IN THE SUPREME COURT OF FLORIDA

FLORIDA INTEREXCHANGE CARRIERS ASSOCIATION, ET AL., Appellants vs. FLORIDA PUBLIC SERVICE COMMISSION, ET AL., Appellees.	CASE NO. 86,957

INITIAL BRIEF OF APPELLANT MCI TELECOMMUNICATIONS CORPORATION

On Appeal from Final Order of the
Florida Public Service Commission
Docket No. 920260-TP

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STATEMENT OF THE CASE AND FACTS

This case involves the implementation by Southern Bell Telephone and Telegraph Company (Southern Bell) of a $25 million rate reduction required by the terms of a Stipulation and an Implementation Agreement approved by Florida Public Service Commission (Commission). The issue on appeal is whether the Commission erred in its determination that the Extended Calling Service (ECS) which was implemented on 288 routes to effectuate that rate reduction is "basic service," rather than "nonbasic service," under the recently revised provisions of Chapter 364, Florida Statutes.

Background

This case is one of the final chapters in Southern Bell's transition from rate base regulation to price regulation. In 1988, the Commission approved a three-year Rate Stabilization Plan for Southern Bell. In re: Petitions of Southern Bell for Rate Stabilization and Implementation Orders and Other Relief, Order No. 20162, 1988 F.P.S.C. 10:311 (1988). Under this plan, which required Southern Bell to share with its customers earnings within a specified range, and to refund to its customers earnings above the top of that range, Southern Bell was granted more earnings flexibility than it had previously enjoyed under traditional rate of return regulation.

In 1992, after some interim extensions of the plan, the Commission initiated a proceeding to evaluate the results of the plan and to determine whether, and in what form, the plan should be

continued. As part of that proceeding, the Commission required Southern Bell to file the information necessary to conduct a full revenue requirements analysis of Southern Bell's operations under traditional rate base, rate of return principles.[1] (App. A at 3) The Office of Public Counsel (OPC) and a number of other intervenors, including MCI Telecommunications Corporation (MCI) and the Florida Interexchange Carriers Association (FIXCA) participated actively in that proceeding. That proceeding was ultimately consolidated with four other Commission dockets involving Southern Bell.

On January 5, 1994, Southern Bell and OPC filed with the Commission a Stipulation and Agreement (the "Stipulation") as a complete settlement of four of the five consolidated dockets. (App. A at 3) Under the Stipulation, Southern Bell would continue to operate under a modified version of the Rate Stabilization Plan, and would also be required to make various tariff changes and rate reductions totalling $115 million in 1994, $80 million 1995, and $84 million in 1996. Except for $55 million associated with the elimination of Touch-Tone charges in 1994, the Stipulation left the application of the required rate reductions to particular services

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[1] The order on appeal, which sets out some of the history of this proceeding, is attached as Appendix A. It appears in the record on appeal beginning at R. 458.

to be decided by the Commission in future proceedings.[2] (App. B at 15, 17-18)

On January 12, 1994, Southern Bell and the other parties to the proceeding filed with the Commission an Implementation Agreement for Portions of the Unspecified Rate Reductions in the Stipulation and Agreement Between OPC and Southern Bell (the "Implementation Agreement"). (App. A at 3) Under the Implementation Agreement, the parties agreed to the specific application of (i) an additional portion of the rate reduction for 1994, and (ii) portions of the scheduled rate reductions for 1995 and 1996. (App. B at 31-38) The Implementation Agreement also established the procedure under which the Commission would decide how to apply the remaining "unspecified" rate reductions:

> The PARTIES agree that the Commission shall conduct hearings to determine the rate design by which the amounts not specifically allocated by the Stipulation and this Implementation Agreement shall be disposed of in 1994 ($10 million), 1995 ($25 million), and 1996 (approximately $48 million).
>
> (App. B at 38)

Under the Implementation Agreement, proposals for the future unspecified rate reductions were to be submitted by interested parties not less than 120 days prior to the scheduled effective date of each reduction. (App. B at 38-39)

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[2] A copy of the Commission's order approving the stipulation (Order No. PSC-94-0172-FOF-TL), which includes as attachments the Stipulation referred to in this paragraph and the Implementation Agreement referred to in the next paragraph, is attached as Appendix B. It appears in the record on appeal beginning at R. 1.

On January 18, 1994, the Commission voted to approve the Stipulation and the Implementation Agreement. (App. A at 3) This approval was embodied in Order No. PSC-94-0172-FOF-TL (the "Order Approving Stipulation"). In re: Comprehensive review of the revenue requirements and rate stabilization plan of Southern Bell, 1994 F.P.S.C. 2:238 (1994).

Current Proceeding

On May 15, 1995, Southern Bell filed its proposal to implement the $25 million of unspecified rate reductions scheduled to take place on October 1, 1995. (App. A at 4; Ex. 1) Southern Bell proposed to convert 252 long-distance toll calling routes to Extended Calling Service (ECS). (See T 43) ECS is essentially a pricing plan under which traffic on long-distance toll routes is repriced on a per-message or reduced per-minute basis.

Under ECS, a residential customer pays a flat $0.25 per call regardless of distance or call duration, rather than the distance-sensitive, per-minute charges previously associated with toll calls. (T 47-48; Ex. 1 at 6) A business customer also pays a reduced per-minute charge of $0.10 for the first minute and $.06 for each additional minute. (T 48; Ex. 1 at 6)

Southern Bell estimated that the conversion of these 252 routes from toll service to the ECS pricing plan would result in an annualized revenue reduction of approximately $43.5 million.[3] (App.

[3] The $43.5 million figure is the number reflected in the Commission's final order. Southern Bell presented several sets of numbers that produce different revenue reduction estimates. The original filing contained a $42.9 million estimate. (Ex. 1 at 1, 6) A subsequent exhibit to the deposition of Southern Bell's witness

A at 10) This amount is well in excess of the $25 million required by the Commission-approved Stipulation and Implementation Agreement.

Other parties made competing proposals for the application of the $25 million rate reduction, and the Commission scheduled a hearing on the proposals for July 31, 1995.

On July 28, 1995, three days prior to the start of the hearing, Southern Bell amended its proposal to include 36 additional long-distance toll calling routes in its ECS plan. (Ex. 5) The Commission found that the conversion of these routes would have an additional $4.5 million revenue impact.[4] (App. A at 10) Using the figures adopted by the Commission, the implementation of the ECS pricing plan on these 288 toll routes results in an overall projected revenue reduction of $48.0 million a year. (App. A at 10)

At the hearing, and in the post-hearing briefing process, MCI and other intervenors opposed Southern Bell's ECS plan. One of the primary bases for the opposition was that approval of the ECS plan would effectively re-monopolize long-distance toll service along these 288 calling routes, on which long-distance interexchange carriers (IXCs) such as MCI and AT&T were currently allowed to compete. (T 295-6, 317-8) This re-monopolization would occur

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Hendrix estimated the effect at $3.614 million per month, which translates to approximately $43.4 million annually. (Ex. 22, Item 1) And a Southern Bell interrogatory answer shows the effect to be $44.7 million, i.e. annual toll loss of $97.3 million less annual ECS revenue of $52.6 million. (Ex. 7 at 23)

[4] This compares to the $6 million estimated by Southern Bell in its July 28, 1995 filing. (Ex. 5 at 1)

because Southern Bell's retail price for ECS service is lower than the wholesale price that Southern Bell charges to MCI and other IXCs for switched access service, which is a necessary input into the IXCs' "competitive" long-distance service.[5] (T 297-9; see Ex. 20 at 1, 2)

The anti-competitive effect of this pricing relationship can be demonstrated by a simple example. Southern Bell estimates that the average duration of a residential ECS call is 4.2 minutes. (T 81, 111; Ex. 22, Item 2) The retail price for such a call is $.25. (T 48) Thus the average residential ECS revenue is less than $.06 per minute. ($.25 / 4.2 = $.05952) On the other hand, an IXC which carries the same call along the same route must pay Southern Bell switched access charges which total more than $.07 per minute.[6] This means that Southern Bell's retail ECS price is less than the wholesale access charge rate that Southern Bell's competitors must pay to Southern Bell for originating and terminating a

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[5] When a telephone customer makes a long-distance call using an interexchange carrier, the originating end of the call uses facilities of the calling party's local telephone company to reach the IXC. Similarly, the terminating end of the call uses the facilities of the local telephone company to reach the called party's premises. The IXC pays the affected local telephone company(ies) "switched access charges" on a per-minute of use basis as compensation for this originating and terminating service. Because the local telephone companies are the only firms with telephone facilities to the customers' premises, the use of their switched access service is an essential, monopoly input into the IXCs' long-distance service.

[6] Southern Bell estimated that originating and terminating switched access charges would total $.07152 per minute effective October 1, 1995. (Ex. 21) Using information in other interrogatory answers provided by Southern Bell, FIXCA's witness Mr. Gillan estimated that such access charges would total $.0745 per minute. (T 299)

"competitive" long-distance call. As Mr. Gillan summarized the situation:

> Q. And would it also be safe to say that if ECS, if Southern Bell's proposal in this case were approved without taking the actions you have proposed, then there will be no competition on these 288 routes in question?
>
> A. Without a doubt. It just don't make any sense at all for any interexchange carrier or any competitive firm to go in and try and attract customers and provide them a better service or a high quality service, whatever, charge those customers 6 cents a minute and turn around and pay Southern Bell 7.5 cents a minute. It just doesn't work. You can't take in 6 cents and send out 7.5 cents and do it very long.
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> (T 316)

MCI and others contended that this pricing relationship violates the provisions of the recently enacted amendments to Chapter 364, Florida Statutes.[7] In particular, MCI contended that this pricing relationship violates Section 364.051(6)(c), Florida Statutes (1995), which requires the price charged by Southern Bell to a retail consumer for a "nonbasic service" to cover, among other

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[7] Chapter 364 was substantially amended by Chapter 95-403, Laws of Florida, which took effect on July 1, 1995. These amendments, among other things, eliminate the monopoly over local exchange service effective January 1, 1996 in the territories of Florida's large local telephone companies, authorize the certification of alternative local exchange companies, and allow the incumbent local exchange companies such as Southern Bell to elect statutory price regulation as an alternative to traditional rate base, rate of return regulation. Southern Bell elected such price regulation effective January 1, 1996, the earliest date on which such an election could become effective. See, In re: Notice of election of price regulation by Southern Bell, Order No. PSC-96-0036-FOF-TL, 1996 F.P.S.C. 1:___ (January 10, 1996).

things, the price charged by Southern Bell to MCI for switched access, the monopoly component of MCI's functionally equivalent long-distance service.[8]

On November 8, 1995, the Commission entered Order No. PSC-95-1391-FOF-TL (the "ECS Order")[9] in which it approved, with Commissioners Clark and Kiesling dissenting, the implementation of the ECS pricing plan on the 288 routes requested by Southern Bell as the method for making the required $25 million rate reduction.[10] (App. A at 4) The ECS Order expressly provided that competition would continue to be permitted on these ECS routes. (App. A at 4) In other words, IXCs can continue to carry long-distance toll calls on these routes. (App A. at 20-1)

The ECS Order further held that ECS on these routes constitutes "basic service" under the provisions of revised Chapter 364. (App. A at 7-8) As a basic service, the Commission held that the ECS pricing plan on these routes is not subject to the imputation requirements imposed by Section 364.051(6)(c), Florida Statutes (1995), on nonbasic services. (App. A at 8) In light of this holding, the Commission made no finding as to whether the

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[8] Southern Bell agreed that intraLATA toll service is the IXC service which will compete with ECS. (Ex. 20 at 1) Southern Bell also admitted that it intends to charge the IXCs tariffed switched access charge rates for originating and terminating long-distance toll calls along these ECS routes. (Ex. 20 at 2)

[9] This order is reported as In re: Comprehensive review of the revenue requirements and rate stabilization plan of Southern Bell, 1995 F.P.S.C. 11:313 (1995).

[10] The vote which was embodied in the order was taken on September 26, 1995.

retail prices for ECS service meet the statutory imputation standard.

On November 28, 1995, FIXCA filed its Notice of Appeal of the ECS Order. (R. 498) On December 7, 1995, MCI filed its Notice of Joinder as an Appellant.

By order dated January 8, 1996, the Commission denied FIXCA's and MCI's Motions for Stay pending appeal of the ECS Order, and delayed the implementation date for the 288 new ECS routes to January 15, 1996. In re: Comprehensive review of the revenue requirements and rate stabilization plan of Southern Bell, Order No. 96-0020-FOF-TL, 1996 F.P.S.C. 1:___ (1996). Southern Bell has now implemented ECS calling on the 288 affected routes.

Scope of Appeal

MCI's appeal does not seek review of the Commission's decision to use the establishment of ECS on these 288 routes as the method for implementing the required $25 million rate reduction. Although MCI strenuously opposed this action at the administrative level, it did not prevail before the Commission and it was unsuccessful in obtaining from the Commission a stay of the ECS Order pending appeal. MCI recognizes that once the ECS pricing plan has been implemented on these routes, there are technical, practical, and political reasons that the former status quo cannot be restored.

MCI therefore is seeking review only of the Commission's decision that ECS is a "basic service" under Chapter 364, and hence is not required to meet the imputation requirements of Section 364.051(6)(c), Florida Statutes (1995).

STATUTES INVOLVED

The resolution of this appeal will require the Court to construe a number of provisions of Chapter 364, Florida Statutes (1995) that were added or amended by Chapter 95-403, Laws of Florida. The applicable portions of the revised statute are set forth below for ease of reference.

Section 364.02(2), Florida Statutes (1995), defines basic local telecommunications service as follows:

> (2) "Basic local telecommunications service" means voice-grade, flat-rate residential, and flat-rate single-line business local exchange services. . . . For a local exchange telecommunications company, such term shall include any extended area service routes, and extended calling service in existence or ordered by the commission on or before July 1, 1995.

Section 364.02(8), Florida Statutes (1995), defines nonbasic service as follows:

> (8) "Nonbasic service" means any telecommunications service provided by a local exchange telecommunications company other than a basic local telecommunications service, a local interconnection arrangement described in s. 364.16, or a network access service described in s. 364.163.

Section 364.051(6)(c), Florida Statutes (1995), establishes an imputation standard which must be met by each nonbasic service provided by a local exchange telephone company, such as Southern Bell, which has elected price regulation:

> (6) NONBASIC SERVICES.-- Price regulation of nonbasic services shall consist of the following:
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> * * *
>
> (c) 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.

Section 364.385, Florida Statutes (1995), contains two savings clauses potentially applicable to this case:

> (2) 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 the 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. Any administrative adjudicatory proceeding which has not progressed to the stage of a hearing by July 1, 1995, may, with the consent of all parties and the commission, be conducted in accordance with the law as it existed prior to January 1, 1996.
>
> (3) Florida Public Service Commission Order No. PSC-94-0172-FOF-TL [the Order Approving Stipulation] shall remain in effect, and BellSouth Telecommunications, Inc. [d/b/a Southern Bell], shall fully comply with that order unless modified by the Florida Public Service Commission pursuant to the terms of that order. . . .

(bracketed material added) It is these provisions that the Commission misconstrued in reaching its conclusion that ECS service on the 288 new routes is "basic service" and hence is exempt from the statute's imputation requirements.

SUMMARY OF ARGUMENT

This is a case of first impression. It requires the construction of a number of provisions of Chapter 364 which were added or amended by the comprehensive rewrite of Florida telecommunications law contained in Chapter 95-403, Laws of Florida.

If Extended Calling Service (ECS) is, as the Commission concluded, a "basic service" under Chapter 364, then the price of the service is subject to the price cap provisions of Section 364.051(2), Florida Statutes (1995). If ECS is, as Appellants contend, a "nonbasic service" under Chapter 364, then its pricing is subject instead to the imputation and other requirements imposed by Section 364.051(6), Florida Statutes (1995).

The status of ECS service is answered by the plain language of the statute. Under Section 364.02(2), ECS on a particular route is basic service only if it was "in existence or ordered by the commission on or before July 1, 1995." ECS service was not in existence on the 288 long-distance toll calling routes at issue in this appeal on July 1, 1995. Its implementation was not ordered by the Commission until either September 26, 1995 (the date of the Commission's vote) or November 8, 1995 (the date of the ECS Order), either of which is well after the July 1, 1995 cut-off date. Thus ECS service on these 288 routes is not a basic service unless some provision of the savings clauses requires a contrary result. They do not.

Section 364.385(2) provides that "all applications for. . . extended calling service pending before the Commission on March 1, 1995" shall be governed by the prior law and, upon approval, "shall be considered basic services. . . ." Southern Bell's application for extended calling service on 252 of the routes at issue here was filed on May 15, 1995, well after the March 1, 1995 cut-off date. Southern Bell's application for the remaining 32 routes was filed even later, on July 28, 1995. Since there was no application for ECS service on these routes pending before the Commission on March 1, 1995, such ECS service cannot acquire the status of "basic service" when ultimately approved by the Commission. It remains nonbasic service.

The Commission erred when it construed Section 364.385(3) to reach the opposite conclusion. That section simply preserves the effect of the Order Approving Stipulation, which was entered under an earnings regulation regime, in a subsequent time period when Southern Bell would no longer have its earnings regulated by statute. It means that notwithstanding Southern Bell's election to be governed by the price regulation provisions of Chapter 364 effective January 1, 1996, Southern Bell remains obligated, for the term of the Stipulation and Implementation Agreement, to share or refund earnings above certain levels, to make the prospective rate reductions scheduled for October 1, 1995 and 1996, and to comply with the other terms of the Order Approving Stipulation. Nothing in Section 364.385(3), or in the Order Approving Stipulation preserved by that section, confers a special status on ECS

proposals made by Southern Bell pursuant to the order or exempts such proposals from the other provisions of Chapter 364.

The general rule that the construction of a statute by the agency charged with its implementation is entitled to deference by the Court does not apply when, as here, the agency's interpretation is contrary to the plain language of the statute.

The Commission's decision that these 288 ECS routes are basic service also contravenes the intent of the statute. If ECS is a basic service, then the Commission's determination that IXCs will continue to be allowed to compete on the long-distance toll routes converted to the ECS pricing plan is a hollow gesture. Unless the imputation requirements of Section 364.051(6)(c) are applied to ECS service on these routes, IXCs cannot afford to compete. One cannot compete against Southern Bell's retail ECS price of $0.25 per message when one is required to pay Southern Bell a wholesale rate of over $.07 per minute for the switched access which is an essential monopoly component of the "competitive" long-distance service. By misclassifying these ECS routes as basic service, the Commission has denied competitors the protection against price squeezes on these routes that the Legislature intended to afford when it enacted the imputation requirements of Section 364.051(6)(c), Florida Statutes.

It is impractical, if not impossible, to restore Southern Bell's long-distance pricing on these 288 routes. The Court nevertheless should reverse the Commission's erroneous determination that these ECS routes are basic service. The Court

should then remand the case to the Commission with instructions to set switched access charges for long-distance toll calls provided by IXCs on these routes at a level which would enable Southern Bell's ECS prices to pass the imputation test imposed by Section 364.051(6)(c), Florida Statutes.

ARGUMENT

I. THE COMMISSION ERRED WHEN IT CONCLUDED THAT ECS SERVICE ON ROUTES PROPOSED ON MAY 15, 1995 AND APPROVED ON NOVEMBER 18, 1995 IS "BASIC SERVICE" UNDER THE PROVISIONS OF REVISED CHAPTER 364.

The sole legal issue on this appeal is whether ECS service on the 252 routes proposed by Southern Bell on May 15, 1995 and the 36 additional routes proposed by Southern Bell on July 28, 1995 is "basic service" or "nonbasic service" under the provisions of revised Chapter 364.

This question is of more than academic importance. The manner in which Southern Bell's ECS service is regulated depends on its classification. If ECS on particular routes is basic service, its price is capped for five years and that price is not required to meet an imputation requirement. §364.051(2), Fla. Stat. (1995) If ECS on particular routes is nonbasic service, its price can be adjusted by Southern Bell within certain limits and that price must meet the imputation requirements of Section 364.051(6)(c), Florida Statutes. Unless those imputation requirements apply and are met, MCI and other IXCs who offer competing long-distance services will face a price squeeze which will foreclose the possibility of real competition for traffic on these 288 ECS routes.

Under the plain language of Chapter 364, ECS service on these 288 routes is "nonbasic service." The Commission's determination to the contrary is clearly erroneous, and must be reversed.

A. SECTION 364.02(2) CONFERS BASIC SERVICE STATUS ON ECS ROUTES ONLY IF THEY WERE IN EFFECT, OR ORDERED BY THE COMMISSION, ON JULY 1, 1995.

Section 364.02(2), Florida Statutes (1995) provides in pertinent part as follows:

> (2) "Basic local telecommunications service" means voice-grade, flat-rate residential, and flat-rate single-line business local exchange services. . . . For a local exchange telecommunications company, such term shall include any extended area service routes, and **extended calling service in existence or ordered by the commission on or before July 1, 1995.**
>
> (emphasis added)

Extended calling service was not "in existence" on any of the 288 routes at issue in this appeal until January, 1996, well after the cut-off date established by Section 364.02(2).

Extended calling service was not "ordered by the commission" on any of those 288 routes until either September 26, 1995, the date of the Commission's vote, or November 18, 1995, the date of its ECS Order. Either date is also well after the cut-off date established by Section 364.02(2).

ECS on these routes is not a basic service under the plain language of this definitional section. ECS service on these routes is thus a nonbasic service under Section 364.02(8), Florida Statutes,[11] unless some provision of Chapter 364's savings clauses

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[11] Section 364.02(8) defines non-basic service to mean any service provided by a local exchange telecommunications company other than a basic service, a local interconnection arrangement under section 364.16, or a network access service under section 364.163. No party contends that ECS is a "local interconnection arrangement" or a "network access service."

compels a different result. Each of the two potentially applicable savings clauses will be examined in turn.

B. SECTION 364.385(2) CONFERS BASIC SERVICE STATUS ON ECS ROUTES ONLY IF AN ECS APPLICATION WAS PENDING BEFORE THE COMMISSION ON MARCH 1, 1995.

The savings clause in Section 364.385(2), Florida Statutes (1995), has the effect of categorizing some ECS routes as basic service even though they fall outside the general definition in Section 364.02(2). That savings clause provides in pertinent part as follows:

> (2) 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 the 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.
>
> (§364.385(2), Fla. Stat. (1995))

Southern Bell's proposal to offer the ECS pricing plan on the first 252 routes at issue in this appeal was filed with the Commission on May 15, 1995. (Ex. 1) Its proposal to include 36 additional routes was filed with the Commission on July 28, 1995. (Ex. 5) No application for extended calling service on these routes was "pending before the commission on March 1, 1995." This saving clause's exception to the general definition of basic service therefore does not apply, and ECS service on these 288

routes could not become basic service upon its approval.[12]

C. NOTHING IN SECTION 364.385(3) EXEMPTS ECS ROUTES PROPOSED PURSUANT TO ORDER NO. PSC-94-1712-FOF-TL FROM THE OTHER PROVISIONS OF CHAPTER 364.

In concluding that ECS service on these 288 routes constitutes "basic service," the Commission relied on the savings clause contained in Section 364.385(3), Florida Statutes (1995). That section provides in pertinent part that:

> (3) Florida Public Service Commission Order No. PSC-94-0172-FOF-TL [the Order Approving Stipulation] shall remain in effect, and BellSouth Telecommunications, Inc. [d/b/a Southern Bell], shall fully comply with that order unless modified by the Florida Public Service Commission pursuant to the terms of that order. . . .
>
> (bracketed material added)

This section simply requires that Southern Bell fully comply with the provisions of the Order Approving Stipulation, which was entered at a time when Southern Bell was subject to earnings regulation, even if Southern Bell makes a statutory election to be governed by the price regulation provisions of Chapter 364 beginning January 1, 1996. For example, this section means that Southern Bell is required to make the agreed rate reductions scheduled for October 1, 1995 and October 1, 1996. It also means that, through 1997, Southern Bell is required to share or refund

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[12] Southern Bell in fact had preexisting ECS applications on file for six of these 288 routes at the time of its May 15, 1995 rate reduction proposal. These six ECS routes were approved by orders issued on September 12, 1995, prior to the date of the Commission's vote in the instant case. (See App. A at 16) These six routes <u>are</u> covered by the provisions of the savings clause, and are properly classified as basic service.

earnings above the levels specified in the Stipulation incorporated in the Order (App B. at 19), notwithstanding that fact that other price-regulated companies are not subject to any statutory sharing or refund requirements.

1. The PSC's Reasoning Regarding the Application of the Savings Clause in Section 364.385(3) is Flawed

The Commission's reasoning as to how Section 364.385(3) authorizes it to classify ECS pricing on these 288 routes as basic service is less than crystal clear, but appears to be that:

1. In May, 1994, the Commission approved the same type of ECS pricing plan on three toll routes -- Fort Lauderdale/Miami, Hollywood/Miami, and Fort Lauderdale/North Dade. (App. A at 7)

2. The revenue reduction from these three ECS routes was accounted for in accordance with a specific provision in Paragraph 8 of the Stipulation. (App. A at 7)

3. ECS on these three earlier routes is basic service under Chapter 364 (because it was in existence on July 1, 1995) and "we believe the same treatment is appropriate for this [288 route] proposal." (App. A at 7-8)

4. "We believe that Section 364.385(3), Florida Statutes, preserving the Commission's authority with respect to Order No. PSC-94-0172-FOF-TL, is a more specific expression of the legislative intent than the provisions regarding ECS found in Section 364.385(2), Florida Statutes." (App. A at 8)

5. "The authority granted by the legislature with respect to this docket permits the Commission to approve this [288 route ECS] proposal in a similar [basic service] framework." (App. A at 8)

This position makes no sense. Distilled to its essence, the Commission says that because three ECS routes it approved under the Stipulation in 1994 became local service, and because the Commission likes this result, it is therefore authorized by Section 364.385(3) to classify any future ECS routes proposed pursuant to the Stipulation "in the same framework," on the grounds that this section is "more specific" than the statutory provisions which define such routes as nonbasic service.

It is difficult to understand the Commission's position that Section 364.385(3) is a more specific expression of the legislature's intent regarding the classification of ECS service than the sections which deal specifically with that question. Nothing in Section 364.385(3), nor in the Order whose effect is preserved by that section, makes any mention of ECS service, much less any mention of how future ECS service (if any) is to be classified for purposes of price regulation.

There will be no contravention of Section 364.385(3) if ECS on these 288 new routes is classified as nonbasic service under the other provisions of Chapter 364. The Order Approving Stipulation will still be given the full effect required by the savings clause in Section 364.385(3) -- that is, the ratepayers of Southern Bell will receive their full $25 million rate reduction effective October 1, 1995 -- regardless of how these new ECS routes are classified for future regulatory purposes.

The flaw in the Commission's view is underscored when one considers what its interpretation would permit Southern Bell to do

in the name of implementing the Order Approving Stipulation. In the instant case, the Commission applied Section 364.385(3) to confer a special status on ECS routes representing a $48 million revenue reduction, even though that is almost twice the amount of the reduction required by the Stipulation. If this interpretation is upheld, Southern Bell could choose in October, 1996, to re-monopolize long-distance service throughout its territory by proposing to convert all of its remaining toll routes to ECS pricing, regardless of the revenue impact, as the means of "implementing" the $48 million rate reduction scheduled for that date.

2. The Parties Below Agreed That ECS on These Routes Is Nonbasic Service

Each of the parties below was required by the Commission's rules to file a post-hearing brief and was required to state a position on the legal issue of whether, if approved, Southern Bell's ECS plan would become a part of basic local service. Those positions, without the supporting argument, are included verbatim in the staff's recommendation to the Commission on Legal Issue 2. (R. 362 at 381-82) As the Commission staff summarized those positions:

> All of the parties except Southern Bell agree that if Southern Bell's ECS plan is approved, the ECS service should be classified as a non-basic service rather than basic local telecommunications service. Southern Bell asserts that since the prior version of Chapter 364 applies to all aspects of this proceeding, then the concept of basic and non-basic services is not applicable, since it appears for the first time in the new legislation. However, Southern Bell concedes

> that if the new version of Chapter 364 applies, then its ECS proposal should be considered a non-basic service.
>
> (R. 362 at 382)

It is instructive to note that even Southern Bell conceded that its ECS proposal is a nonbasic service, assuming that it is subject to the new statute at all.[13] Since every service that Southern Bell offers is subject to the new statute, the parties (including the Office of Public Counsel) were unanimous as to the ECS routes' proper classification as nonbasic service.

D. THE COMMISSION'S CONSTRUCTION OF A STATUTE IT ADMINISTERS IS NOT ENTITLED TO DEFERENCE WHERE THAT CONSTRUCTION CONFLICTS WITH THE PLAIN LANGUAGE OF THE STATUTE.

The Commission will undoubtedly argue that its interpretation of a statute which it has the duty to administer is entitled to great weight and should not be overturned by the Court unless clearly erroneous. MCI acknowledges that this is the general rule. But that rule by its terms does not apply where the agency's interpretation is "clearly erroneous," as occurs when its interpretation contravenes the plain language of the statute. As this Court stated in one of the early cases applying this rule:

> . . .such administrative interpretation of statutes is not entitled to such great weight

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[13] Southern Bell's argument that this proceeding is governed by the prior version of Chapter 364, therefore its ECS service is neither fish nor fowl, is disingenuous. Virtually every service that Southern Bell offers was originally approved under the "prior version" of Chapter 364. Yet the new statute classifies each of those services into one of four categories: basic, non-basic, local interconnection, or network access. Under Southern Bell's argument, this new ECS service would defy classification, and find itself alone in a regulatory "Never-Never Land."

> by this Court when the result reached by the administrative board or agency or the effect of its ruling is "clearly erroneous." There can be no doubt that an administrative ruling or policy which is contrary to the plain and unequivocal language of a legislative act is clearly erroneous. This proposition seems to be too elemental to require further discussion. It is also an elemental rule that if the terms and provisions of a statute are plain there is no room for judicial or administrative interpretation.

Southeastern Utilities Service Company v. Redding, 131 So. 2d 1, 2 (Fla. 1961). These same principles are followed to the present day. Kimbrell v. Great American Insurance Company, 420 So. 2d 1086, 1088 (Fla. 1982); Woodley v. Department of HRS, 505 So. 2d 676, 678 (Fla. 1st DCA 1987).

In addition, "statutory construction is ultimately the province of the judiciary" and an agency's interpretation is entitled to less deference when the matter is not one within the agency's demonstrated expertise. Schoettle v. State, Department of Administration, 513 So. 2d 1299, 1301 (Fla. 1st DCA 1987). MCI respectfully suggests that the interpretation of a savings clause is appropriately the province of the judiciary, and is not within the Commission's "demonstrated expertise."

E. THE COMMISSION'S DETERMINATION THAT ECS ON THESE ROUTES IS BASIC SERVICE FRUSTRATES THE LEGISLATIVE INTENT TO PROMOTE COMPETITION BY PROTECTING SOUTHERN BELL'S COMPETITORS FROM PRICE SQUEEZES ON NONBASIC SERVICES.

The 1995 rewrite of Chapter 364 made substantial changes in the way that telecommunications service is to be provided and regulated in Florida. Chapter 95-403, Laws of Florida, abolished the incumbent local exchange companies' monopoly over local

exchange telephone service. In exchange, the local exchange companies can elect to be governed by the price regulation provisions of Section 364.051, Florida Statutes, in lieu of the former strictures of rate of return or earnings regulation.

The new price regulation provisions impose one set of requirements on basic services and a different set of requirements on nonbasic services. In general, there is a three- or five-year cap on the price for basic services. §364.051(2), Fla. Stat. (1995) This price cap ensures that ratepayers will see no increase, in the short term, in the price of the local and ECS services that they were receiving on July 1, 1995. On the other hand, customers may see increases of up to 20% per year (or up to 6% in areas where there is no competition) in the prices of nonbasic services. §364.051(6), Fla. Stat. (1995)

In addition, a local exchange company is prohibited by Section 364.051(6)(c) from pricing a service to a retail customer at a level that is insufficient to cover its direct cost of providing the service, including the wholesale price charged to a competitor for a necessary input into the competitor's same or functionally equivalent service.

> (6) NONBASIC SERVICES.-- Price regulation of nonbasic services shall consist of the following:
>
> * * *
>
> (c) 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.
>
> (§364.051, Fla. Stat. (1995))

This provision is designed to prevent a local exchange company from creating a price squeeze for nonbasic services. Such a price squeeze occurs whenever the local exchange company sets the retail price of a service lower than the wholesale price charged to its competitor for an essential input into the competitor's functionally equivalent service.

Applied to the facts of this case, Section 364.051(6)(c) is designed to prevent Southern Bell from charging residential customers less than 6 cents a minute for an ECS call, while at the same time charging MCI, AT&T and other IXCs over 7 cents a minute for the switched access which those companies must purchase in order to provide competing long-distance service. (T 297-99)

The Commission recognized that IXCs today provide competitive long-distance service on the toll routes that were being converted to the ECS pricing plan. It even affirmed the IXCs' right to continue to compete on these toll routes following their conversion to ECS pricing. (App. A at 20-21) Because it misclassified the new ECS service as a basic service, however, the Commission found that it was not necessary to address the price squeeze caused by the relationship between Southern Bell's wholesale and retail prices. (App. A at 8) Since an IXC cannot match Southern Bell's retail price without losing money on every call, this right to continue to compete is a hollow one at best. (See T 316)

By miscategorizing the 288 new ECS routes as basic service,

the Commission has abrogated the very protection against price squeezes that Section 364.051(6)(c) was enacted to provide. The Commission's decision thus flies in the face of the Legislature's intent to provide a fair competitive environment for nonbasic telecommunications services.

II. THE COURT SHOULD REVERSE THE COMMISSION'S ERRONEOUS CONSTRUCTION OF CHAPTER 364 AND REMAND WITH INSTRUCTIONS TO SET A PRICE FOR SWITCHED ACCESS SERVICE WHICH ENABLES SOUTHERN BELL'S ECS PRICE TO MEET THE IMPUTATION REQUIREMENTS IMPOSED BY SECTION 364.051(6)(C), FLORIDA STATUTES.

The Commission has erroneously construed Chapter 364, and has improperly classified these 288 new ECS routes as basic service. Under Section 120.68(9), the Court must reverse this improper application of the law and remand to the Commission for further proceedings consistent with the correct interpretation of the statute.

> (9) If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:
>
> (a) Set aside or modify the agency action, or
>
> (b) Remand the case to the agency for further action under a correct interpretation of the provision of law.
>
> (§120.68(9), Fla. Stat. (1995))

In this case, the Commission should be required on remand to set the price relationship between the retail rate for ECS service and the wholesale rate for switched access service in a way that permits the nonbasic ECS service to pass the imputation requirements of Section 364.051(6)(c). This can be accomplished in

one of two ways -- either by increasing the price for ECS service or, more appropriately, reducing the price of switched access for calls along ECS routes to a level that permits Southern Bell's existing ECS rates to pass the imputation test.

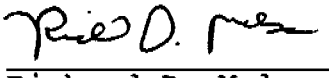
The Court should also order the Commission to conclude the proceedings on remand within 120 days of the issuance of the Court's mandate. Such action would be consistent with the Court's authority under Section 120.68(13)(a)2, Florida Statutes (1995), to "order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld." Every day that the Commission wrongfully withholds the application of the imputation provisions of Section 364.051(6)(c) to ECS service on these 288 new routes is a day that Florida's consumers are deprived by an improper price squeeze of the benefits of competition that revised Chapter 364 was designed to confer. A 120-day time limit to redress this statutory noncompliance would be consistent with the time frames established by the Legislature for the other Commission actions required to implement a competitive telecommunications environment in Florida. See, §§364.16(2), 364.161(2), 364.162(3), Fla. Stat. (1995).

CONCLUSION

The Commission's determination that Southern Bell's 288 new ECS routes constitute basic service is clearly inconsistent with the plain language of revised Chapter 364 and must be reversed. Further, the Commission should be instructed to establish, within 120 days, a price structure for the retail ECS service and the wholesale switched access service which complies with the requirements of Section 364.051(6)(c), Florida Statutes. Only in this way will the Legislature's intent to promote competition in telecommunications services in Florida be given its full and proper effect.

RESPECTFULLY SUBMITTED this 6th day of February, 1996.

HOPPING GREEN SAMS & SMITH, P.A.

By: 

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