IN THE SUPREME COURT OF FLORIDA

FLORIDA INTEREXCHANGE
CARRIERS ASSOCIATION,

Appellant,

v.

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

SUSAN F. CLARK, etc., et al.

Appellees.

______________________________/

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

REPLY BRIEF OF APPELLANT

THE FLORIDA INTEREXCHANGE CARRIERS ASSOCIATION

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Preliminary Statement

This Reply Brief contains the reply of the Florida Interexchange Carriers Association (FIXCA) to the briefs of the Florida Public Service Commission (Commission), BellSouth Telecommunications, Inc. (BellSouth) and the Office of Public Counsel. These parties are collectively referred to as the Appellees. Of necessity, FIXCA has not attempted to respond to every argument made by these parties, but has selected those points to which, in FIXCA's opinion, additional attention is most warranted. FIXCA relies on its Initial Brief for the points not specifically addressed herein.

Introduction

The Court's decision in this case turns on a question of law involving the Florida telecommunications statute. FIXCA contends that the language of the new law is clear, that BellSouth's extended calling service (ECS) approved by the Commission is governed by the new law, and that ECS is a non-basic service under § 364.02(2), Florida Statutes (1995). Therefore, ECS must comply with the new statute's imputation requirements, enacted in order to prevent BellSouth from squeezing competitors out of the market. Appellees, in an attempt to escape the imputation requirement, contend that ECS is governed by the prior law and therefore need not meet the imputation standard, designed to provide customer choice. This is the issue of law which the Court must decide.

ARGUMENT

I. THE COMMISSION'S INTERPRETATION OF THE NEW TELECOMMUNICATIONS STATUTE, AS APPLIED TO BELLSOUTH'S ECS PROPOSAL, IS CLEARLY ERRONEOUS AND MUST BE REVERSED.

A. The Court is required to correct the Commission's erroneous interpretation of law.

Appellees argue that the Commission's interpretation of the new telecommunications law is entitled to great weight and that the Court should defer to the Commission's interpretation. Appellees then suggest that this is the end of the matter and that the Commission may not be reversed. FIXCA does not take issue with Appellees' recitation of black letter law; however, the rule they attempt to rely on has no application to this case.

The Court's standard of review of the matter before it is set out in § 120.68(9), Florida Statutes (1995). The Court must reverse if the Commission has erroneously interpreted a provision of law. As the cases cited in FIXCA's initial brief demonstrate, courts have not hesitated to reverse an agency order which incorrectly interprets a provision of law.[1] That is exactly what has occurred in this case. The Commission's erroneous interpretation of the law is entitled to no deference by this Court.

B. The new statute's savings clause does not exempt BellSouth's ECS proposal from the requirements of the new law.

Appellees attempt to rely on two different provisions of the new telecommunications law's savings clause to support their position that the Commission need not apply the new law's

[1] FIXCA Initial Brief at 10-11.

requirements to BellSouth's ECS proposal. Neither provision supports Appellees' contention.

1. Section 364.385(3) does not permit the Commission to apply prior law to BellSouth's ECS proposal.

Appellees argue that somehow the language in § 364.385(3), Florida Statutes (1995), gives the Commission the authority ignore the new law and to apply the prior law to BellSouth's ECS proposal. A careful reading of the section belies Appellees' contention:

> 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.

This provision means exactly what it says: BellSouth is required to make the series of refunds to which it agreed when it settled the numerous cases pending against it.[2] The provision does not say that the prior law will apply to the way such refunds are made nor does it say that because the settlement agreement was executed prior to the new telecommunications law that the old law will govern.[3]

Appellees want to read into this clear provision of the law language which simply is not there. An expansion of the plain language of the statute, as suggested by Appellees, is a departure from the law's plain meaning and is impermissible. Florida

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[2] Order No. PSC-94-0172-FOF-TL, (R. 32-33), requires BellSouth to make the following unspecified refunds: $25 million in 1995 and $48 million in 1996.

[3] As BellSouth points out, substantive statutory revisions, such as this one, apply prospectively. Rothermel v. Florida Parole and Probation Commission, 441 So.2d 663, 664 (Fla. 1st DCA 1983).

Interexchange Carriers Association v. Beard, 624 So.2d 248, 250 (Fla. 1993).

Appellees argue that the above-quoted language permits the Commission to approve implementation of ECS without reference to the new law's requirements. This is the case, Appellees say, because ECS is a proposal BellSouth made to fulfill its obligations under the settlement agreement, which, pursuant to the new law, is to remain in effect. This wishful thinking would have the Court find that the new law's provision, which requires BellSouth to make the agreed upon refunds, allows BellSouth to totally disregard the new law's requirements. Such a contention finds no support in the language of the statute.

Section 364.385(3) does not require BellSouth to make the required refunds via an ECS proposal. Section 364.385(3) does not even mention ECS. It was BellSouth that proposed that its settlement obligations for 1995 be met in this way. Having chosen ECS to met its obligation under the settlement agreement, that plan must meet the new law's requirements. There is nothing in § 364.385(3) that indicates, or implies, otherwise.

Further, BellSouth argues that because the hearing below concerned how it would fulfill its refund obligations, the Commission's order may not be disturbed. BellSouth complains that requiring it to comply with the new statute's standards would change the rules "mid-stream." This argument is disingenuous at best.

BellSouth was one of the main proponents of the new

telecommunications legislation. That legislation gives BellSouth tremendous pricing flexibility. BellSouth has not hesitated to take advantage of the new law's benefits;[4] however, it wants to do so without complying with the new law's requirements. BellSouth cannot have it both ways.

BellSouth's reference to the legislative history of the new law does not indicate that the Legislature intended to "exempt" the implementation of the settlement agreement from the law's requirements. To the contrary, the legislative history indicates that the quid pro quo for allowing BellSouth to escape from the scrutiny of rate of return regulation was to require that mechanisms be put in place to foster competition:

> One mechanism for preventing anticompetitive pricing is <u>to require that the incumbent LECs impute the price charged competitors for monopoly services</u> into the cost used as a basis for pricing competitive service.
>
> . . .
>
> A primary concern is the need for all providers of local exchange telecommunications services to be able to <u>interconnect their facilities</u> to ensure that customers of any provider can terminate calls to customers of any other provider.
>
> . . .
>
> In addition to the issue of interconnection, and an <u>integral part</u> of establishing appropriate interconnection arrangements, <u>is the issue of the incumbent LECs unbundling their local networks</u>. . . .

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[4] BellSouth elected "price regulation" on November 1, 1995. This election will allow BellSouth, under certain circumstances, to raise prices for some services as much as 20% per year. <u>See</u>, § 364.051(6)(a).

. . .

> <u>Resale</u> of local exchange services <u>is an issue closely related to the issue of unbundling.</u>

Staff Report, Senate Committee on Commerce and Economic Opportunities at 9-12, emphasis supplied (BellSouth brief, appendix, tab B). The legislation does not "exempt" BellSouth from these requirements.

Finally, BellSouth makes the preposterous argument that its request that the Commission allow it to implement ECS is not an "application." Therefore, BellSouth says, the more specific section of the new statute, § 364.385(2), which explicitly provides that ECS proposals which are not pending before March 1, 1995 must comply with the new law, is inapplicable. BellSouth says its proposal to implement ECS is not really an "application" at all.[5]

BellSouth's argument elevates form over substance and must be rejected outright. BellSouth sought Commission approval to institute ECS. It could not have implemented ECS without that approval.[6] Therefore, the more specific section of the new

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[5] Contrary to BellSouth's argument, FIXCA is not attempting to limit the Commission's "options" in implementing the settlement agreement's refund requirements. However, any option which the Commission chooses must comply with the new law's specifications.

[6] BellSouth says that its ECS proposal was not a "consumer application" under rule 25-4.059, Florida Administrative Code. (BellSouth brief at 26). BellSouth implies that only consumers may request ECS service. BellSouth is wrong on two points. First, the rule upon which BellSouth attempts to rely governs <u>EAS</u> (extended area service). EAS service is an arrangement for "nonoptional, unlimited, two-way, flat-rate calling service between two or more exchanges . . . ." Rule 25-4.057(2). BellSouth's ECS proposal does not fall within the parameters of this rule. Second, even if the (continued...)

statute, which deals explicitly with ECS plans, § 364.02(2), governs BellSouth's proposal.

2. Section 364.385(2) does not exempt BellSouth's ECS plan from the requirements of the new law.

Appellees then suggest that if § 364.385(3) does not apply, § 364.385(2) requires that this case be governed by prior law. The part of § 364.385(2) upon which Appellees attempt to rely states:

> 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.

Appellees make several arguments in regard to § 364.385(2) but their reliance on this section is misplaced. First, BellSouth and the Commission argue that the proceeding at issue here was "pending" on July 1, 1995 and therefore the prior law governs. This strained reasoning requires acceptance of the fact that the hearing which resulted in the order in this case was not the result of a separate proceeding, but rather was part of a previous, earlier proceeding.

In an argument worthy of the BellSouth "application is not an application" theory addressed above, the Commission asserts that a "docket" is the same as a "proceeding." Therefore, because the Commission chose to continue to use the same docket number which it used in the proceeding approving the settlement agreement, somehow the instant proceeding and a <u>different</u> proceeding to determine how

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[6](...continued)
EAS rule were applicable, subsection 25-4.059(1)(b) specifically permits applications by a telecommunications company.

BellSouth will make the required refund are actually the same proceeding and were "pending" before July 1, 1995. This convoluted argument implies that the Legislature delegated to the Commission the discretion to choose under what circumstances it would apply the new law. Such a nonsensical argument must be rejected.

The fallacy of this argument is easily illustrated. Had the Commission decided to assign a new docket number to BellSouth's ECS proposal when it was filed on May 15, 1995, the Commission's position would have be that the new law applies to the ECS proposal.[7]

Further, Appellees' argument that this is the <u>same</u> proceeding as the January 24 hearing which resulted in the settlement agreement is belied by a quick review of the procedure the Commission followed in this case. The Commission entered prehearing Order No. PSC-95-0895-PHO-TL on July 24, 1995. (R. 91). This order set out the procedure, including prefiled testimony and a prehearing conference, to govern <u>this</u> proceeding. Such procedure would have been unnecessary had this just been the continuation of an already existing case. After a <u>full evidentiary hearing</u> on July 31, 1995, the Commission entered a <u>separate</u> final order. Order No. PSC-95-1391-FOF-TL. (R. 458). This is not an interim order but a separate final order which would have been unnecessary if this were the same proceeding in which a final order had already been issued.

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[7] FIXCA is not confusing a "proceeding" with a "hearing" as the Commission alleges; rather, the Commission is attempting to equate the ministerial assignment of a docket number to a proceeding.

Appellees are never able to reconcile how a proceeding that took place on July 31 could possibly have been pending on July 1.

The parties to the settlement agreement unequivocally agreed that the Commission would conduct additional proceedings to dispose of the required refunds:

> 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 . . . .

(R. 38). This provision resulted in the separate proceeding which is the subject of this appeal.

II. THE COMMISSION'S DECISION CONTRADICTS THE LEGISLATIVE INTENT OF THE NEW STATUTE.

Appellees argue that FIXCA asks the Court to reweigh the evidence. This is not the case. What FIXCA asks this Court to do is to ensure that the Commission's interpretation of the new law comports with the clear legislative intent of the new statute to foster competition.[8] The new law states:

> The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage

[8] Similarly, BellSouth's contention that FIXCA wants the Commission to implement the required revenue reductions in a manner that "will increase the rates to be paid by BellSouth's ratepayers simply to improve Appellants' competitive position" (BellSouth brief at 17-18) is absurd. First, it makes no sense to argue that rate <u>reductions</u> will <u>increase</u> rates. Second, FIXCA simply wants the Commission to follow the law.

investment in telecommunications infrastructure.

Section 364.01(3), Florida Statutes (1995).

The fact that the Commission's ECS order "permits" competition is very different from fulfilling the statute's requirement for the "competitive provision of telecommunications services." The Commission's "permission to compete" does not address the reality of whether competition will actually occur.[9]

Chairman Clark and Commissioner Kiesling found that, ECS:

> . . . will stifle vigorous competition which, in the long-term, is the best means of ensuring low rates and high quality service.

Order No. PSC-95-1391-FOF-TL at 25. (R. 482). A plan which "stifle[s] vigorous competition" is contrary to the clear legislative intent of the new statute.[10]

The Commission also argues that if the Court required it to set interconnection and resale rates in order to meet the new statute's imputation standards, the Court would usurp the prerogative of the Commission to set rates.[11] The Commission

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[9] ECS is not an "enhancement to local service" as BellSouth claims; it is an anticompetitive pricing scheme designed to reserve ECS traffic to BellSouth.

[10] The argument that IXCs can provide "one-stop shopping" while BellSouth cannot is a red herring. Upon compliance with the relevant provisions of the federal Telecommunications Act of 1996, BellSouth will be able to provide packaged intraLATA and interLATA services.

[11] The Commission cites two cases in support of this point: Florida Retail Federation v. Mayo, 331 So.2d 308 (Fla. 1976) and International Minerals and Chemical Corp., 336 So.2d 548 (Fla. 1976). However, those cases are inapposite. In both cases, the Commission set rates with which the appellants disagreed. In this (continued...)

misunderstands; of course, rate setting is within the purview of the Commission. FIXCA does not contend otherwise. It does not ask this Court to set the appropriate rates for interconnection and resale.[12] Rather, if ECS is to be a legal service under the new law, the Court must require the Commission to do so.[13]

Finally, the Commission argues that FIXCA urges this Court to take a "narrow" view of the new legislation so as to further its own competitive purposes. This is not the case; FIXCA's reading of the statute takes into account the entire statutory scheme, including those portions which indicate that imputation, interconnection, and resale are vital parts of the new statute's plan to encourage competition.

Florida Cable Television Association v. Deason, 635 So.2d 14 (Fla. 1994), does not support the Commission's position. In that case, the Court rejected the interpretation of the prior telecommunications statute which the Cable Television Association

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[11](...continued) case, the dispute is not about the level of the interconnection and resale rates set but it is about the Commission's failure to set any rates at all.

[12] Public Counsel says that there was no evidence before the Commission that ECS violates the statute's imputation requirement. This is incorrect. The record demonstrates that the imputation requirement was violated. (See, i.e., Tr. 312).

[13] FIXCA does not disagree with the Commission that the appropriate remedy in this case is a remand to the Commission. However, the remand must explicitly direct the Commission to expeditiously set appropriate resale and interconnection rates so that ECS will pass the statute's imputation test. BellSouth implemented ECS on January 15, 1996. The longer the service remains in place without the requisite safeguards, the longer ratepayers fail to receive the benefits of competition.

recommended. The Court found that interpretation to be too narrow.

However, in this case, it is Appellees who "fail to see the forest for the trees." Florida Cable at 14. The intent of the statute, as evidenced by its plain language and the legislative history quoted above, is to ensure a competitive telecommunications environment. To do that in this case, interconnection and resale rates must be in place so that others can compete. The "comprehensive framework" on which the Commission seeks to rely is not set out in the settlement agreement; it is found in the new statute.[14]

III. FIXCA HAS NOT WAIVED ITS RIGHT TO RELIEF IN THIS CASE.

The Commission makes a curious argument at the conclusion of its brief. It states that FIXCA has "explicitly" waived its right to relief in this case. FIXCA never executed a waiver of its rights in this case.

First, the Commission says that FIXCA has waived any right to a price increase for ECS. While increasing the price for ECS is one way to remedy the failure of the service to pass the statute's required imputation test, FIXCA has never sought this relief, as

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[14] The Commission laments, through the quotations of various Commissioners, that it will not be able to carry out its duty to ensure that BellSouth makes the required refunds under the settlement agreement if its order is overturned. This is not the case. In fact, at the Agenda Conference where this matter was decided, Commissioner Kiesling clearly articulated the way to ensure compliance with the Commission's order approving the settlement agreement: ". . . [W]e impose some kind of restriction on Southern Bell to keep them from being able to raise these rates until they have effectuated the full amount of the refund." (AC at 18). Compliance with the new statute does not hinder the Commission's ability to ensure that BellSouth meets its obligations under the settlement agreement.

the Commission recognizes in its brief.[15]

Second, the Commission argues that interconnection and resale are governed by §§ 364.161 and 364.162 of the new law, (the same new law which the Commission says elsewhere in its brief is not even applicable to this case). The Commission suggests that FIXCA look to those sections for its remedy in this case.

These sections require a party to "request" interconnection and resale rates from the incumbent LEC, in this case, BellSouth. If the "request" is unsuccessful, the statute requires the Commission to set the appropriate rates. The Commission says that FIXCA is free to follow this procedure at any time but that this process has nothing to do with BellSouth's ECS plan.

This argument misses the mark for several reasons. First, FIXCA is not now, and never has been, the proponent of ECS.[16] It is BellSouth who applied to the Commission for approval of this service. Thus, it is incumbent upon BellSouth, and ultimately the Commission, to ensure that, if the ECS plan is approved, it complies with the new statute's requirements. In this regard, the Commission had two options when it considered BellSouth's proposal:

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[15] Nonetheless, the Commission's argument that FIXCA has waived the right to this relief because it agreed not to seek a reduction in access charges from the BellSouth 1995 refund is incorrect. As the new statute makes clear, interconnection and access charges never apply to the same traffic. Section 364.16(3)(a) provides that traffic to which access charges apply may not be delivered through a local interconnection arrangement.

[16] It has always been FIXCA's position that it does not object to ECS, per se, so long as the requisite safeguards of interconnection and resale are in place.

it could have raised the price for ECS, or it could have put resale and interconnection rates in place. Either option would allow ECS to pass the imputation test. If FIXCA's motive was simply to foster its own competitive interests, as Appellees allege, FIXCA would have urged the former option; however, FIXCA suggested the latter approach.

The legality of BellSouth's ECS plan _depends_ on having appropriate interconnection and resale rates in place. That is the connection between ECS and interconnection and resale that the Commission ignores--only implementation of interconnection and resale rates (or a higher price for ECS) will save the ECS service and allow it to comply with the requirements of the statute. These arrangements are not "unrelated" to the approval of ECS, as the Commission contends; on the contrary, they are an integral part of the approval of this service. FIXCA does not assert that BellSouth may not use ECS to fulfill its settlement obligations (as Appellees suggest). _But_, ECS must meet the new law's requirements.

Further, the new statute is ambiguous as to the procedure _IXCs_ are to follow. The interconnection section, §364.162, speaks in terms of negotiations between LECs and alternative local exchange carriers (ALECs); it is unclear what procedure an IXC is to follow. Despite this, the statute provides that any dispute between IXCs and LECs regarding interconnection and resale is to be resolved by the Commission. In this case, the dispute is clear. Requiring the IXCs to negotiate with BellSouth before the Commission will resolve

the dispute would be meaningless given BellSouth's position in this case.

Conclusion

The Commission made an error of law in this case. It erroneously interpreted the new telecommunications law when it classified ECS as a basic service and found that the new law's imputation requirements did not apply. The Court should correct the Commission's error of law, classify ECS as a non-basic service, and require the Commission to ensure that ECS meets the statute's imputation requirement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of Appellant, the Florida Interexchange Carriers Association, has been furnished by U.S. Mail to the following parties of record, this 26th day of March, 1996:

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