

IN THE SUPREME COURT OF FLORIDA

TELECO COMMUNICATIONS COMPANY,)
)
Appellant,)
)
vs.)
)
SUSAN F. CLARK, J. TERRY DEASON,)
)
JOE GARCIA, JULIA L. JOHNSON, and)
)
DIANE K. KIESLING, as the)
)
FLORIDA PUBLIC SERVICE COMMISSION,)
)
Appellees.)
)
_____)

CASE NO. 87,316

✓ **FILED**
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ANSWER BRIEF OF APPELLEE
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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, the Florida Public Service Commission, is referred to in this brief as "the Commission" or "the Appellee." Appellant, Teleco Telecommunications Company, is referred to as "Teleco" or "Appellant." Regency Towers Owner's Association is referred to as "RTOA."

Commission Order No. PSC-93-0009-FOF-TP, Proposed Agency Action Order finding that Teleco Communications Company is Operating as a Local Exchange Company is referred to as the "PAA Order." Commission Order No. PSC-94-1304-FOF-TP, Final Order Disposing of Show Cause Proceeding is referred to as the "Show Cause Order." Commission Order No. PSC-96-0007-FOF-TP, Order Denying Motion for Reconsideration, is referred to as the "Reconsideration Order."

Citations to the record are referred to as "R. ____."

Citations to Teleco's brief are referred to as "Br. ____."

STATEMENT OF THE CASE AND FACTS

The Commission agrees with and adopts all of Teleco's Statement of the Facts with the following exception: The Commission found that Teleco owned and operated the inside wire and that RTOA would gain title to that inside wire at some future date upon payment in full. That RTOA billed for the inside wire was of no consequence to the Commission's finding.

SUMMARY OF THE ARGUMENT

The Circuit Court referred to the Florida Public Service Commission ("Commission") any matter in the proceedings between Teleco Communications Company ("Teleco") and Regency Towers Owners Association ("RTOA") that would be within the subject matter jurisdiction of the Commission. The Circuit court retained jurisdiction over the remaining issues,

The Commission determined based on the facts stipulated by the parties that Teleco was a telecommunication company under sections 364.02 and 364.33, Florida Statutes, and its activities constituted the unlawful provision of telecommunications service. The Commission found that Teleco owned the wire and charged for its use without obtaining permission and a certificate of convenience and necessity from the Commission. Teleco did not qualify for the transient exception which allows certain providers of telecommunications services to operate without a certificate. Based upon this determination, the Commission has jurisdiction over Teleco to determine what action to take in view of the unlawful activities of Teleco. The result of the Commission's resolution was fair and reasonable and within its jurisdiction. All of the other issues raised by Teleco should be considered by the Circuit Court or dismissed as irrelevant to the case at hand.

ARGUMENT

Counsel for Appellee addresses Appellant's arguments out of order to present the issue in straightforward manner. To address the issues in the order presented by the Appellant would require Appellee to repeat arguments unnecessarily.

Appellee addresses Appellant's issue II and III, in its issue I. Appellant's Issue I is addressed in Appellee's Issue II. Appellee's Issues III and IV address Appellant's Issues IV and V respectively.

I. **Teleco Communications Company (Teleco) is a telephone company pursuant to sections 364.02 and 364.33, Florida Statutes, and therefore, is subject to the jurisdiction of the Florida Public Service Commission.**

The issue before the Florida Public Service Commission was whether Teleco Communications Company could own or control the 360 pairs of station wire or riser cables without becoming a telecommunications company under Chapter 364, Florida Statutes, and Commission rules. (R. 9) In this case, inside wire means the actual wires that are used to connect the telephone instruments in the condominium units used by residents or guests to the Private Branch Exchange (PBX) telephone switch. The PBX is the equipment that switches the calls to connect with other telephone instruments within Regency Towers or switches the calls for termination on other telephone companies' networks. (R. 85-86) In its Proposed Agency Action Order (PAA Order), the Commission reviewed the statutes and its rules governing telecommunications companies. The Commission found that Teleco's activities constituted operation as a telecommunications company. (R. 11)

A. Teleco is a telecommunications company.

The Show Cause order recited the stipulated facts the Commission relied upon to determine that Teleco was operating as a telephone company as anticipated by Chapter 364, Florida Statutes. (R. 83-85)

The statutes and rules governing the provision of telecommunications services to the public for hire are set forth in Chapter 364, Florida Statutes, and Rule 25-4.004, Florida Administrative Code, respectively. Section 364.01, Florida Statutes, grants the Commission exclusive jurisdiction over the provision of telecommunication service.

Section 364.02(7), Florida Statutes (1991), defines "telecommunications company" to include:

every corporation, partnership, and person . . . offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility. . . .

Section 364.028(8), Florida Statutes (1991), defines the term "telecommunications facility" to include:

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

Rule 24-4.004, Florida Administrative Code, implementing section 364.33, Florida Statutes (1991), provides in pertinent part:

A person **may** not begin the construction or operation of any telecommunications facility, . . . for the purpose of providing telecommunications services to the public, or acquire ownership or control thereof, in whatever manner, . . . , without prior approval.

Teleco stipulated to the following facts in the proceeding before the Commission:

15. The \$11,566 purchase price for the wire **was** paid to Southern Bell by Teleco Communications Company (Teleco),

16. Paultronics assigned its rights to the wire to Teleco in 1986. , , ,

18. Affidavits from former members of the Board of Directors also reflect that payments of \$1,072 per month, maintenance included, would be made for 84 months with ownership reverting to RTOA at the end of the 84 months. . . . (Emphasis supplied.)

24. Teleco had not applied for, nor has it been issued a certificate of public convenience and necessity from the FPSC.

(R. 84-85)

The Commission found that "it seems clear that the wire is currently owned by Teleco" (R. 88) and that "RTOA did not acquire title from Southern Bell." (R. 89) Teleco owned the wire and charged for its use. (R. 10, 91) Based upon these stipulated facts, the Commission concluded that Teleco was a telecommunications company within the meaning of Chapter 364, Florida Statutes. The Commission stated: "We find that Teleco's leasing the wire to RTOA for payment constitutes operating a telecommunications facility. Teleco does not have a certificate of public convenience and necessity." (R. 11, 91)

Startlingly absent from Appellant's arguments is any challenge to the Commission's finding that Teleco is a telecommunications provider. The Commission noted in its Reconsideration Order that Teleco does not in any way suggest any flaw in the Commission's interpretation and analysis set forth in the Show Cause Order regarding the statutory and rule provisions that lead to the conclusion that Teleco's activities constitute the unlawful provision of telecommunications service. (R. 182)

Section 364.33, Florida Statutes, and Commission Rule 25-4.004, Florida Administrative Code, provide that a Company must obtain a certificate if it acquires ownership or control of a telecommunications facility. Teleco stipulated to the fact that it owned the embedded inside wire. (R. 84) It further emphasizes that point in its brief. (Br. at 1, 20) If Teleco owns the wire, this fact is enough for the Commission to determine that Teleco meets the statutory definition of a telephone company and, therefore, would have to apply to the Commission for certification.

Moreover, the statute and Commission rule provide only for "ownership or control," not "ownership and control." Section 364.33, F.S., and Rule 25-4.004, F.A.C. Owning the inside wire, which is a telecommunications facility within the meaning of the statute, is sufficient to render Teleco a telecommunications provider pursuant to the statutes and Commission rules. Teleco violated section 364.33, Florida Statutes, and Rule 25-4.004, Florida Administrative Code, because it was an independent third party provider of telecommunications service that has interposed itself between the transient provider, RTOA, and the transient end user. (R. 90)

The Commission based its findings on the facts stipulated by the parties. The Commission's interpretation of Chapter 364, Florida Statutes, is reasonable. The Court should not substitute its judgement for that of the Commission. Deference should be given to the Commission's interpretation of the statutes in light of the facts stipulated. The Circuit Court has jurisdiction and

authority to determine the issues involved in a suit and defer to the Public Service Commission as necessary. City of Tallahassee v. Talquin Electric Cooperative, 549 So. 2d 725 (Fla. 1st DCA 1989). The Legislature has provided the Commission with broad authority to regulate telephone companies. Florida Interexchange Carrier's Association v. Beard, 624 So. 2d 248, 251 (Fla. 1993). The Commission has the authority to interpret the statutes that empowers it, including jurisdictional statutes, and to make rules and issue orders accordingly. PW Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988); Fletcher Properties, Inc. v. Florida Pub. Serv. Comm'n, 356 So. 2d 289, 292 (Fla. 1978). It follows that the PSC must be allowed to act when it has at least a colorable claim that the matter under consideration falls within its exclusive jurisdiction. Florida Pub. Serv. Comm'n v. Brvson, 569 So. 2d 1253, 1255 (Fla. 1990).

B. The arrangement between Teleco and RTOA was not a financing arrangement.

The Commission did not make a finding as to whether there was an agreement between RTOA and Teleco. This finding should be left for the Circuit Court to decide when it resumes jurisdiction over the contract matter.

The Commission considered, but was unpersuaded by Teleco's argument that the agreement between Teleco and RTOA was a "financial" arrangement. Teleco argues that the agreement was similar to that of a contract for deed, where it was holding title until all payments had been made. The Commission found RTOA would

not logically or rationally enter into such a usurious loan arrangement. (R. 89)

The Commission stated:

To characterize this situation as a "financing arrangement" implies that Teleco, as the source of financing, loaned RTOA the \$11,566 to purchase the inside wire. There is nothing in this record that suggests that this is what happened. Even if one assumes that Teleco "loaned" the purchase money, based on a monthly payment of \$1,072 for 84 months, the interest rate on such a loan would be approximately 111%.

(R. 89) The Commission, pursuant to its authority to regulate telephone companies, simply found that Teleco owned the wire and was charging RTOA for its use. (R. 10, 91)

The Appellant makes much of the argument concerning the type of contract that existed between RTOA and Teleco. Teleco claims that the contract created by RTOA and Teleco is an installment sales contract giving RTOA equitable title to the embedded inside wire. (Br. 11) This argument should be saved for the Circuit Court, since the matter was not ruled on by the Commission. Moreover, the stipulated facts are contrary to the position argued by Teleco. The Appellant is correct that current property law interpretations of contracts for deed render such contracts as mortgages. Title is transferred to the mortgagor and the mortgagee is given the right to foreclose on the mortgage upon default, eventually gaining title. The mortgagor still retains a right of redemption. White v. Brousseau, 566 So. 2d 832, 385 (Fla. 5th DCA 1990). The stipulated facts and Teleco's admissions show that Teleco retained title to the embedded inside wire. RTOA never had

the title to pledge as security to Teleco which makes the facts of this case inapposite to the contract for deed argument.

The appellant argues that actions by Southern Bell should be evidence of the lawfulness of the transactions between Teleco and RTOA. No evidence was placed in the record as to what was represented to Southern Bell at the time of the negotiations and the Commission, rightfully, declined to speculate.

The Commission concluded that "Teleco could not, as a matter of law, acquire the embedded inside wire at Regency Towers without the Commission's permission" as required by section 364.33, Florida Statutes, and Rule 25-4.004, Florida Administrative Code. (R. 183) "Teleco's purchase of the embedded inside wire at Regency Towers from Southern Bell should not have occurred," (R. 184) That the transaction did occur does not change its illegality. Finally, this argument has no relevance to the case before this Court. The Commission's decision was based upon competent and substantial evidence and should not be overturned by the Court. If the Commission acted within its authority and there is competent substantial evidence to support the action, the Court must approve it. City Gas Company of Florida v. Florida Public Service Commission, 501 So. 2d 580, 588 (Fla. 1987).

11. The Commission retains jurisdiction over resellers of telecommunications services including those providers that qualify for a "transient exception."

A. RTOA does not have to be certificated as a telecommunications provider pursuant to the Commission's "transient exception" policy.

The Commission agrees that RTOA qualifies for the "transient exception." This is not the issue. The question before the Commission is whether Teleco is a telecommunications company, not RTOA.

The "transient exception" policy is established by Commission order that does not require certification of certain providers of telecommunications service. The factors originally enumerated in PSC Order No. 11206, In re: Resale of Wide Area Telephone Service and Message Toll Service, issued September 29, 1982, in considering whether "transient" resellers are properly considered as telephone companies pursuant to Chapter 364, Florida Statutes, are as follows:

- 1) "Transient" resellers offer and provide service only to in-house customers, not the general public at large;
- 2) Offering of resale service is ancillary to the primary business of these entities;
- 3) The sheer number of these entities exceeds our capacity to regulate in any meaningful fashion;
- 4) Evidence of record indicates that, at least for the hospitality industry, provision of resold telephone service is not a profit making venture;
- 5) These entities are already subject to regulation on an industrywide basis, making the opportunity or incentive for price gouging or fraud even more minimal than under natural market place checks and balances.

82 F.P.S.C. 9:190, 201 (1982).

These factors illustrate that the Commission is concerned that the public interest is protected. So long as the protections are

in place, the Commission does not have to exercise its authority to regulate these entities. RTOA, without evidence to the contrary, seems to meet this criteria, and therefore, would qualify under the transient exception policy adopted by the Commission.

B. The Commission did not abruptly change its policy as it relates to the "transient exception."

Teleco argues that the Commission abruptly changed its policy as it relates to the "transient exception" and failed to apply it in this case. Teleco is incorrect on both points. The Commission has jurisdiction over all telecommunications companies. (Section 364.01, Florida Statutes) The Commission has declined to exercise that jurisdiction where it **has** found that it is not in the public interest to do so. The Commission has set criteria which it uses to determine whether the transient exception should apply. 82 F.P.S.C. 9:190, 210. Moreover, the Commission does not state a policy whereby it allows agents to provide telecommunications services for persons that qualify for the "transient exception." The criteria by their nature would prohibit such a relationship without certification of the agent by the Commission.

In its Order 11206, the Commission concludes that resellers, generally, are telephone companies. 82 F.P.S.C. 9:190, 195. The fact that resellers hold themselves out for hire to the public as providing "telephone services" is sufficient to support the Commission's jurisdiction over these entities. 82 F.P.S.C. at 196. In that order, the Commission declared that it will regulate resellers pursuant to its authority vested under Chapter 364, Florida Statutes. (Id.)

Beginning on page 9 of its Brief, Appellant attempts to make a distinction between exemption and exception. That argument is irrelevant. From the initial Order No. 11206¹ to date, the Commission has always maintained that it has the authority to regulate resellers of telecommunications services that provide such services to transient end users.' The criteria stated above assures the Commission that the public interest is protected. The fact that a provider of these types of telecommunications services meets the criteria established by the Commission exempting it from certification does not divest the Commission of its jurisdiction over that provider. The Commission has the authority to revisit the criteria at anytime it determines that the public interest is not being protected. 84 F.P.S.C 6:36, 37-38 (1984) .

C. Teleco does not qualify for the "transient exception" either directly or as an agent for RTOA.

The Commission found that Teleco does not qualify for the transient exception. (R. 89, 90) Teleco is an independent third party provider of telecommunications service that has interposed itself between the transient provider, RTOA, and the transient end users. (R. 90) Teleco argues that it does qualify for the transient exception because RTOA qualifies for it. Lacking in its

¹ In its order, the Commission stated that "[a] review of the record supports not defining "transient" resellers as telephone companies for the following reasons" and cited the five element criteria quoted earlier.

² In Order No. 13367, In re: Petition for Rulemaking of Donald Pevsner Relating to Resale of Telephone Services by Hotels and Motels, the Commission stated "[w]e hereby decline to exercise our jurisdiction in this area at the present time." 84 F.P.S.C. 6:36 (1984).

argument is both an **agency** or other relationship between RTOA and Teleco, as well as a stated policy of the Commission that an agency relationship would qualify the entity for the exception.

The Commission **stated that no evidence** exists in the record that an agency relationship existed between RTOA and Teleco. (R. 90) Moreover, the stipulated facts of this case do not support an "agency" scenario. Agents in the course of an agency relationship do not typically sell or lease facilities to their principles for provision of service. Furthermore, the Commission has not stated a policy that allows for agency relationships to qualify the agent for the transient exception.

A policy allowing an agent to provide telecommunications service without certification, or **at** least oversight by the Commission, would be contrary to the public interest. For example: resale of telephone service is not "ancillary to the primary business" of Teleco, and the resale of telephone service on the terms established in this case would certainly be a "profit making venture" for Teleco. Finally, Teleco is not "otherwise subject to regulation on an industrywide basis," such as through the Department of Business and Professional Regulation. There is no regulatory control which would make the opportunity or incentive for price gouging or fraud even more minimal than under natural marketplace checks and balances.

III. The enactment of Chapter 95-403, Laws of Florida, does not make this case moot.

Chapter 95-403, Laws of Florida, ("Telecommunications Act of 1995") provides for the systematic deregulation of local exchange

telecommunications service. Effective January 1, 1996, certificated alternative local exchange telecommunications providers may compete against incumbent local exchange providers who have elected price cap regulation.'

Nowhere in Chapter 95-403, Laws of Florida, was there a provision for retroactive application. Moreover, Section 28(2) of the new law provides that "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 law." The Commission has taken evidence, closed the record, and issued its order making its findings years prior to the enactment of the 1995 changes to Chapter 364, Florida Statutes. To dismiss this case would be in violation of the law.

To support its position that this case is moot, the Appellant cites to a recent order where the Commission closed a docket on an investigation of certain violations of Chapter 364, stating that the Telecommunications Act of 1995 obviated the need for further investigation. In re: Investisation of Central Telephone Company of Florida's provision of Centrex Service to Royal Oaks Apartment in Violation of Section 364.339(1)(b), F.S., Order No. 17111, Rule 25-24.560, F.A.C., and General Customers Services Tariff 23.8.3., Order No. PSC-95-1114-FOF-TP, issued September 6, 1995. 95 F.P.S.C. 9:79 (1995).

The Royal Oaks Apartment case is factually distinguishable from the Teleco case. The violation in Royal Oaks Apartment was the provision of telecommunications services without a certificate

through the resale of service acquired from the local exchange company, Centel, and resale of the service to residents of the apartments. There is no third party providing facilities to Royal Oaks as in the case with RTOA and Teleco. It is significant to note also that the entities in Royal Oaks terminated providing service after issuance of the show cause order. The issue of the ownership and operation of third party facilities is not present in Royal Oaks Apartments.

The Commission treated similar violations by Teleco and Royal Oaks Apartments similarly in that the violators were not fined for providing service without a certificate under the circumstances of their respective cases. The questions of the ownership and use of third party facilities was not present in Royal Oaks Apartments and the Commission resolved this issued as stated in the order. Royal Oaks Apartments was prohibited from providing centrex service that it could not legally provide and Teleco was required to turn over the inside wire it could not have owned at the time of acquisition to entities who should have received the inside wire from Southern Bell.

A case is moot when the issues presented are no longer "live" or the parties lack legal cognizable interests in the outcome. Powell v. McCormack, 395 U.S. 486, 496; 89 S.Ct. 1944, 1951; 23 L.Ed. 2d 491, (1969); quoted in Graham v. Butterworth, 5 F.3d 496 (11th Cir. 1993). The Commission has a legal interest in the outcome of this case as it has the responsibility of enforcing the statutes and its rules. RTOA and the Circuit Court have an

interest in the outcome of this case **as** it effects the outcome of the proceeding before the Circuit Court. The record has long been closed and, but for this appeal, the issues would have been long settled.

IV. The Commission acted within its authority when it ordered the distribution of the inside wire to RTOA and Southern Bell.

Contrary to the arguments made by Teleco, the Commission's order to transfer ownership of inside wire to RTOA and Southern Bell was not based upon equitable principles. Rather, the transfer was ordered pursuant to the Commission's authority to reach a fair and reasonable result when it finds that the "rates, charges, or rentals demanded or collected by any telecommunications company for services, or the practices of any telecommunications company affecting such rates, charges, rentals, or services are unjust, unreasonable, or otherwise in violation of the law." (R.183) Section 364.14, Florida Statutes, provides that the Commission shall determine the just and reasonable rates, charges, rentals, or practices to be thereafter observed and fix the same by order. In its orders, the Commission also noted its statutory authority to impose monetary penalties of up to \$25,000 per day for violations of statutes, rules, or orders. (R. 183) Section 364.285, Fla. Stat.

Rather than require refunds, penalties, and interest, the Commission determined that a fair and reasonable result would be to require Teleco to turn over the inside wire to the entities which should have received the inside wire from Southern Bell absent Teleco's unlawful acquisition.

The result is fair in that Southern Bell would have transferred the existing embedded inside wire to the relevant premises owners and retained wire for the customers it serves. (R. 183-184) RTOA would have received the wire from Southern Bell upon Bell's recovery of its investment at the end of its amortization schedule. (Id.) Teleco was not totally uncompensated because it recouped the purchase price it paid Southern Bell. As for the wire transferred to RTOA, it is the appropriate inheritor of the wire.

CONCLUSION

For the foregoing reasons, the Commission's final orders should be affirmed. Teleco has not met its burden of overcoming the presumption of correctness that attaches to Commission orders. City of Tallahassee v. Mann, 411 So. 2d 162, (Fla. 1981).

Respectfully submitted,

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Dated: May 6, 1996

CERTIFICATE OF SERVICE

I HEREBY CERTIFY **that a** true and accurate copy of the foregoing has been furnished by United States mail this 6th day of May 1996 to the following:

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