section (3) if it does not apply at all.

proceeding below was initiated well prior to July 1, but ECS was not specifically proposed until after March 1. Therefore, if the latter section controls then the statutory revisions are inapplicable and the Order below must be affirmed, because the proceedings below were initiated well prior to July 1, 1995. If the former provision controls, however, then the revised statute applies and the case should be remanded for consideration of the imputation requirement.

As between the two clauses in section 364.385(2), and assuming section 364.385(3) does not apply (though as shown above, sub-section (3) is the most specifically-applicable section), the provision pertaining to an "application" for ECS is clearly more specific that the provision pertaining to "proceedings" generically. Therefore, under the maxim that the specific controls the general, if the proceeding below involved an "application" for ECS within the meaning of section 364.385(2) then the revised statutes should have been applied.[19] In fact, however, the proceeding below did not involve an application at all, and if any portion of section 364.385(2) applies it is the clause pertaining to "proceedings" initiated prior to July 1, 1995.

Appellants' implicitly contend that all proceedings which involve ECS routes in any manner whatsoever automatically constitute "applications" for ECS routes under section 364.385(2).

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[19]Again, this entire line of reasoning assumes section 364.385(3) is inapplicable. BellSouth submits, however, that subsection (3) is indeed applicable and, as the most specific portion of the entire statute, it is controlling no matter what the result in subsection (2).

That makes no sense. While the terms "application" and "proceeding" are not defined in the statutes, the Legislature must be presumed to have intended different meanings by using different terms. Therefore, a "proceeding" which in some way involves ECS is not necessarily an "application" for ECS.

Moreover, standard industry usage suggests that an "application" for ECS (or EAS, for that matter) is a petition submitted pursuant to Rule 25-4.059, F.A.C., typically by ratepayers or their representatives. In this situation the Commission would have the authority, under the prior law (and rate of return regulation), to require LECs to implement Extended Area Service (a mandatory form of extended service) or some other alternative, including ECS.[20] The proceedings below are materially different. The proceedings below involved proposals by BellSouth, McCaw and CWA to reduce BellSouth's revenues pursuant to the Settlement Order, which had been pending since 1994. (See Settlement Order at 38-39; Implementation Agreement at 12-13) Only one of the three proposals involved ECS, and that proposal was not a consumer application under Rule 25-4.059 but a rather "tariff proposal" by BellSouth according to F.A.C. Chapter 25-9. (See Order at 4).

Appellants argument, then, that because the proceedings below involve ECS routes they constitute an "application" under the first clause of section 364.385(2) is off the mark. The Settlement Order

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[20]See Rule 25-4.064, F.A.C., dealing with alternatives to non-optional extended area service.

required that the proceeding below be commenced to determine how BellSouth's revenues would be reduced. It was not an "application" for ECS routes, it was a hearing on how to reduce BellSouth's revenues. Thus the construction of section 364.385(2) in this case does not present a "general versus specific" dichotomy at all, because only one clause applies. The proceeding below constituted a "proceeding" within the second clause of that statute, it was pending prior to July 1, 1995, and therefore under the clear meaning of the savings clause the Commission appropriately conducted the proceeding under the prior statutes.

II. The Commission's Determination That The ECS Routes Are Not Anticompetitive Is Supported By Competent Substantial Evidence.

MCI and FIXCA contend that the Order on Appeal is anticompetitive and will result in a "re-monopolization" of toll services on these routes. It is argued that because the Commission applied prior law and classified the ECS routes as a local service, and did not provide for the ECS rates to meet the imputation requirement of section 364.051(6)(c), the Order allows BellSouth to engage in an anticompetitive "price squeeze", charging its ECS customers one rate while charging competing IXCs a higher rate in order to interconnect with BellSouth's facilities.

This argument fails. First, as shown above, the Legislature clearly exempted the administration of the Settlement Order from the effect of the new statutes, including the imputation requirement. Whether this was wise or ill-advised, the Legislature

clearly had the authority to do this and the Commission made the only ruling consistent with this statutory exemption.

Moreover, this argument simply reargues the evidence, and asks this Court to rule on that evidence as a matter of first impression. The fact is, however, that the Commission specifically found that the IXCs could continue to compete on the ECS routes at issue and that the ECS rates approved did not pose a "re-monopolization" danger:

> Some of the intervenors express concerns that approval of the ECS plan will re-monopolize the provision of toll service throughout a significant portion of Southern Bell's operating territory. However, as discussed subsequently in this Order, interexchange companies (ICXs) may continue to carry the same types of traffic on these ECS routes that they are now authorized to carry. Additionally, under the revised telecommunications statutes, specifically Section 364.337, Florida Statutes, providing for alternative local exchange telecommunication companies (ALECs) on January 1, 1996, there could be additional competition for this traffic, as well as for other local services. In fact, the 17+ holders of Alternative Access Vendors' (AAVs) certificates as of July 1, 1995, upon notification to the Commission, are certificated as ALECs.
>
> Intervenors also expressed concern that the ECS calls would be dialed on a seven-digit basis. Southern Bell's witness does not believe seven-digit dialing gives the Company an insurmountable competitive edge. While ECS offers a slightly more convenient dialing pattern, it does not offer customers the advantage of aggregating their usage for discount purposes [a reference to another kind of competitive edge that the IXCs have which is not available to BellSouth in selling ECS services]
>
> * * * *
>
> In contrast, all parties to this docket agree that IXCs should be permitted to continue to carry this traffic. Given our decision, discussed beginning on page 20 of this Order, that competition shall be allowed on these routes, there is no cognizable argument that this plan would, as a matter of law, remonopolize the intraLATA toll market.

* * * *

> After January 1, 1996, the potential for the competitive provision of telecommunications services in Florida will be greatly expanded. ALECs, as well as IXCs, will be able to compete for this traffic.

(Order at 13-1, emphasis added) The Commission's holding is supported by competent substantial evidence, and this Court should not supplant the Commission as the finder of fact but rather must affirm the Commission's factual determination. See e.g. Manatee County v. Marks, 504 So. 2d 763, 764-65 (Fla. 1987). It is the Commission's prerogative to evaluate and choose between conflicting evidence, and to determine what inferences to draw from the evidence. Id. An appellate court will not re-weigh or re-evaluate the evidence, even if it might have reached a different result had it been the decision-maker. Id. If competent substantial evidence exists the Commission's decision may not be overturned.

Furthermore, Orders of the Commission are clothed with a presumption of correctness. United Telephone Co. v. Public Service Comm'n, 496 So. 2d 116, 118 (Fla. 1986). As the party seeking to overturn the Commission's order, FIXCA and MCI have the burden of demonstrating to this Court that the Commission's order was arbitrary or unsupported by any competent evidence at all. See Manatee County, 504 So. 2d at 765. If they fail to carry this burden then the Order on Appeal must be affirmed.

Appellants cannot carry this burden; the record is replete with evidence supporting the Commission's determination. First, Appellants' argument assumes that price is the sole competitive factor within the relevant market, but there is record evidence to

the contrary. Unlike LECs, IXCs have been able to provide "one stop shopping" for toll services -- intraLATA, interLATA, interstate and international. (Hrg. Tr. at 225-26, 371-72) Many will provide discount plans based on the total volume of toll use, including interstate and international. (Id. at 225-26). IXCs would not do this if it did not make economic sense, i.e. if it did not afford them some advantage. Moreover, the LECs have been precluded by law from offering competing programs.

In addition, Appellants' argument assumes that IXCs must price toll service on ECS routes at least at the level of their costs of local interconnection. That too is contradicted by the evidence. IXCs can utilize "melded" access rates, blending both intrastate and the lower interstate rates in establishing their toll floor, and the Commission has recognized the technical advantage this affords the IXCs.[21] There is testimony in the record that this pricing flexibility allows IXCs to compete even for ECS routes. (Hrg. Tr. at 371-72)

Finally, Appellants' argument assumes that the particular ECS routes at issue comprise a relevant market for competitive purposes but there is no evidence in the record to support that contention. Indeed, depending on how the relevant market is determined BellSouth could capture 100% of the intraLATA toll market (a completely unrealistic construct) and the IXCs would still control over 80% of the total toll market. (Hrg. Tr. at 61)

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[21]See the Commission's Order number 24859 in Docket 900708-TL.

Thus there is substantial, competent evidence in the record upon which the Commission properly concluded that the implementation of the ECS routes at issue will not preclude competition. Simply put, this is neither the time nor the forum in which to argue the weight of the evidence. The record clearly contains competent substantial evidence to support the Commission's determination, and thus it meets (and in reality exceeds) the standard of review. This Court should, therefore, reject the Appellants' invitation to supplant the Commission as fact-finder. For the reasons stated, the Order should be affirmed.

CONCLUSION

For the reasons set forth above, the Order on Appeal should be affirmed. The Legislature has clearly expressed its intent not to change in mid-stream the rules by which the Settlement Order is administered and the determination below, by the Commission in construing the very statute which it administers, is clearly in the public interest.

Respectfully submitted,

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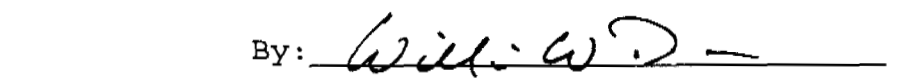
By: 

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following parties of record on this 1st day of March, 1996.

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