IN THE FLORIDA SUPREME COURT

TELECO COMMUNICATIONS COMPANY)
)
Appellant,)
)
v.) CASE NO. 87,316
)
SUSAN F. CLARK, etc. et al.,)
)
Appellee.)

ANSWER BRIEF OF REGECNY TOWERS OWNERS ASSOCIATION, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

onda Statues

Laws of Florida

IN THE FLORIDA SUPREME COURT

TELECO COMMUNICATIONS COMPANY Appellant, v. SUSAN F. CLARK, etc. et al., Appellee.	)	CASE NO. 87,316

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INTRODUCTION AND REFERENCES

Regency Towers Owners Association Inc. ("RTOA" hereafter) herewith submits its answer Brief to the Initial Brief of Teleco Communications Company ("Teleco"). References to the parties are as cited and references to the Florida Public Service Commission are "FPSC" References to the Brief of Teleco are cited as "Brief p. " and to the record or transcript as "R " or "TR " respectively."

STATEMENT OF THE CASE AND FACTS

Teleco has presented a fairly correct statement of the case and facts for purposes of this review and RTOA would not burden the record with an unnecessary version of the case and facts. However, Teleco has characterized as fact the existence of "fmancing arrangements" "lease purchase arrangements" and "installment sale arrangements" and RTOA would ask the court to recognize that these are characterizations and assertions of Teleco and RTOA does not agree with these "facts".

With this exception, RTOA would accept the statement of the case and facts to the extent that they portray to the Court how this case has proceeded.

SUMMARY OF ARGUMENT

The Public Service Commission has correctly determined Teleco to be a telecommunications company operating without proper authority. Teleco owned and operated a telecommunications company by reason of its ownership of inside wire and the leasing of that wire to RTOA. Such activity constitutes the provision of telecommunication service requiring certification by $364.33. F.S. Furthermore, Teleco had no claim to any exception or exemption by reason of its relationship with RTOA or through its own right. Further, the assertion that this case has been made moot by reason of the enactment of the Telecommunications Act of 1995 is without basis and contrary to the specific provision of that Act. Finally the penalty imposed by the PSC was within their authority and does not constitute an abuse on their part.

ARGUMENT

I. TELECO COMMUNICATIONS COMPANY'S OPERATIONS CONSTITUTE OPERATING AS A TELECOMMUNICATIONS COMPANY CONTRARY TO THE REQUIREMENTS OF CHAPTER 364.F.S.

In points I, II and III of its Initial Brief, Teleco has presented arguments which are so intertwined that for ease of response, RTOA will address them at the same time under this point. Essentially the arguments presented by Teleco are that it is not a telephone company under Chapter 364 either by way of some association with RTOA which gives rise to Teleco being able to claim an exemption or because the "contract" between Teleco and RTOA places ownership of the wire at issue here with RTOA (Brief p. 11, 17). These are the same arguments made to the PSC (R87, 89).

Given these same arguments, the PSC nevertheless found Teleco to have been operating as a telephone company without authority in violation of the provisions of section 364.33, Florida Statutes.

Disposition of the question presented to the PSC was relatively simple. Section 364.33 F.S. provides in part:

> A person may not begin the construction or operation of any telecommunications facility, or an extension thereof for the purpose of providing telecommunications services to the public, or acquire ownership or control thereof, in whatever manner, including the acquisition, transfer or assignment of majority organizational control or controlling stock ownership, without prior approval.

As defined by Section 364.02(8), a "telecommunications facility" includes:

> "Telecommunications facility" includes real estate, easements, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire within this state.

The stipulated facts upon which the Commission made its determination included, in part, that Paultronics, Inc. purchased 360 pairs of station wire from Southern Bell for $11,566 in May 1986 (Stip. 14 R84); the purchase price was paid by Teleco (Stip. 15 R84); Paultronics assigned its rights to the wire to Teleco in 1986 (Stip. 16 R84) and finally, RTOA would make payments for 84 months with "ownership" reverting to the RTOA at the end of the 84 months (Stip. 18 R84) and RTOA did make payments to Teleco for a period of time (Stip. 19 R84). Plainly, Teleco owned the wire, the facility, and leased that wire to a third party. To now assert otherwise is simply not consistent with the facts and representations stipulated to the Commission. In view of the requirements of Chapter 364 cited above and the evidence, the Commission could not have done any less than they did.

Notwithstanding the factual and legal basis for the PSC action, Teleco continues to argue that they are not a telephone company first either because of some exemption or secondly because they do not own the wire (Brief p. 9-11, 17). First Teleco argues that RTOA is exempt from PSC jurisdiction because RTOA would qualify for a transient exception to the certification requirements of Chapter 364 (Brief p. 11). Teleco says that what RTOA does or does not do is beyond the authority of the PSC to control (Brief p. 11). Undoubtedly all parties would agree with this, but it simply has no relevance whatsoever to what Teleco can or cannot do. It is not the action or exemption of RTOA that is at issue, it is Teleco. Teleco simply can not legitimize its actions because RTOA would or could have an exemption or exception from certification. The PSC has not attempted to control the activities of RTOA, but they did correctly find the activities of Teleco to be subject to PSC control.

There is likewise little support for Teleco to attempt to claim an exemption by virtue of the fact that it is providing service to an "exempt" telecommunications company. Section 364.02(7) exempts from PSC regulation those entities providing facilities exclusively to other certificated telephone companies. RTOA has no certificate from the PSC and is not a certificated telephone company. Teleco is not providing service to a certificated carrier; consequently there is no exemption available to Teleco in this instance. Teleco simply has no basis to claim any exemption, either through its own devices or through association with RTOA. Period.

Teleco next attempts to remedy its position by arguing that the arrangement with RTOA is little more than a lease purchase or financing arrangement (Brief p. 1 1- 13). In the first place, the Commission did not accept this argument as there was absolutely no evidence to support such a contention . (R87) There are no documents, no contracts, no written agreements expressing any

intent that any arrangement between RTOA and Teleco was either a lease purchase or financing arrangement or an installment sale. (TR 18). Secondly, to now argue that RTOA had title and ownership to the wire is inconsistent with the facts stipulated by Teleco (R24). Even in the argument presented by Teleco, there is recognition that title reposed with Teleco, not with RTOA (Brief p. 14). Teleco owned the wire by any definition and leased it to RTOA. There is no basis for the assertion that this was merely a financing arrangement.

Given the facts before it, the PSC was presented with the question of whether Teleco was operating as a telephone company. After carefully considering the alternative arguments presented by Teleco, the Communication concluded that Teleco was indeed a telephone company. Teleco owned the wire, a telecommunications facility as defined by section 364.02, Florida Statutes and they operated that facility by leasing the wire to an unrelated third party. Teleco did so without a certificate and thus the PSC concluded they were in violation of section 364.33 F.S. (R 92)

The Commission here has performed its charge and given an interpretation of statutes which it is charged with enforcing. Similar activities have been afforded great weight by courts and courts generally defer to the agency even if there may be more than one interpretation so long as the interpretation is not clearly erroneous. Florida Cable Television Association v. Deason, 635So. 2d 14 (1994); Florida Interexchange Carriers Association v. Beard, 624 So. 2d 248 (1993); Nassau Power Corp. v. Beard, 601 So. 2d 1175 (1992); PW Venures Inc., v. Nichols, 533 So. 2d 281 (1980); Pan American World Airways v. PSC, 427 So. 2d 716 (1983); Ft. Pierce Utilities Authority v. Florida Public Service Commission, 388 So, 2d 103 1(1980); Florida Power Corp. v. Department of Environmental Regulation, 481 So. 2d 684 (Fla. 1st DCA 1983); Brooks v. Anastasia Mosquito Control District, 148 So. 2d 64 (Fla. 1st DCA 1963).

This case does not even lend itself to more than one interpretation. Teleco was operating as a telecommunications company. Teleco does not like the result of the Commission decision, and understandably so, but Teleco can not take the facts which were stipulated and construct any other result than was given.

II. THE ENACTMENT OF CHAPTER 95403, LAWS OF FLORIDA, HAS NOT MADE THIS CASE MOOT.

While appellant has done a reasonably adequate job of explaining a very complex and sweeping change to the way by which telecommunications companies are regulated, Teleco has failed to cite one reason why its illegal acts committed years earlier should now be ignored. Similarly Teleco fails to point out that the first Commission order resolving the central issue was issued in 1993 - three years before the effective date of the Telecommunications Act of 1995 (Order PSC 93-0009-FOF-TP (R8). The only reason that this case was pending when the new law became effective was because of a Petition for Reconsideration filed in November 1994 (R95). The Commission had entered its final order and the fact that the case was pending because of the request for reconsideration does not change that. The purpose of reconsideration is to bring to the attention of the Commission some material, relevant point of fact or law which was overlooked or was not considered. It is not an opportunity to reargue the case or to provide new material. Diamond Cab Co. v. King, 146 So, 2d 889 (Fla. 1962); Pingree v. Quantance 394 So. 2d 161 (Fla. 1st DCA 1981). This is not a case where no decision had been rendered at the time of the decision.

Of significance also is the specific savings provision of the Telecommunications Act of 1995 contained in $364.385 which Teleco also overlooks. Subsection (2) of this section provides in part:

> 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 January 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.

This proceeding was concluded in 1993 and even if the Commission had not entered its final order prior to the effective date of the new law the "savings clause" makes it clear that the pre-existing law would control the disposition of this proceeding. Absent a clear intent for legislation to operate retroactively, acts of the legislature will operate prospectively. Fleeman v. Case, 342 So. 2d 8 15 (Fla. 1977); Keystone Water Co, v. Bevas, 289 So. 2d 606 (Fla. 1973); Greyhound Lines Inc. v. Yarborough, 275 So. 2d 1 (Fla. 1973); Lewis v. Creative Developers Ltd, 350 So. 2d 828 (Fla. 1st DCA 1977). Teleco would argue that the new law should be applied but the fact is that the Commission made its decision in 1993 and correctly applied the law in effect when the decision was rendered. Deltona Corp v. Florida Public Service Co-,220 So. 2d 905 (Fla. 1969); Fogg v. Southeast Bank N. A., 473 So. 2d 1352 (Fla. 4th DCA 1985); Brunner v. Board of Real Estate, 399 So. 2d 4 (Fla. 5th DCA 1981). There is simply no legal basis or reason to apply the new law in this case.

Finally, Teleco asserts that they have now filed for an ALEC certificate so they can now compete in the emerging telecommunications industry. That's good and certainly one of the purposes for the new regulatory scheme is to encourage competition. That they will now become good corporate citizens and competitors does not change the fact that they were operating without appropriate authority in 1993. To reverse this case now rewards Teleco for past actions. Teleco

chose to act as a telecommunications company in 1993 without required authority and should be expected to bear the penalty.

III. THE FPSC HAS THE AUTHORITY TO REQUIRE TELECO TO DIVEST ITSELF OF ITS INSIDE WIRE.

Teleco has correctly stated the standard of review of Commission orders when they come before this court to be that they are clothed with a presumption of validity and are just and reasonable. (Brief p. 20 - 21). Teleco has not overcome this presumption.

In this instance the Commission, upon considering whether to impose a fine upon Teleco as authorized by Chapter 364, determined instead to direct Teleco to return the wire to the rightful owners. Teleco argues that this is beyond the authority of the Commission and infringes on the contract issues that are before the Circuit Court . Not so. There remain issues relating to contractual matters which can only be resolved by the Circuit Court; the Commission has not made any attempt to determine damages or any other matter more appropriately before the court. Further, the Commission has applied its unique expertise to the facts and law and determined that the appropriate disposition of the violation was to return the wire to its rightful owners. This action foes not impair or prevent further proceedings and is well within the framework of the authority of the PSC. Florida Public Service Commission v. Bryson, 569 So. 2d 1253 (Fla.. 1990); Southern Bell Telephone and Telegraph Co, v. Mobile America Corporation, 291 So. 2d 199 (Fla. 1974); Richter v. Florida Power Corporation, 366 So. 2d 798 (Fla. 2nd DCA 1979).

What the Commission has done is to recognize that without a certificate, Teleco had no authority to do that which it was doing and simply put the parties back where they were or should have been (R183-184). The Commission did not direct Teleco to make any refund to RTOA or to

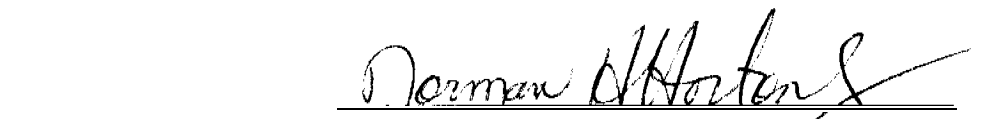
make any payment of any kind but to ignore what Teleco did would be to permit Teleco to circumvent PSC jurisdiction. H. Miller and Sons Inc. v. Hawkins. 373 So 2d 913 (Fla. 1979).

The action taken by the Commission was well within its authority and does not infringe with the jurisdiction of the Circuit Court. Notwithstanding this, even if the Court concurs with Teleco on this point that is not sufficient basis or reason for reversing this order.

CONCJ .USION

The order of the Commission properly interprets Chapter 364 and determines that Teleco was operating as a telephone company without authority. This case has not been made moot by the reason of the adoption of the Telecommunications Act of 1995, nor is the "penalty" imposed by the Commission beyond their authority. Consequently RTOA respectfully requests the Court to enter its opinion affirming the order of the PSC.

Respectfully submitted this 6th day of May, 1996.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Answer Brief of Regency Towers Owners Association in Case No. 87,316 has been sent by Hand Delivery (*) on this 6th day of May, 1996 to the following parties of record:

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