SUPREME COURT OF FLORIDA

BELLSOUTH TELECOMMUNICATIONS, INC.,

Appellant,

v.

JULIA L. JOHNSON, etc., et al.,

Appellees.

CASE NO. 90,671

REPLY BRIEF OF APPELLANT SPRINT-FLORIDA, INC.

On Appeal From Florida Public Service Commission order No. PSC-97-0488-FOF-TL

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I. The Commission's Attempt To Justify Its Conclusion That Rate Regrouping Is A Prohibited Price Increase Is Unsuccessful

In its Initial Brief, Sprint-Florida, Inc. ("Sprint") demonstrated that the Florida Public Service Commission's ("FPSC") Order No. PSC-97-0488-FOF-TL ("Order") denying rate regrouping to price regulated local exchange companies violates Rule 25-4.056, Florida Administrative Code; results in an "undue discrimination" in violation of Sections 364.08, 364.09 and 364.10; and erroneously interprets the type of price increases prohibited by Section 364.051 (2), Florida Statutes. The FPSC's Amended Answer Brief, on the other hand, fails to provide the Court with any support that the conclusions reached in its Order are grounded in competent, substantial evidence or are correct as a matter of law.[1]

The FPSC claims in its Answer Brief that its decision to deny BellSouth's request to regroup exchanges is correct because such regrouping constitutes a price increase prohibited by Section 364.051(2), Florida Statutes. That this conclusion is not supported by competent, substantial record evidence is evident from the FPSC's far-fetched claim that BellSouth and Sprint have supplied the necessary competent, substantial evidence by making an "admission against interest" in their Initial Briefs that rate regrouping is a "price increase." (AB, pages 8-9.)

In the first place, "admission against interest" is an evidentiary concept and has no place in an appellate brief.

[1] For purposes of Sprint's Reply Brief, the FPSC's Amended Answer Brief is simply referred to as "Answer Brief" or is cited to as "AB."

Interestingly, the FPSC does not contend that, on the record below, upon which the FPSC is required to base its decision, BellSouth and Sprint made any such "admission against interest." Secondly, the FPSC's syllogism is fatally defective. Even if, arquendo, what BellSouth and Sprint have stated in their Initial Briefs constitutes an "admission against interest," that admission in no way supplies the necessary competent, substantial evidence because nowhere have BellSouth or Sprint "admitted" that the rate regrouping is a "price increase" prohibited by Section 364.051(2). Moreover, the FPSC can point to no evidence which supports that conclusion.

A reasonable reading of BellSouth and Sprint's statements in their Initial Briefs regarding the "price increase" aspects of rate regrouping clearly demonstrates that it is not the type of "price increase" prohibited by Section 364.051(2), Florida Statutes. These statements are consistent with the only record evidence below. Although rate regrouping results in some consumers paying more than they paid for local telephone service prior to rate regrouping, it is for a different product and it is the same amount as others are already paying for that different product. In fact, the rates which the customers in the regrouped exchanges will pay are the same rates which were in effect on July 1, 1995, the date on which the rates were capped by the statute. Appellant Sprint made no "admission" in its Brief, and there simply was no competent, substantial evidence below to support the FPSC's Order.

11. The FPSC Fails To Justify Its Decision That Exchange Regrouping Is Not An "Undue Discrimination"

The FPSC next contends that its decision to ignore its own rule is driven by the requirements of Sec. 364.051, Florida Statutes, which it claims prohibits rate increases for price regulated local exchange companies. (AB, page 14.) What the FPSC's contention ignores is that Rule 25-4.056 does not address price increases; rather it addresses the need to regroup exchanges in order to prevent "undue discrimination" between similarly situated exchanges. "Undue discrimination" is prohibited by Sections 364.08, 364.09 and 364.10, Florida Statutes. The FPSC argues, however, that failure to rate regroup is no longer an "undue discrimination" because competition has changed the regulatory model. (AB, page 15.) Yet, the FPSC offers not one shred of competent, substantial evidence to support this conclusion. Without that support, the FPSC's entire construct falls.

The FPSC's own regulatory process has enforced the requirements of Sections 364.08, 364.09 and 364.10, Florida Statutes, in an analogous "competitive" situation. In its Initial Brief, Sprint referred the Court to an earlier decision of the FPSC, In re: Proposed Tariff Filing by AT&T Communications of the Southern States, Inc., etc., Order No. 22197, issued November 20, 1989, which concluded that the non-discrimination provisions embodied in Sections 364.08, 364.09 and 364.10 apply to "deregulated" interexchange companies. Indeed, as that decision points out, a carrier that has been "deregulated" is still a

"common carrier" subject to the requirements of Sections 364.08, 364.09 and 364.10. The FPSC attempts to side-step this fundamental regulatory principle by now declaring that that decision "concerned a different kind and degree of discrimination" and "pre-dated the transition to competition which provides the context for the Commission's regulatory decision in this case." (AB, page 19.) The FPSC's argument is wrong on both counts.

The FPSC provides no analysis as to why the result in the AT&T proceeding involves a different kind and degree of discrimination; an "undue discrimination" does not have different degrees or types. As the FPSC noted, in denying AT&T's tariff offering free service to only certain hospitals, "... this tariff offering will not treat equally all persons similarly situated." Order No. 22197, page 3. That, of course, is the definition of "undue discrimination," and that is exactly what rate regrouping is intended to address and correct. Moreover, the FPSC totally misses the point of the decision in the AT&T proceeding; that legislatively created "competition" and "deregulation" have not abrogated the statutory prohibition against "undue discrimination."

Because the FPSC hangs its hat on the notion that the 1995 Act creates a new "competitive" paradigm which changes what constitutes an "undue discrimination," the AT&T case is precisely applicable. The competitive position of the IXCs in 1989 is directly comparable to the competitive, price regulated local exchange telephone companies in a post-1995 environment. The FPSC concluded in 1989 that even though it had the authority to exempt AT&T from any and

all parts of Chapter 364 and had granted AT&T forbearance from earnings regulation "to allow it to operate on a more competitive basis with the other interexchange carriers," the prohibition against "undue discrimination" and the requirement to "treat all persons in similar circumstances equally" still apply to AT&T and its competitors, even in a "competitive environment." Order No. 22197, pages 3 and 4. Thus, the FPSC cannot here use the existence of a "competitive environment" as its rationale for determining that an "undue discrimination" does not exist, when the FPSC rejected the identical rationale in its AT&T decision.

Ratification of the FPSC's bogus "competitive environment" rationale would require, by implication, that the FPSC has the authority to exempt price regulated local exchange carriers from the requirements of Sections 364.08, 364.09 and 364.10, when the Legislature has, in fact, granted the FPSC no such authority. Indeed, the FPSC's "competitive environment" rationale flies in the face of the fact that, while the Legislature exempted the price regulated LECs from other statutory provisions related to traditional monopoly regulation, the Legislature did not exempt competitive, price regulated local exchange companies from the "undue discrimination" requirements of Sections 364.08, 364.09 and 364.10.[2] Section 364.051(1)(c), F.S. It is clear that the

[2] In fact, Section 364.10 was amended by the 1995 Legislature by adding subsection (2) to exempt "Lifeline Assistance Plan to qualified residential subscribers" from the prohibition against undue discrimination. However, during the amendatory process, the 1995 Legislature did not declare that rate regrouping was no longer necessary to avoid an "undue discrimination." The Legislature is presumed to know what the law is. Holmes County School Board v. Duffell, 651 So.2d 1176 (Fla. 1995).

Legislature intended the prohibitions against "undue discrimination" will remain in full force and effect despite the Legislature's decision to create a "competitive environment" by opening the local exchange market to competition. Section 364.01(3), F.S.

In light of the foregoing, the FPSC's contention that it can now disregard its own rule is unpersuasive. Contrary to the FPSC's assertion that the enactment of Section 364.051(2) has, ipso facto, rendered its rule ineffective as to price regulated local exchange companies, Section 364.051(2) and Rule 25-4.056 are, at worst, in conflict, but only because of the FPSC's erroneous interpretation of what constitutes a prohibited "price increase." If the FPSC is going to persist in its mistaken position that rate regrouping is a prohibited rate increase, then the FPSC must take the steps to change its rule rather than simply ignoring its rule as it has improperly done in this case. The FPSC's ad hoc approach in the name of expediency undermines the statutorily mandated rulemaking process and is incorrect. Cleveland Clinic v. Asencv for Health Care Administration, 679 S.2d 1237, 1242 (Fla. 1st DCA 1996).

In a "last gasp" effort to show that it can safely ignore its own rule because the Legislature's introduction of a "competitive environment" has created changed circumstances, the FPSC now alleges that during the Agenda Conference BellSouth's counsel conceded that the statute prevails over the rule. (AB, pages 19-20.) The FPSC, however, provides only a portion of BellSouth's counsel's statement on the issue. The entire quote - which follows, presents quite a different picture:

> MR. CARVER: Well, I think if at some point you determine that your rule violates the law, that they are in conflict, then I think you have to follow the statute, and I think you have to do away with your rule as quickly as you can if it is the view of the Commission that it conflicts with the overridins statutory authority. So if that is the view, then I think you should move throush that process quickly.
>
> But the other thins that I also want to emwhasize is that there is also a statutory mandate not to unduly discriminate, and I think if you're going to do away with regrouping in the future, you have to do it in some wav so that all the customers who have been resrouwed are going to be treated the same as everyone else. (Emphasis added.)

R. 176-177.

Again, the FPSC has attempted to rely upon a statement by counsel in place of the necessary record evidence. However, the partial quote is not evidence nor is it accurate.

The FPSC's unilateral and unsupported decision to ignore its own rule places every price regulated local exchange company in the awkward position of having to disregard an existing FPSC rule and run the risk of paying the consequences for doing so. Section 364.285(2), F.S. In view of the FPSC's refusal to follow in this case the reasoning of its Order in the AT&T proceeding, no price regulated local exchange company could possibly rely upon the FPSC's Order in this proceeding in deciding to disregard the Rule 25-4.056 requirement to regroup exchanges.

CONCLUSION

The appealed order should be reversed with directions to allow the application for rate regrouping.

October 14, 1997.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail or hand delivery (*) this 14th day of October, 1997, to the following:

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