

BEFORE THE FLORIDA SUPREME COURT

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

FILED

BID J. WHITE

APR 10 1996

CLERK SUPREME COURT

By _____
Clerk of the Court

CASE NO. 87,316

APPEAL FROM FLORIDA PUBLIC SERVICE COMMISSION
FINAL ORDERS IN DOCKET NO. 911214-TP

INITIAL BRIEF OF APPELLANT
TELECO **COMMUNICATIONS COMPANY**

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STATEMENT OF THE CASE AND OF THE FACTS

1. NATURE OF THE CASE.

This is an appeal taken from Proposed Agency Action and Final Orders of the Florida Public Service Commission (FPSC), interpreting §§364.02(7), 364.02(8), 364.33, Fla. Stat. (1993), and Fla. Admin. Code R. 25-4.004 and finding that Teleco Communications Company (Teleco) was a Local Exchange Company (LEC) operating without a certificate of necessity and prohibiting its continued ownership of certain complex inside wiring.

2. PROCEEDINGS AND DISPOSITION IN LOWER TRIBUNAL.

This case was initiated by the FPSC on December 21, 1991 in response to an order of Circuit Court Judge Judy Pittman issued three days before. [R. 9, 163-64] Judge Pittman was the presiding judge in a breach of contract suit brought by Teleco against the Regency Towers Owners Association (RTOA) for failure to pay for the lease and maintenance of complex inside wire at the Regency Towers, a condominium located in Panama City, Florida. Teleco Communications Company v. Regency Towers Owners Association, Case No. 91-1158. Judge Pittman referred "any matter in these proceedings which would be the subject matter of the jurisdiction" of the FPSC to that body while retaining jurisdiction over the contract issues raised in the pleadings. [R. 1631

On January 1, 1993, the FPSC issued Proposed Agency Action Order No. PSC-93-0009-FOF-TP (Order 93-0009) in which the FPSC made a series of interconnected findings. First, that the complex inside wiring connecting the switching equipment at Regency Towers

with individual phones in the condominium units routinely rented through the condominium's rental program fell within the definition of "telecommunications facility" in §364.02(8), Fla. Stat, (1993). [R. 101 Second, that ownership of this complex wire brought Teleco within the definition of "telecommunications company" pursuant to §366.02(7), Fla. Stat. (1993). [R. 101 Third, that Teleco did not have, nor could it receive, a certificate of necessity to operate a "telecommunications company", commonly referred to as a Local Exchange Company (LEC). [R. 101 Fourth, that Teleco would not be fined pursuant to §364.285, Fla. Stat. (1993). [R. 101 And finally, that Teleco must immediately give Southern Bell Telephone Company (Southern Bell) all complex wire connecting the switching equipment to permanent residents or rental units not in the condominiums rental program and give all complex wire connecting the switching equipment to the rental units in the rental program to RTOA. [R. 11]

On January 22, 1993 Teleco filed a timely objection to PAA Order No. 93-0009 and requested an evidentiary hearing. [R. 141 RTOA filed for intervention in the docket on July 28, 1993 and was granted intervention by Order No. PSC-93-1141-PCO-TP, issued on August 5, 1993. [R. 30] Pursuant to agreement by the parties, a formal §120.57(1) hearing was waived and two issues were set for an informal §120.57(2) hearing: "Do Teleco Communications Company's operations at the Regency Towers Condominium constitute operating as a telecommunications company in violation of 1364.33 and Rule 25-4.004?" and "If Teleco is operating as a telecommunications

company, what is the appropriate action that should be taken?" [R. 33, 341

Oral arguments were held in which Teleco and RTOA participated on September 1, 1993, followed by each party's written brief and Teleco's Statement of Issues and Positions filed on October 4, 1993. [R. 39, 54, 671 One year later, on October 21, 1994, the FPSC voted on the issues before it and issued Final Order No. PSC-94-1304-FOF-TP (Order No. 94-1304). [R. 821 Order No. 94-1304 essentially repeated the findings of PAA Order No. 93-0009. [R. 89-901 Teleco filed a timely Motion for Reconsideration of this order on November 4, 1994 and Request for Oral Argument. [R. 951 RTOA filed its response in opposition to both motions on November 15, 1994. [R. 971

On July 1, 1995, Chapter 95-403, Laws of Florida, deregulating the telecommunications industry in Florida became effective. On July 20, 1995, the FPSC Staff filed an agenda conference recommendation on Teleco's motion for reconsideration. [R. 1091 On December 1, 1995, Teleco filed a request for official recognition of Order No. PSC-95-1114-FOF-TP, issued on September 6, 1995 (Order No. 95-1114). [R. 1711 After several deferrals, the FPSC finally voted on the Staff's recommendation on December 5, 1995, and issued Order No. PSC-96-0007-FOF-TP (Order No. 96-0007) denying reconsideration on January 2, 1996. [R. 177] Teleco filed a timely notice of appeal to this court of PAA Order No. 93-0009, Final Order No. 95-1114, and Order No. 96-0007 on January 31, 1996. [R. 1891

3. STATEMENT OF THE FACTS.

Regency Towers is a 340 unit condominium constructed by Major Development Company (MDC) in Panama City, Florida. [R. 8, 831 All 340 units are privately owned with the majority (approximately 145) rented through a rental property program administered by RTOA. The remaining units are either owner-occupied or on the market for sale. [R. 83, 81 From November of 1982 until September of 1988, Advisors Realty, a real estate and property management firm owned by MDC, managed the rental units for the Regency Towers Owners Association (RTOA), a condominium association representing the unit owners at Regency Towers. [R. 831

When the condominium was constructed, Southern Bell provided the private business exchange switching equipment (PBX) and the complex inside wiring connecting that PBX equipment to each individual condominium unit and to Southern Bell's network. [Ex. 1 at 1] This wiring consisted of two sets of cables: Cable 1 consisting of 600 pairs of cable used for all private (owner-occupied) units and 170 rental units in Phase #2 of the condominium and, Cable 3 consisting of 600 pairs of cable connecting the Southern Bell telephone cables on the right of way outside of the condominium with Mechanical Room No. 2. [Ex. 1 at 11 This complex inside wiring was provided to RTOA by Southern Bell for a charge of \$1,072.00 per month in February of 1985. [R. 841

In early 1985 spurred by complaints from condominium residents that the PBX equipment provided by Southern Bell did not allow direct inward dialing to each unit, the Board of Directors of RTOA

authorized Advisors Realty to acquire both a new PBX from the newly deregulated telephone equipment market which would allow direct inward dialing without an operator's assistance and the complex inside wiring needed to connect that equipment to individual condominium units. [R. 84; Ex. 2 at 61 RTOA authorized Advisors Realty to find someone to both purchase the complex inside wire from Southern Bell and to maintain it because the Board of Directors wanted only one entity to be responsible for telephone problems at the condominium. [R. 141 By August of 1985 new PBX equipment had been installed and RTOA had signed a written contract with Paultronics, Inc. for the lease of that equipment. [Ex. 2 at 71

However, although Paultronics had been in constant negotiation with Southern Bell regarding the purchase of the complex inside wire associated with the PBX, it was not until May of 1986 that Paultronics was finally able to reach an agreement to buy portions of Cable 1 containing 360 pairs of wire from Southern Bell. [R. 84] Southern Bell refused to sell any of Cable 3 and those portions of Cable 1 used to serve permanent residents of the condominium thereby necessitating the installation of Cable 2 in order to place the rental units in Phase 2 of the condominium on the PBX. [Ex. 1 at 1] The purchase price negotiated by Paultronics for the complex inside wiring Southern Bell was willing to sell was \$11,566. [R. 841

Once Paultronics had an agreement with Southern Bell to sell the inside wire, Paultronics offered RTOA three options. The first

option was to simply lease the inside wire and obtain maintenance service on that wire for \$850.00 per month. The second option was to enter into an installment sales contract for the wire conditioned on the payment 84 installments of \$1,072 with title transferred at the end of the contract term. This option also provided that Teleco would maintain the wire throughout the 84 month contract term. The third option was to purchase the wire outright from Paultronics. [Ex. 2 at 14, 19] The Board ultimately decided to buy the wire and wire maintenance on the installment plan proposed by Paultronics and orally contracted with Paultronics to pay \$1,072 per month as of May 16, 1986. [Ex. 2 at 191

In 1986, shortly after the Board's decision, Paultronics assigned the rights to its lease of the PBX and sale and maintenance of the inside wiring to Teleco. [R. 841 Pursuant to the terms of the oral installment sales contract, Teleco installed Cable 2 and Cable 4 creating a small switchboard at the guardhouse. [Ex. 1 at 11 From June of 1986 until September of 1988, RTOA authorized payment of \$1,072 per month to Teleco for the purchase and maintenance of the inside wiring with the approximately \$29,176 paid to Teleco in total. [R. 851

In September of 1988, RTOA took over the management of the condominium, fired Advisors Realty and stopped paying Teleco for both the lease of the PBX and the purchase and maintenance of the inside wiring. [R. 85] In November of 1988, RTOA contacted the FPSC about its dispute with Teleco over both the PBX and the complex inside wiring. [R. 8, 851

Throughout the term of the lease purchase agreement, Southern Bell has owned all of the cable in Cable 3 connecting the condominium to the Bell telephone network and substantial portions of Cable 2 which connect Mechanical Room 2 to Mechanical Room 3 and serve all owner-occupied units in the condominium. [Ex. 1 at 2] All units, both private and rental units, have access to Southern Bell and such access has never been denied or impeded in any way. [R. 841 From 1986 until the present, RTOA has always controlled the operation of the complex wiring and all billing associated with the use of the PBX and its associated wire either directly or through its property management agent, Advisors Realty. [T. 541

SUMMARY OF ARGUMENT

The orders of the FPSC in this case must be reversed for several reasons. First, neither RTOA nor Teleco is subject to the jurisdiction of the FPSC by operation of the "transient exception", the nature of installment sales contracts and the language of §§364.33, 364.02(7) and 364.02(8), Fla. Stat. (1993). Second, the passage of Chapter 95-403, Laws of Florida, has made the central issue on which this case turns, the inability of Teleco to receive a certificate of necessity, moot since Teleco can now receive a certificate as an Alternative Local Exchange Company (ALEC). And finally, even if RTOA and Teleco are subject to the FPSC's jurisdiction as telecommunications companies, the FPSC does not have jurisdiction over private contracts between regulated entities nor between regulated and unregulated entities. As such, the FPSC cannot fashion a contractual remedy nor render a decision on whether a contract is valid and enforceable. That being the case, the ordering paragraphs of the FPSC's decisions on review here requiring Teleco to give its inside wire to RTOA and Southern Bell are beyond the FPSC's express or implied statutory authority and must be stricken.

ARGUMENT

I. RTOA IS COMPLETELY EXEMPT FROM FPSC JURISDICTION UNDER ~~THE~~ "TRANSIENT EXCEPTION".

The FPSC has consistently taken the position that it was lawful for RTOA to own the inside wiring used to serve rental units in the condominium. [R. 89-901] Indeed, the FPSC has required Teleco to give its wire to RTOA in order to remedy the fact that Teleco was uncertificated, and under the law in effect until July 1, 1995, uncertificatable. [R. 92]

The ability of RTOA to own this wire without the certificate of necessity required by §364.33, Fla. Stat. (1993), is due to the administratively developed "transient exception". This exception was first officially articulated by the FPSC in 1982¹ and has been consistently followed ever since' although the rationale supporting this exception and its jurisdictional nature appears to have evolved over time.

This "exception" was originally articulated as a failure to

¹ In re: Resale of Wide Area Telephone Service and Message Toll Service, Docket No. 810239-TP, Order No. 11206, issued on September 29, 1982; 82 F.P.S.C 9:190 (1982).

² In re: Petition for rulemaking of Donald Pevsner relating to resale of telephone services by hotels and motels, Docket No. 820315-TP, Order No. 13367, issued on June 1, 1984, at 2; 84 F.P.S.C. 6:36, 37 (1984); In re: Investigation of joint and shared telephone service in Florida, Docket No. 851005-TP, Order No. 15989, issued on April 15, 1986, at 3-4; 86 F.P.S.C. 4:214, 216-17 (1986).

meet the statutory definition of "telephone company"³ under §364.02(4), Fla. Stat. (1981), and is more accurately labeled an "exemption".⁴ The distinction between the two is important. If resale of this type does not meet the statutory definition, it is nonjurisdictional. If, on the other hand, resale of this type does meet the statutory definition, the FPSC has jurisdiction but simply declines to exercise it. The later is apparently the position now

³ The definition of "telephone company" found in 364.02(4), Fla. Stat. (1981), is "every corporation, company, association, joint stock association, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, and every city or town owning, operating, or managing any telephone line or part of telephone line used in the conduct of the business of affording telephonic communication service to the public for hire within this state." This definition evolved into the definition of "telecommunications company" found in §364.02(7), Fla. Stat. (1993) at issue here. Likewise the definition of "telephone line" found in §364.02(5), Fla. Stat. (1981), evolved into the definition of "telecommunications facility" found in §364.02(8), Fla. Stat. (1993) at issue here.

⁴ In Order No. 11206 the FPSC appears to find that this type of telephone resale does not bring hotel and motel owners within the statutory definition of "telephone company" because the service is not offered to "the general public at large". 82 F.P.S.C. 9:190, 201-02 (1982). Order No. 15989 takes a different tack finding that this type of resale does not meet the statutory definition of "telephone company" since such resale does not "compete with nor duplicate local exchange service." 86 F.P.S.C. 4:214, 216 (1986). In addition to these statutory considerations, the FPSC cites four public policy reasons why regulation of this type of resale is not required: resale is ancillary to the primary business being conducted; the sheer number of such resales exceed the capacity of the FPSC to regulate; this type of resale is not profitable; and consumers will be protected from price gouging by the free market and regulation by the Department of Business Regulation of hotels and motels. 82 F.P.S.C. at 201-02; 84 F.P.S.C. 6:36-37 (1984); 86 F.P.S.C. 4:214, 216-17 (1986).

erroneously taken by the FPSC.⁵

Not only is the clear language of Orders Nos. 11206, 15989 and 13367 directly in conflict with this position, but consistent with other jurisdictional exemptions, RTOA and others similarly situated are not even required to register or to make any type of "informational filings" with the FPSC.⁶

It is settled case law that the FPSC has only the powers, duties and authority conferred expressly or impliedly by statute. Florida Bridge Co. v. Bevis (Florida Bridge), 363 So.2d 799 (Fla. 1978). RTOA, and others like it, have been found by the FPSC not to be "telephone companies". Once that finding has been made, the FPSC has no ability to regulate RTOA's operations. Period. Whatever RTOA does or does not do is simply beyond the FPSC's authority to control.

II. THE CONTRACT CREATED BY RTOA AND PAULTRONICS/TELECO IS AN INSTALLMENT SALES CONTRACT GIVING RTOA EQUITABLE TITLE TO THE INSIDE WIRE.

Eight of the ten affiants referenced in Exhibit 2 state that RTOA's board members authorized their property management company, Advisors Realty, to acquire both new telephone switching (PBX)

⁵ The FPSC now states that "while it has jurisdiction over the provision of telephone service to transient guests, it has declined to impose certification and other requirements on providers of such service." [R. 90 at Footnote 31. See also the FPSC's characterization of Order No. 11206 as one in "which the Commission declined to impose extensive regulation over the provision of telephone service to transient guests." [R. 891

⁶ §367.022(4), Fla. Stat. (1995)

equipment and the inside wire associated with it. [Ex. 2 at 1-2, 4, 6, 8, 10, 14, 15-16, 191 This fact was stipulated to by all parties to the docket in Prehearing Order No. 94-1304. [Stipulation 13; R. 84] It is also uncontested in the record that RTOA was given the option to purchase the inside wire outright and decided instead to purchase the wire from Paultronics, Teleco's predecessor, over a period of 84 months with title of the wire passing to RTOA upon the payment of 84 installments of \$1,072. [R. 84; Stipulation 181 Concomitant with the purchase of the wire was an agreement between Paultronics and RTOA that Paultronics would maintain the wire throughout this 84 month installment purchase period. [R. 84; Stipulation 181

It is also uncontested that after the purchase/maintenance contract's assignment to Teleco, Teleco purchased the 360 cable pairs of inside wire from Southern Bell in May of 1986 for \$11,566. [R. 84; Stipulation 141 Southern Bell knew that RTOA was not the purchaser of the wire at the time of its sale in May of 1986 and certainly knew that Teleco would have to install additional inside wiring in order to connect all of the rental units in Regency Towers to the PBX. [R. 84; Stipulation 15; Ex. 1 at 11 Based on these facts, it is a fair assumption that at the time of the sale Southern Bell believed that the ownership of the inside wiring by Teleco was a lawful act. It is also a fair assumption that

Southern Bell believed that the inside wire was its to sell.'

The relevant terms of the installment sales contract between Paultronics/Teleco and RTOA are analogous to that of an agreement for deed. Under an agreement for deed, the seller continues to hold legal title in trust for the purchaser subject to the contractual duty to convey title to the purchaser at the time all payments are completed. Cain & Bultman, Inc. v. Miss Sam, Inc., 409 So.2d 114, 118 (Fla. 5th DCA 1982) Under this type of land purchase agreement, the seller continues to hold legal title throughout the contract term while the purchaser is considered to hold equitable title to the property. Id. at 119. Should the seller fail to convey legal title when the total purchase price has been paid pursuant to the contract terms, the purchaser can request that the court convey legal title to the owner. Id.

Courts have consistently treated this type of contract for deed as the equivalent of a mortgage where legal and equitable title is passed to the purchaser who then executes a note and mortgage back to the seller to secure the unpaid portion of the

⁷ This is contrary to the FPSC's assertions that when inside wiring was deregulated at state and federal levels, "the existing embedded inside wire was transferred to the relevant premises owner" with the outstanding investment recovered from ratepayers. [R. 1161 Southern Bell, the largest telecommunications company in the state, was clearly in a much better position than Teleco to know the legal status of this sales transaction. Teleco had no reason to doubt Southern Bell's expertise in this area and every reason to believe that Southern Bell held the title to the wire and that it could sell that inside wire to Teleco legally. Teleco would also argue that although the FPSC's statement may in fact be true, at the time this sale took place in 1986, the issue was not without doubt at both the state and the federal levels.

purchase price.' White v. T. H. Brousseau, 566 So. 2d 832, 835-36 (Fla. 5th DCA 1990); Mid-State Investment Corporation v. O'Steen, 133 So.2d 455 (Fla. 1st DCA 1961), cert. denied, 136 So.2d 349 (Fla. 1961).

The primary function of this type of time sales agreement is to state the terms of a binding agreement to transfer title upon payment in full. 409 So.2d at 120. This type of agreement meets the definition of lease-purchase agreement found in §944.02(7), Fla. Stat. (1995): "an installation sales contract which requires regular payments with an interest charge included and which provides that the lessee receive title to the property upon final payment."

The uncontested facts in this case create such a situation: one in which Teleco held title to the inside wire it purchased from Southern Bell and to the wire that it installed pursuant to the terms of a lease-purchase agreement/installation sales contract where title to the inside wire would pass to RTOA when 84 payments of \$1,072 had been made. That being the case, RTOA held equitable title to the inside wire from the moment the contract was entered into with Teleco. Simply stated, this installment sales contract was a device to secure a loan to RTOA for the purchase of the inside wire acquired from Southern Bell and that installed by

⁸ For example, the purchaser holding a contract for deed has been afforded the right to redemption of the right to legal title by payment of all sums due, and the right to an equity action similar to a traditional foreclosure suit of a mortgage lien. 409 So.2d at 119-120.

Teleco.⁹

III. TELECO IS NOT A **"TELECOMMUNICATIONS COMPANY"** SINCE RTOA **HAS CONSISTENTLY MAINTAINED OWNERSHIP AND CONTROL OF THE INSIDE WIRE.**

The FPSC's rationale in this case turns on who holds legal title to the inside wire, equating legal title with "ownership" and the ability to exercise "control" over the wire via repossession. [R. 90-91] "Control" or "ownership" of a "telecommunications facility" without a certificate of necessity was prohibited by §364.33, Fla. Stat. (1993). Had RTOA held legal title it is uncontested by the FPSC that RTOA could contract with Teleco to install, maintain and operate the inside wiring in question without subjecting itself or Teleco to the jurisdiction of the FPSC.¹⁰

⁹ The FPSC rejects this argument out of hand stating that RTOA would not agree to a financing agreement with interest rates of 111%. [R. 891] What the FPSC overlooked in its calculation of this interest rate were the monies expended by Teleco to install Cable Sets 2 and 4 and the monthly charges associated with the maintenance of the inside wiring, neither of which were quantified in the record, but both of which were established. [R. 84; Stipulation 18: Ex. 1 at 11] Further, it overlooks the most significant fact from RTOA's point of view: RTOA paid less per month to buy the inside wiring and the PBX from Teleco than it paid to Southern Bell to use an older, less desirable PBX and the same inside wiring needed to operate it. [Ex. 2 at 141] Simply stated, Teleco offered a better deal.

¹⁰ Although not discussed in the orders or at oral argument, the FPSC must also concede under its analysis that RTOA could give a security interest in the inside wire without affecting its nonjurisdictional status, i.e., could secure a loan using the inside wiring as collateral while retaining legal title to the wire.

Under such a scenario if RTOA did not pay per the terms of the secured instrument, a third party could legally gain possession of the collateral, the inside wire. The lender in that instance would

What the FPSC completely ignores in its analysis is that RTOA freely contracted with Teleco to purchase and finance the inside wire under the terms and conditions it now finds so objectionable. RTOA continued to be in physical control of the wire throughout the contract term. RTOA either directly or through its agent, Advisors Realty, billed individual **endusers** for phone service and was the only entity who could terminate phone service for nonpayment. [R. 91] Most importantly, RTOA had complete control over its continued access to, and ownership of, the inside wire, all it had to do was make the payments it voluntarily agreed to make. The only way a "third party" could ever be interjected between the **enduser** and the "regulated telephone network" is if RTOA defaults and puts them there.

The installment agreement which the FPSC finds so offensive does not divest RTOA of "ownership" nor does it divest RTOA of "control". RTOA's level of control is not tied to the type of title that it holds but rather to the terms and conditions of the installment sales contract voluntarily entered into with Teleco. Finding Teleco jurisdictional simply because it holds bare legal

then also be an "independent third party provider of telecommunications service that has interposed itself between the transient provider, RTOA, and the transient **endusers**." [R. 90] Like Teleco this lender would then be deemed to "control" the wire and therefore become a "telephone company" in need of a certificate of necessity.

If RTOA could use this type of financing scheme without subjecting the lender to FPSC jurisdiction as a telephone company, it should also be able to use its legal equivalent: an installment sales contract.

title on behalf of RTOA, while RTOA holds equitable title and physically controls the wire and the telephone service offered is nonsensical and reaches new heights in the elevation of form over substance.

Under the installment sales contract at issue here, Teleco does not "own" or "control" the inside wire and hence is not in violation of 1364.33, Fla. Stat. (1993), neither does RTOA give up its "ownership" or "control" of the inside wire. The status quo is preserved; the transient exception still applies; and both parties remain beyond the FPSC's jurisdiction.

IV. THE **ENACTMENT** OF CHAPTER 95-403, LAWS OF FLORIDA, HAS MADE THIS **CASE MOOT**.

During the 1995 legislative session lawmakers completely rewrote Chapter 364, the section of Florida statutes which regulates telecommunications companies.¹¹ This legislation, commonly referred to as the Florida Telecommunications Act of 1995 (Act), became effective on July 1, 1995. The most significant change brought about by the Act was the creation of certificated Alternative Local Exchange Companies (ALECs) who can provide "local exchange telecommunications service" to the general public in competition with the traditional telephone company, the LEC. §364.02(1), Fla. Stat. (1995).

ALECs are required to file applications for certification with the FSPC which are to be expediently granted upon a showing that

¹¹ Chapter 95-403, Laws of Florida.

the ALEC has sufficient technical, financial and managerial capability to provide telephone service in the area he proposes to serve. §§364.337(1) and (3), Fla. Stat. (1995). The FPSC does not have the authority to regulate the rates charged by ALECs, although it does have the ability to set and monitor service quality criteria. §§364.337(2) and (5), Fla. Stat. (1995). The Act provides that ALECs can file for certification as of July 1, 1995 with the certification becoming effective on January 1, 1996.

The language of 5364.33, Fla. Stat. (1993) did not change. And, although certain telecommunication services were added as exclusions¹², the definition of "telecommunications company"¹³ was not changed by the Act, nor was the definition of "telecommunications facility".¹⁴

The net effect of these statutory changes on the case at hand is dramatic: Teleco can now be a "telecommunications company" who owns, operates or controls a "telecommunications facility" simply by applying to be certificated as an ALEC. And, Teleco has in fact filed such an application for ALEC certification which is currently pending before the FPSC.¹⁵

¹² These exclusions are: commercial mobile radio service providers, facsimile transmission services, and private computer data network companies not offering services to the public for hire.

¹³ §364.02(12), Fla. Stat. (1995).

¹⁴ §364.02(13), Fla. Stat. (1995).

¹⁵ Application for certificate to provide alternative local exchange telecommunications service by Teleco Communications, Ltd, Docket No. 951512-TX, filed on December 1, 1995. Teleco

Thus, even if the Court is persuaded that Teleco's ownership of bare legal title to the inside wire pursuant to a installment sales contract does make it a telecommunications company, Teleco is now able to own that wire and charge whatever the market will bear for its use.

As a matter of public policy, the legislature has opened the telecommunications monopoly up to competition in the belief that this act "will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure." §364.01(3), Fla. Stat. (1995). Allowing this FPSC decision to stand is absolutely contrary to these sweeping statutory changes and the public policy so clearly articulated by the legislature which supports those changes.

The FPSC has told Teleco that it couldn't own the inside wiring and therefore should divest itself of the wire. Teleco can now own the wire, and has applied for the appropriate AEC certificate. It is simply inequitable to not to recognize this fact and reverse this case as moot.¹⁶

Communications, Ltd. is the successor company to Teleco Communications Company.

¹⁶ This is an action which has, in fact, been taken by the FPSC recently in very similar circumstances. In In re: Investigation of Central Telephone Company of Florida's provision of Centrex Service to Royal Oaks Apartments 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 (Royal Oaks), the FPSC had show caused several apartment complexes for providing "shared tenant" telecommunications services in violation of 11364.33 and 364.335(3), Fla. Stat. (1993). Order No. PSC-95-1114-FOF-TP,

V. **THE** FPSC DOES NOT **HAVE THE** AUTHORITY TO REQUIRE TELECO TO DIVEST ITSELF OF ITS INSIDE WIRE.

Even should the Court agree with the FPSC that Teleco is a telecommunications company illegally operating without a certificate notwithstanding the above arguments to the contrary, the Court must reverse this case since the FPSC has no statutory authority to order Teleco to give its inside wire to either Southern Bell or RTOA.

The orders of the FPSC come before the Supreme Court clothed with the presumption that they have been made within the FPSC's jurisdiction and powers and that they are reasonable and just. General Telephone Co. v. Carter, 115 So.2d 554, 556 (Fla. 1959); Citizens v. Public Service Commission, 448 So.2d 1024, 1026 (Fla. 1984). However, such deference cannot be accorded when the FPSC exceeds its authority and if there is reasonable doubt as to the lawful existence of a particular power that is being exercised, the court must rule against the existence and exercise of that power. City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493, 496 (Fla.

issued on September 6, 1995, at 1; 95 F.P.S.C. 9:79, 80 (1995). While the case was pending, two apartment complexes, the Southgate Campus Centre and Regent's Club continued to provide the contested shared tenant services. Id.; 95 FPSC at 80. The parties timely requested a formal hearing on the show cause proceeding and while the case was pending, Chapter 95-403, Laws of Florida, was enacted and became effective. Based on that enactment, the FPSC found that the major substantive changes to Chapter 364, Fla. Stat., allowing "competition in the provision of local exchange service" "obviated the need for any further investigation" noting that both apartment complexes could "apply for the appropriate certification if they wish to provide telecommunications services." Id. at 2; 95 F.P.S.C. at 80.

1973); Citrus County v. Southern States Utilities, Inc., 656 So.2d 1307, 1311 (Fla. 1st DCA 1995), rev. den., 663 So.2d 631 (Fla. 1995); State Department of Transportation v. Mayo, 354 So.2d 359, 360 (Fla. 1978). The threshold question, then, is the scope of the legislative grant given to the FPSC since the FPSC derives its power and authority to act solely from the legislature. Florida Bridge at 802; United Telephone Co. v. Public Service Comm. (United Telephone), 496 So.2d 116, 118 (Fla. 1986); 656 So.2d at 1311; 354 So.2d 359 at 360.

Section 364.285(1), Fla. Stat. (1993), gives the FPSC the authority to impose a fine on regulated companies of up to \$25,000 per day per offense for the refusal to comply with or the *willful* violation of any lawful rule or order of the FPSC or any provision of Chapter 364.¹⁷ The FPSC is also given the authority to amend, suspend or revoke any certificate which it has lawfully issued. Id.

The statute does not give the FPSC authority over contractual disputes between private parties", nor does the FPSC have the

¹⁷ Section 364.285, Fla. Stat. (1995), was amended to its current form by Section 28, Chapter 90-244, Laws of Florida. Prior to this amendment which became effective October 1, 1990, a penalty of up to \$5,000 per day for each offense with each day the offense continued to be considered a separate offense could be assessed. Section 364.285, Fla. Stat. (1995), has always required intent as a prerequisite for the imposition of any penalty or fine.

¹⁸ United Telephone, 496 So.2d at 118 (the Court held that the FPSC could not modify revenue distribution contracts entered into by telephone companies); In re: Petition for resolution of a coseneration contract dispute with Orlando Cogen Limited, L.P., by Florida Power Corporation, Order No. PSC-95-0209-FOF-EQ, issued on February 15, 1995, at 4-5; 95 F.P.S.C. 2:257, 260 (1995) (FPSC did

statutory authority to order that Teleco give its wire to either Southern Bell or RTOA. The ability to adjudicate contractual disputes and to order appropriate remedies for contractual breach, including that title for property be transferred, lies totally with the courts. Judge Pittman's order did not, and could not, give this authority to the FPSC. [R. 163-641

The facts of this case stipulated to by all parties do not support a finding that Teleco *willfully* violated 5364.33, Fla. Stat. (1993), and the FPSC has not made such a finding in any order associated with this case. In fact, the record below supports the finding that Teleco did not know, and had no reason to know, that it was violating any applicable FPSC rule or statute since Southern Bell sold it the wire without any indication that this transaction was not completely legal. [R. 84; Stipulations 14 and 15]

Under these circumstances, the FPSC cannot fine Teleco but can only find that Teleco is a telecommunications company and order it to cease or be fined for its continued violation of the cited rules and statutes. This is exactly the language used by the FPSC in Order No. 93-0009:

However, if Teleco fails to comply with the above conditions and continues to operate as a

not have authority to interpret the terms and conditions of a previously approved cogeneration contract entered into between electric utility and cogenerator). See also: In re: Petition of Tampa Electric Company for Declaratory Statement regarding Conserv Cogeneration Agreement, Order No. 14207, issued on March 31, 1985; 85 FPSC 3:228, 231-32 (1985) (FPSC held: "[W]e agree that the civil courts have exclusive jurisdiction to construe the Agreement [cogeneration contract] and award damages if any are merited." [Emphasis added.]

telecommunications company, then this Commission will consider all avenues available, including the maximum fine allowed by Section 364.285.

[R. 111

The FPSC goes too far, however, when it states:

This Commission wishes to clarify that our decision against the imposition of a fine at this time should be considered a trade-off, and is in the spirit of setting the rights of the respective parties, given the time that has passed and the expense that would be incurred through litigation.

[Id.; Emphasis added.]

The issues before the circuit court in this case are basic contract issues: the existence of a contract between the parties; the terms and conditions of that contract, if found by the court to exist; whether there has been a breach of the contract; and if a breach has occurred, the nature and amount of damages to be awarded. None of these issues were referred to the FPSC by Judge Pittman. However, the remedy proposed by the FPSC, divestiture of the inside wire to RTOA, implicitly finds that the contract between the parties is void for illegality thus preempting the circuit court's decision on the basic contract issue being litigated there. [R. 1161 The FPSC does not have the statutory authority to "set the rights" of the parties and thereby spare them the "expense of litigation". Only Judge Pittman or her predecessor can "Set" the parties' rights and only the parties themselves can determine whether to incur the "expense of litigation."

For these reasons, even if the Court sustains the FPSC's

finding that Teleco is a "telecommunications company", the ordering paragraphs of Order Nos. 93-0009 and 94-1304 requiring that Teleco give its inside wire to either RTOA or Southern Bell must be stricken.¹⁹ Whatever legal consequences are the result of this finding, which may well be that there is no legally enforceable contract between RTOA and Teleco, are the sole domain of the circuit court judge, not the FPSC.²⁰

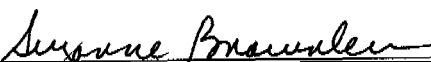
¹⁹ The irony of this remedy should be also noted: Southern Bell is paid twice for its inside wire (once by ratepayers through its base rates and once by Teleco) while RTOA gets inside wire for free having paid neither Southern Bell nor Teleco. Both Southern Bell and RTOA are thereby unjustly enriched.

²⁰ For example, the court could find that although there was no legally enforceable contract, Teleco did render services in installing and maintaining the wire for which it should be made whole under a theory of *quantum meruit*. This is exactly the type of remedy which the FPSC's decision as currently worded could foreclose and which the FPSC is unable to make.

CONCLUSION

For the reasons stated in this brief, the Court should reverse the FPSC orders under review, or in the alternative, strike the ordering paragraphs which require Teleco to divest itself of the inside wire installed at the Regency Towers.

Respectfully submitted,



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CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant Teleco Communications Company was furnished by Hand Delivery (*) or United States Mail on this 10th day of April, 1996 to the following parties of record:

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