IN THE SUPREME COURT OF FLORIDA

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

REPLY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

INTRODUCTION

As stated in MCI Telecommunications Corporation's (MCI) Initial Brief, this appeal arose from 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) in Order No. PSC-94-1712-FOF-TL (Order Approving Stipulation).

Despite the arguments made by the Commission and Southern Bell (hereinafter "Appellees") in their respective Answer Briefs, and despite Appellees' attempts at unnecessary complication, there is one over-riding simple issue in this appeal. That issue is whether the Commission erred when it held that the Extended Calling Service (ECS) which was implemented on 288 routes to effectuate a mandated $25 million rate reduction, is "basic service," rather than "nonbasic service," under the recently revised provisions of Chapter 364, Florida Statutes.

ARGUMENT

I. THE APPELLANTS HAVE MET THEIR BURDEN OF DEMONSTRATING THAT THE COMMISSION'S DECISION IS CLEARLY ERRONEOUS BY SHOWING THAT THE CLASSIFICATION OF ECS AS A "BASIC SERVICE" CONTRAVENES THE PLAIN LANGUAGE OF THE STATUTE.

The Commission urges this Court to find that MCI has not met its burden of showing that the ECS Order was erroneous, citing to this Court's opinion in City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981).

It is true that Commission orders are traditionally clothed with a presumption of correctness which must be overcome by a party

challenging such an order. It is equally true, however, that Commission decisions which contravene a statute or statutes cannot be shown this deference and will not be affirmed. Shevin v. Yarborough, 274 So. 2d 505, 509 (Fla. 1973).

The statutes at issue here include a number of provisions of Chapter 364, Florida Statutes (1995) which were added or amended by Chapter 95-403, Laws of Florida. As shown in MCI's Initial Brief (pp. 16-22), the Commission's determination that the ECS pricing plan implemented on these 288 routes is a "basic service" is clearly erroneous, in that it contravenes the plain language of the statutes. Such a showing more than satisfies MCI's burden of proof under Shevin and its progeny.

II. WHEN ALL PROVISIONS OF CHAPTER 364 ARE READ IN PARI MATERIA, IT IS CLEAR THAT ECS SERVICE ON THESE 288 ROUTES IS A "NONBASIC" SERVICE.

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)

As shown in MCI's Initial Brief, ECS was not in existence or ordered by the Commission on or before July 1, 1995 on the 288 routes in question. **Appellees do not dispute this.** Absent the application of one of the savings clauses in Section 364.385,

Florida Statutes, the provision of ECS on these 288 routes is not "basic" service. In their Answer Briefs, the Appellees advance three separate reasons that one or more of the savings clauses confer special status on the ECS routes at issue in this case. On closer examination, none of these reasons provides a valid basis to uphold the Commission's classification of these ECS routes as "basic service."

A. 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.

Southern Bell asserts in essence that the savings clause in Section 364.385(3), Florida Statutes (1995), which preserves the effectiveness of the Order Approving Stipulation, gives the Commission complete freedom to disregard the provisions of revised Chapter 364 for any action taken to implement or enforce the provisions of the Stipulation and Implementation Agreements. (SB Brief at 17-20)

Southern Bell's position gives that savings clause an effect which goes far beyond the plain language of the statute. Section 364.385(3) provides in pertinent part that:

> 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. . . .

The Commission's own order in the instant case (the "ECS Order") catalogues various provisions in its Order Approving Stipulation that are preserved by this savings clause. (Order, page 5) Notably absent from this list is any mention of the

implementation of future ECS pricing plans. That absence is well-founded. Nowhere in the Order Approving Stipulation, including the Stipulation and the Implementation Agreement attached to and incorporated in that Order, is there any reference to future ECS routes as a possible mechanism for implementing the unspecified rate reductions.[1] The Order Approving Stipulation similarly does not confer special status on any proposal made by Southern Bell to satisfy its rate reduction obligation, nor does it exempt such proposals from any other applicable provision of law.

The savings clause in Section 364.385(3) is fully satisfied regardless of whether ECS is classified as a "basic service" or a "nonbasic service" under other provisions of Chapter 364.

Is classifying ECS as "nonbasic service" inconsistent with the legislative mandate that the Order Approving Stipulation shall "remain in effect"? No, it is not. Southern Bell still makes the required $25 million rate reduction regardless of how ECS is categorized for future regulatory purposes.

Does classifying ECS as "nonbasic service" violate the legislative mandate that "BellSouth Telecommunications, Inc. shall fully comply with that order unless modified by the Commission pursuant to the terms of that order"? Again, it does not. The order is fully complied with regardless of how ECS is categorized for future regulatory purposes.

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[1] The implementation of additional ECS was not identified as a potential method of making the October, 1995 rate reduction until Southern Bell filed its "plan" for such reductions with the Commission on May 15, 1995.

The Commission and Southern Bell have somewhat different views of how Section 364.385(3) operates. The Commission determined that "Southern Bell's ECS plan shall be considered part of basic local telecommunications service, for the purposes of Sections 364.02 and 364.051, Florida Statutes." (ECS Order at 8) Thus the Commission implicitly recognizes that every service must be placed into some category under the revised Chapter 364. Southern Bell, however, argues that Section 364.385(3) means that its ECS proposal is treated for all purposes under the law in effect at the time the Stipulation was signed. Since the distinction between "basic" and "nonbasic" service is a creature of the 1995 revisions to Chapter 364, Southern Bell appears to take the position that ECS service is neither, but instead retains a special status as "local service" (SB Brief at 17), a concept which was undefined under prior law and which has no meaning at all under the revised statute.

Either interpretation, however, allows Southern Bell to implement ECS under conditions which give it a competitive advantage that would otherwise be impossible under the revised provisions of Chapter 364, Florida Statutes. Whether the ECS pricing plan on the 288 additional routes is categorized as a "basic service" or as a "local service," Southern Bell still avoids the requirement to comply with the imputation standards of Section 364.051(6), Florida Statutes. As discussed in MCI's Initial Brief, if the imputation standard is not applied, Southern Bell has an unfair competitive advantage in that its retail price to end users for an end-to-end ECS call can be set below the wholesale price to its competitors for piece-parts of the "competitive" service that

they provide. This is precisely the evil that Section 364.051(6)(c), Florida Statutes, was intended to prevent.

Without a demonstration that the classification of ECS as a "nonbasic service" makes it impossible for Southern Bell to "fully comply" with the Order Approving Stipulation, there is no basis in Section 364.385(3) to confer special regulatory status on ECS (or any other service) used as the vehicle to implement the rate reductions required by that order.

B. THE SAVINGS CLAUSES IN SECTION 364.385(2) DO NOT CONFER SPECIAL STATUS ON ECS ROUTES UNLESS AN ECS APPLICATION WAS PENDING BEFORE THE COMMISSION ON MARCH 1, 1995.

As noted in MCI's Initial Brief, Section 364.385(2), Florida Statutes, contains a very specific savings provision which confers "basic service" status on new ECS routes (i.e., routes not in effect or ordered by the Commission on July 1, 1995) only if an "application" for ECS service on such routes was "pending before the commission on March 1, 1995." Since ECS service was not proposed on the 288 routes at issue in this case until May 15, 1995, there was no application pending on March 1, 1995, and such routes therefore do not qualify for "basic service" status under this provision.

Both the Commission and Southern Bell seek to exempt these 288 ECS routes from the operation of this savings clause on similar, but not identical, grounds. The Commission takes the position that the ECS plan at issue in this case was not "merely" an application for ECS service but was "also a proposal to meet the requirements of the Stipulation Order." (PSC Brief at 10) As such, the

Commission appears to argue that the status of this ECS plan must be governed by the provisions of Section 364.385(3) relating to the Order Approving Stipulation, rather than the more specific provisions related to ECS applications. As discussed in Part II.A above, this argument is unavailing since nothing in Section 364.385(3) requires that a proposal submitted pursuant to the Order Approving Stipulation be given any special regulatory classification under the revised Chapter 364.

Southern Bell takes this argument a step farther. It argues that the ECS plan was not an "application" for ECS service at all.[2] (SB Brief at 24-27) Southern Bell states that:

> 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.

(SB Brief at 26) That statement is incorrect. Rule 25-4.059 deals exclusively with EAS, or Extended Area Service.[3] Nothing in Rule 25-4.059 makes any reference to ECS, or Extended Calling Service, which is the service at issue in this case.

The manner in which Southern Bell actually sought to implement ECS calling in this case is fully consistent with an "application" for ECS service. Southern Bell simply filed tariff revisions with

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[2] Of course, this is inconsistent with the Commission's position that the proposal was an application, though not a "mere" application.

[3] EAS is a totally different service from ECS. With EAS, upon a showing of sufficient community of interest, the flat rate calling area is extended to reach an additional exchange or exchanges. While there may be an increase in the customer's flat monthly rate to reflect the extended calling scope, no per minute or per message charges apply to calling in that extended area.

the Commission to introduce ECS calling on additional routes. (Ex. 1) This is exactly the same way that Southern Bell would file any other "application" for any other new service.

While Southern Bell's proposal for ECS service was admittedly filed in order to implement its rate reduction obligation under the Order Approving Stipulation, that filing nevertheless constituted an "application" for ECS service within the meaning of the savings provisions of Section 364.385(2), Florida Statutes. Because the application came after March 1, 1995, the resultant ECS service does not qualify for "basic service" status under that provision.

C. THE "PROCEEDINGS" TO IMPLEMENT THE $25 MILLION RATE REDUCTION ARE NOT GOVERNED BY PRIOR LAW.

Section 364.385(2) presents an interpretive challenge. It provides that:

> [Clause 1] All applications for. . .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 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.
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> * * *
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> [Clause 2] 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.
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> * * *
>
> [Clause 3] 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.

(clause numbers added)

As Southern Bell concedes, the provisions of Clause 1 of this subsection relating to ECS applications are more specific than either of the latter provisions and therefore should govern if the Court determines that its ECS proposal constitutes an "application" within the meaning of that clause. (SB Brief at 25) As discussed in Part II.B above, the ECS proposal in fact did constitute an application for ECS service. As such, a mechanical application of the dates in the statute to the facts of this case compels the conclusion that these ECS routes do not become "basic service" under Chapter 364. It thus becomes unnecessary to further analyze the remaining provisions of Section 364.385(2).

The Commission, on the other hand, ignores Clause 1, thus requiring an analysis of Clauses 2 and 3. These two clauses contain a potential inconsistency. Clause 2 declares that proceedings pending on July 1, 1995 are governed by prior law. This proceeding to implement the $25 million rate reduction was clearly pending on July 1, 1995, since the proposal to implement ECS had been filed on May 15, 1995. Thus, without more, this proceeding would be governed by prior law. Clause 3, however, declares that proceedings which have not progressed to the stage of a hearing by July 1, 1995 may be conducted in accordance with pre-January 1, 1996 law only "with the consent of all parties and the commission." Since Clause 3 is more specific than Clause 2, and since no such consent was obtained in this case, then under Clause 3 the new statute would apply to this proceeding unless it had "progressed to the stage of a hearing" by July 1, 1995.

The Commission resolves this issue by declaring that this proceeding had progressed to the stage of a hearing in January, 1994, and therefore is governed by prior law without the necessity for the parties' consent. (ECS Order, page 6; PSC Brief at 11) That conclusion is clearly erroneous. The Commission relies on the fact that the various proceedings related to the Stipulation have been conducted in the same docket to conclude that they constitute a single "proceeding." (PSC Brief at 5)

In fact, there have been and will be multiple "proceedings" in this docket. The first proceeding was to reexamine Southern Bell's incentive regulation plan. That proceeding was scheduled to go to hearing on January 24, 1994. It terminated, without progressing to the stage of a hearing, when a settlement was approved by the Commission on January 18, 1994. That proceeding resulted in the entry of a final order.

The second proceeding was to implement the rate reduction scheduled for October 1, 1995. That proceeding commenced no earlier than February 27, 1995, when the Communications Workers of America filed the first proposal for disposition of the $25 million rate reduction. (R 47) This second proceeding progressed to the stage of hearing on July 31, 1995. (ECS Order, page 4) It likewise resulted in the entry of a final order.

The third proceeding will be to implement the rate reduction scheduled for October 1, 1996. Proposals for that rate reduction must be filed no later than 120 days prior to that date, and the proceeding will commence upon the first such filing. If there are competing proposals, then a hearing will be required sometime

during the summer of 1996. That proceeding too will result in the entry of a final order.

Under the Commission's approach, all of these are a single "proceeding" which "progressed to the stage of a hearing" in January, 1994, even though the hearing scheduled for that time was cancelled. The consequence of the Commission's approach is that the upcoming proceeding to implement the 1996 rate reduction has already progressed to the stage of a hearing even though no proposals for such a reduction have yet been filed, and no hearing on those proposals has yet been scheduled.

This interpretation of Section 364.385(2), Florida Statutes, contravenes the plain language of the statute and is thus clearly erroneous. Southeastern Utilities Service Company v. Redding, 131 So. 2d 1, 2 (Fla. 1961); Shevin v. Yarborough, 274 So. 2d 505, 509 (Fla. 1973).

D. ASSUMING ARGUENDO THAT THE PRIOR LAW APPLIES TO THESE PROCEEDINGS, ECS MUST STILL BE CLASSIFIED AS A NONBASIC SERVICE UNDER CHAPTER 364.

The following discussion assumes, arguendo, that the implementation of the 1995 rate reduction at issue on this appeal had progressed to a hearing over 12 months before a proposal for implementation was filed. In that situation, the proceedings to consider the ECS proposal would be governed by the law in effect prior to July 1, 1995. Notwithstanding this fact, the ECS routes at issue on this appeal would still have become non-basic service when Southern Bell elected price regulation effective January 1, 1996.

Once Southern Bell elected price regulation, every service that it provides is either a basic service, a nonbasic service, a network access service, or an interconnection arrangement. §364.02(2),(8), Florida Statutes. This categorization applies not only to new services, but to every service offered by Southern Bell under prior law. Even if the Commission's decision to approve the ECS service at issue on this appeal was governed by prior law, that service must still be placed into one of these four categories for future regulatory purposes. As set out in MCI's Initial Brief, when the definitional and savings clause provisions of the statute are read together, these ECS routes must be classified as nonbasic service.

III. MCI HAS NOT ASKED THIS COURT TO REWEIGH EVIDENCE NOR TO INVADE THE RATEMAKING AUTHORITY OF THE COMMISSION.

The Commission's claim that MCI has asked this Court to reweigh the evidence before the Commission is incorrect. The Commission attempts to turn what is a purely legal issue, the interpretation and application of a statute, into a factual one. This it cannot do.

A decision by this Court to adopt MCI's plain language reading of the provisions of Chapter 364, Florida Statutes, would necessarily require the classification of ECS on the 288 routes as nonbasic service[4]. Once so classified, the statute requires that Southern Bell's price for the service must cover certain direct and

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[4] Sections 364.02(2), 364.385(2), Florida Statutes.

imputed costs.[5] MCI has asked that the Court remand this case to the Commission for further expedited proceedings to establish a legally permissible pricing structure which meets this statutory standard. Such a structure can be implemented either by increasing the price of ECS service or, more appropriately, reducing the price of switched access used in the provision of MCI's competitive service.[6] (MCI Initial Brief at 27-28)

A remand to the Commission to conduct further proceedings in accordance with the law as construed by the Court does not involve either the reweighing of evidence by this Court or an invasion of the Commission's rate-making powers as claimed by the Commission.[7] MCI seeks nothing more that a proper interpretation of the statutes at issue, and a further Commission proceeding to give effect to the imputation requirements of those statutes.

IV. MCI HAS NOT WAIVED ITS RIGHT TO DEMAND PROPER IMPUTATION UNDER SECTION 364.051(6)(C), FLORIDA STATUTES.

The Commission claims that MCI has waived its right to have any change on remand in the price for Southern Bell's ECS service, or in the price for switched access used by MCI to compete with that ECS service. Thus, the Commission says, "even if MCI's

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[5] Section 364.051(6)(c), Florida Statutes.

[6] It may also be possible to comply with this requirement by allowing the resale of ECS service at a discount from the retail price, as suggested by FIXCA in its brief.

[7] The present matter is well beyond the "conflict in evidence" found in Florida Retail Federation, Inc. v. Mayo, 331 So. 2d 308, 311 (Fla. 1976) or questions as to the "reliability of the testimony and other evidence adduced" found in International Minerals and Chemical Corp. v. Mayo, 336 So. 2d 548, 553 (Fla. 1976), cited by the Commission.

arguments were found to have merit, MCI has waived any available remedy." (PSC Brief at 21)

The Commission's claim is specious. First, for the proposition that MCI has waived its right to have a change in Southern Bell's ECS service rate, the Commission relies on the statement in MCI's initial brief that "It is impractical, if not impossible, to restore Southern Bell's long-distance pricing on these 288 routes." (MCI Initial Brief at 14) While long-distance pricing may be impossible to restore, it is neither impractical nor impossible to maintain the ECS rate structure and simply to adjust the rates for ECS service upward so that they would cover imputed access charges. (See MCI Initial Brief at 27-28)

Second, the Commission claims that MCI has waived the right to have the Commission make any reduction in switched access charges in 1995 as the result of a provision in the Implementation Agreement to which it was a signatory. The Commission's quotation from that agreement omits highly pertinent language which bears on this issue:

> B. $55 million of the gross revenue reduction scheduled to be implemented on October 1, 1995, . . .shall be used to further reduce Southern Bell's Intrastate Switched Access Charge rates. . . .However, AT&T, MCI, Sprint, and FIXCA agree that they will make no recommendation to the Commission **under Paragraph 4 of this Implementation Agreement that would require the use of that remainder ($25 million)** to further reduce Intrastate Switched Access Charge rates during 1995, nor support such recommendation by any other party. . . .

(omitted language in **bold**) Contrary to the implication created by the Commission's incomplete quote from the Agreement, the complete

provision shows that MCI simply agreed not to request that any part of the $25 million unspecified rate reduction to be implemented on October 1, 1995, be used to reduce access charges. It has not done so, either at the Commission or before this Court. MCI did not agree to refrain from pursuing access charge reductions apart from the $25 million, nor did it agree to acquiesce in a mechanism for implementing the $25 million reduction that would violate the imputation requirements imposed by prior Commission orders or by the subsequently enacted provisions of Chapter 364.

CONCLUSION

Because the classification of the ECS pricing plan on the 288 routes at issue on this appeal is inconsistent with the plain language of the statute, the Commission's classification is clearly erroneous and must be reversed. The Court should remand the case to the Commission with instructions to set prices for ECS service on the 288 additional routes, and switched access charges for competitive toll traffic on these routes, that, when combined, meet the imputation requirement of Section 364.051(6)(c), Florida Statutes.

RESPECTFULLY SUBMITTED this 26th day of March, 1996.

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