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IN THE SUPREME COURT OF FLORIDA

SID J. WHITE

MAR 1 1996

CLERK SUPREME COURT
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FLORIDA INTEREXCHANGE
CARRIERS ASSOCIATION,

Appellant,

v.

Case No. 86,957
PSC Docket No. 920260-TL

SUSAN F. CLARK, etc. et al.

Appellees.

CITIZENS' ANSWER BRIEF

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FLORIDA PUBLIC SERVICE COMMISSION ORDERS

PSC 94-0172-FOF-TL 1

SUMMARY OF ARGUMENT

Under well established precedent, the Court should give great deference to the interpretation of recent revisions to chapter 364, Florida Statutes, made by the Florida Public Service Commission. These revisions changed the fundamental manner of regulating local exchange companies. The Commission's determination that the most recent Extended Calling Service routes proposed by Southern Bell constitute a basic local telecommunications service should not be disturbed by the Court.

However, if the Court should decide that ECS is a non-basic service, the Court should do no more than require the Commission to determine whether ECS service complies with the requirements of Section 364.051(6)(c), Florida Statutes (1995).

ARGUMENT

I. THE COURT SHOULD GIVE GREAT DEFERENCE TO THE DECISION BY THE FLORIDA PUBLIC SERVICE COMMISSION THAT ECS IS A BASIC SERVICE.

The 1995 amendments to chapter 364, Florida Statutes, overturned decades of rate-of-return, rate base regulation of large local exchange companies by the Florida Public Service Commission. It replaced this type of regulation with an entirely new regulatory scheme generally described as price regulation. This proceeding called upon the Commission to determine how to classify a type of local calling (extended calling service, or ECS) that was implemented many times in other geographic locations before the statutory changes made in 1995.

Section 364.385(3), Florida Statutes (1995) directs that Florida Public Service Commission order no. PSC 94-0172-FOF-TL remain in effect notwithstanding the amendments to chapter 364, Florida Statutes. This order comes in the same docket as this one before the Florida Public Service Commission.

The Commission found that the provisions of section 364.385(3), Florida Statutes (1995) contain a more specific expression of legislative intent than the provisions regarding ECS found in Section 364.385(2), Florida Statutes (1995), and that these provisions allowed the Commission to find the ECS plan proposed by Southern Bell in this docket is a basic local telecommunications service. This is a reasonable interpretation

of the statute and should be upheld.

Although conclusions of an agency that construes a statute with which the agency is charged to enforce are not immune from judicial review, great deference is accorded such determinations. Department of HRS v. A.S., 648 So.2d 128 (Fla. 1995); Florida Cable Television Ass'n v. Deason, 635 So.2d 14 (Fla. 1994). The standard of review in such instances is whether the determination is clearly erroneous, and whether there is competent, substantial evidence to support the conclusion. Fort Pierce Utils. Auth. v. Beard, 626 So.2d 1356, 1357 (Fla. 1993); PW Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988). The appellate court will give deference to any interpretation by an agency that falls within the permissible range of statutory interpretations. Sunshine Jr. Stores, Inc. v. State, Dep't of Environmental Regulation, 556 So.2d 1177 (Fla. 1st DCA 1990), review denied, 564 So.2d 1085 (Fla. 1990), citing Dep't of Professional Reg., Bd. of Medical Examiners v. Durrani, 455 So.2d 515, 517 (Fla. 1st DCA 1984); Dep't of Admin. v. Nelson, 424 So.2d 852, 858 (Fla. 1st DCA 1982); State Dep't of Health & Rehab. Servs. v. Framat Realty, Inc., 407 So.2d 238, 241 (Fla. 1st DCA 1981).

II. THE PROCEEDING BELOW WAS GOVERNED BY THE LAW AS IT EXISTED PRIOR TO THE 1995 REVISIONS TO CHAPTER 364, FLORIDA STATUTES.

Section 364.385(2), Florida Statutes (1995) states that

"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. Upon approval of the application, the extended area service, routes, or extended calling service shall be considered basic services and shall be regulated as provided in s.364.051 for a company that has elected price regulation. Proceedings including judicial review pending on July 1, 1995, shall be governed by the law as it existed prior to the date on which this section becomes a law. No new proceedings governed by the law as it existed prior to July 1, 1995, shall be initiated after July 1, 1995..."

Florida Public Service Commission docket 920260-TL began in 1992 as a general rate case proceeding. A settlement reached in January, 1994, formed the basis for the unspecified \$25 million rate reduction at issue now before the Court. Southern Bell filed its ECS tariff and supporting testimony was prior to July 1, 1995.

Since the proceeding was pending on July 1, 1995, pursuant to section 364,385(2), Florida Statutes (1995) it was governed by the law as it existed prior to the 1995 changes made to Chapter 364, Florida Statutes.

III. EVEN IF ECS WERE A NON-BASIC SERVICE, THERE WAS NO EVIDENCE BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION SHOWING THAT THE ECS PLAN VIOLATED THE IMPUTATION TEST CONTAINED IN SECTION 364.051(6)(c), FLORIDA STATUTES (1995).

The parties before the Commission presented no evidence concerning the direct cost of ECS service. According to Section 364.051(6)(c), Florida Statutes (1995),

"The price charged to a consumer for a nonbasic service shall cover the direct costs of providing the service and shall, to the extent a cost is not included in the direct cost, include as an imputed cost the price charged by the company to competitors for any monopoly component used by a competitor in the provision of its same or functionally equivalent service."

Before applying an imputation test, there must be evidence showing that the price charged for a service does not cover the direct cost of providing the service. Imputation applies only if the price does not cover the direct cost, and then only to the extent that a cost is not included in the direct cost of a service. Since no party presented any evidence before the Florida Public Service Commission showing the direct cost of ECS service, there was no evidence before the Florida Public Service Commission allowing the Commission to conclude that ECS service was required to pass the imputation requirement of Section 364.051(6)(c), Florida Statutes (1995).

If the Court should remand the case to the Florida Public Service Commission, MCI asks the Court to require the Commission to set a price relationship between ECS service and access charges that either increases the price of ECS service or decreases the price of access charges. MCI brief at 27-28. MCI

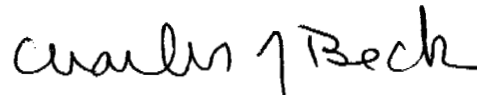
assumes too much. If the Court should remand the order to the Florida Public Service Commission, the Court should require no more than require the Commission to determine whether ECS service complies with the requirements of section 364.051(6)(c), Florida Statutes (1995).

CONCLUSION

The Court should affirm the Commission's decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 1st day of March, 1996.

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