

IN THE SUPREME COURT OF FLORIDA

CHARLES J. CRIST, JR.,
Attorney General, State of Florida,
HAROLD McLEAN,
Public Counsel, State of Florida,
and **AARP,**
Appellants,

Consolidated Case Nos.
SC04-9, SC04-10, SC04-946

vs.

LILA A. JABER, Chairman, et al.,
constituting the FLORIDA PUBLIC
SERVICE COMMISSION, an agency of
the STATE OF FLORIDA, **BELLSOUTH
TELECOMMUNICATIONS, INC.,
VERIZON FLORIDA, INC.,** and
SPRINT-FLORIDA, INC., et al.,
Appellees.

On Appeal From the Florida Public Service Commission

REPLY BRIEF (REDACTED) OF THE PUBLIC COUNSEL
On Behalf of the Citizens of the State of Florida

HAROLD McLEAN
PUBLIC COUNSEL

CHARLES J. BECK
Deputy Public Counsel
Florida Bar No. 217281

H F. MANN
Associate Public Counsel
Florida Bar No. 736225

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

ARGUMENT – I

THERE IS NO EVIDENCE THAT THE PSC WIGHED ALL BENEFITS AND ALL COSTS TO DETERMINE WHETHER THE ILEC PETITIONS WILL BENEFIT RESIDENTIAL CUSTOMERS PURSUANT TO THE REQUIREMENTS OF SECTION 364.164(1)(a)..... 1

ARGUMENT – II

LEGISLATIVE HISTORY SUPPORTS THE INTERPRETATION THAT THE ACT REQUIRES THAT BENEFITS MUST EXCEED COSTS..... 6

ARGUMENT – III

PUBLIC COUNSEL DOES NOT ASK THIS COURT TO REWEIGH EVIDENCE..... 7

CONCLUSION 8

CERTIFICATE OF COMPLIANCE..... 10

CERTIFICATE OF SERVICE..... 11, 12

TABLE OF CITATIONS

CASES

Balsam v. Dept. of Health & Rehab. Serv., 9
486 So.2d 1341 (Fla. 1st DCA 1986)

Citizens v. Public Serv. Comm’n,
464 So. 2d 1194 (Fla. 1985) 8

Citizens of the State of Florida v. Hawkins,
356 So. 2d 254, 259..... 8

Citizens of the State of Florida v. Public Serv. Comm’n,
425 So. 2d, 534, 538 (Fla. 1982) 8

DeGroot v. Sheffield,
95 So. 2d 912 (Fla. 1957)..... 8

Florida Power Corp. v. Public Serv. Comm’n,
487 So. 2d 1061, 1063 (Fla. 1986) 7, 8

Magaw v. State,
537 So. 2d 564, 566 (Fla. 1989) 6, 7

Shevin v. Yarborough,
274, So. 2d 505, 509 (Fla. 1973) 8

Smith v. Crawford,
645 So. 2d 513, 525 n.8 (Fla. 1st DCA 1994) 6, 7

FLORIDA STATUTES

Section 364.164(1)(a)..... 1

ARGUMENT - I

THERE IS NO EVIDENCE THAT THE PSC WEIGHED ALL BENEFITS AND ALL COSTS TO DETERMINE WHETHER THE ILEC PETITIONS WILL BENEFIT RESIDENTIAL CUSTOMERS PURSUANT TO THE REQUIREMENTS OF SECTION 364.164(1)(a)

To ensure that residential customers benefit from the granting of the ILEC petitions, benefits must exceed costs. To determine whether customers will benefit, there must be a weighing of benefits versus costs, and to accomplish that, the Public Service Commission must assign, in some fashion, some relative worth to the factors. Only then may all the factors be properly weighed or compared. These factors must include the net financial harm to residential customers of [REDACTED] per year, which the PSC ignored.

The ILECs twist this argument by wrongly asserting that OPC claims that every customer must receive a dollar-for-dollar offset to higher local rates with corresponding long distance rate reductions. The PSC similarly misstates OPC's argument as a claim that the PSC must implement "bill neutrality," which it defines as comprising a total offset of residential customers' increases in rates for local service by an equal amount of long distance rate reductions.

The PSC additionally misstates Public Counsel's argument by asserting that OPC has argued that the Commission erred because the PSC did not perform a mechanical cost/benefit analysis to show that the qualitative benefits of increased competition will outweigh the financial cost to residential

customers. Contrary to the PSC's erroneous claim, Public Counsel also does not argue that Legislative intent suggests that the PSC cannot approve the petitions unless a net financial benefit inures to residential customers and unless only immediate benefits are weighed in the balance of costs and benefits. Public Counsel does not argue that a "mechanical" cost/benefit analysis should be performed to show that qualitative benefits alone will outweigh the \$300 million per year financial cost to residential customers. Public Counsel argues that all benefits - - qualitative and quantitative - - must be weighed against the costs of achieving those benefits.

The Commission found in its Final Order that it had the discretion to, and so chose to, consider the degree of benefit to residential customers of long distance rate reductions. Its Order on Reconsideration then modified and clarified its Final Order and concluded:

We . . . find that the preponderance of the evidence in the proceeding shows that the qualitative and quantitative benefits to residential customers as a whole generated by the resulting decreases in long distance rates, ~~and~~ elimination of the in-state connection fee, increased availability of bundled offerings, more competitive options for service, and stimulated long distance usage will outweigh the increase in local rates. (R19:3833, clarifying PSC conclusion at R17:3320). (Additions and deletions in original).

Notwithstanding this language, the PSC did not weigh the benefits and costs to residential consumers. The Commission did not assign any values to

the qualitative benefits that it found would result from approval of the petitions; nor did the PSC consider the degree of benefit from residential long distance rate reductions. The PSC spoke of long distance rate reductions in general; however, it never acknowledged that the actual degree of benefit from long distance rate reductions to residential customers is approximately [REDACTED] [REDACTED] per year. The PSC referred generally to residential local rate increases, but never articulated that approximately \$300 million of the total \$343.5 million per year in local rate increases from all three ILECs will be imposed upon residential customers. And the Commission completely ignored the key factual number of [REDACTED] in net financial harm to residential customers. The Commission failed to comply with the essential requirements of law when it ignored the evidence of [REDACTED] in net financial harm to residential customers and erroneously determined that those same customers will benefit from the ILEC petitions. The PSC could not validly conclude that residential customers would benefit from the petitions unless it at least balanced the immediate financial harm to residential customers against other, less tangible, benefits. Instead of accounting for the harm, the Commission simply ignored the harm.

In its brief, the PSC asserts that the Act does not require a “mechanical weighing process” and explains that it rejected Public Counsel’s argument that

the Act requires it to quantify the beneficial impacts of competition. What the PSC fails to explain away is how it could have validly determined that benefits “will outweigh the increase in local rates” without conducting a weighing process. The PSC asserts that the record support for the finding that benefits from implementing the petitions will outweigh the local rate increases is discussed in detail at pages 26 to 33 of the final order. Nowhere within those pages, however, is there competent substantial evidence to support the contention that the qualitative and quantitative benefits, as found by the PSC, will outweigh the \$300 million residential local rate increases.

In its orders, the PSC declares that there is no need for a weighing process, yet simultaneously defends its conclusion that qualitative and quantitative benefits will “outweigh” costs. If it did weigh the benefits against the costs, how was this process performed and what were the results? How could weighing have been performed without the PSC assigning some relative worth to each of the benefits and to the costs?

The PSC’s conclusion is not supported by a proper and necessary analysis of costs and benefits. It made no proper findings concerning an analysis, and did not rely on competent substantial evidence to support its conclusion that benefits will outweigh the local rate increases.

Even if this Court could find competent substantial evidence to support the general finding that competition will bring a number of qualitative benefits to residential consumers, as the Commission asserts, the PSC's conclusion that these qualitative and quantitative benefits will outweigh the local rate increases (of approximately \$300 million per year) is not supported by competent substantial evidence. Nor are there any findings of fact to support this conclusion.

In its Order on Reconsideration, the PSC stated that the intent of its final order was "to reflect that the cumulative benefits resulting from granting the ILECs' petition, including long distance reductions, would offset the impact of the local rate increases." (R19:3833). This revision still lacks the support of competent substantial evidence, regardless of the total "number" of benefits there may be. There is no record evidence of the value of those benefits. The Commission cannot simply assume that benefits of an undetermined value "will outweigh" the ignored and unrecognized "impact of local rate increases" of [REDACTED] per year net harm to residential customers.

Public Counsel does not presume to have identified the only way possible that weighing costs versus benefits could properly take place. However, there must be a balancing of the two. There must be some relative worth assigned to benefits and to costs that would facilitate a comparison of the two. For a

conclusion that a petition is “for the benefit of” residential customers, as the statute requires, the benefit must be worth more than the cost required to obtain it. Otherwise, it is meaningless to say that competition will be created “for the benefit” of residential consumers.

ARGUMENT II

LEGISLATIVE HISTORY SUPPORTS THE INTERPRETATION THAT THE ACT REQUIRES THAT BENEFITS MUST EXCEED COSTS

Even though the PSC found the Act ambiguous and accepted the debates into the record, the ILECs criticize Public Counsel’s reliance on Legislative floor debates to support the argument that benefits must be weighed against costs. The ILECs assert that courts have specifically warned against relying on floor debates to divine legislative intent, citing Smith v. Crawford, 645 So. 2d 513, 525 n.8 (Fla. 1st DCA 1994).

However, the Smith court went on to say, that:

The Florida courts have recognized that ‘[in] construing a statute *which is susceptible to more than one interpretation*, it is often helpful to refer to legislative history,’ Magaw v. State, 537 So. 2d 564, 566 (Fla. 1989) (emphasis added), including reports of staff committees and transcripts of floor debates. In the present case, however, the plain words of the Act are not susceptible of more than one interpretation, and it is not appropriate to rely upon such extrinsic aids to statutory construction as used by the trial court. Moreover, the comments by the legislators referred in the trial court’s order do not even support the conclusion that the trial court reached.”

Smith, at 524, 525.

In Magaw, the Court, in addition to referring to the staff analysis, found that the “debate on the floor when the Senate adopted this bill, is also instructive [I]n view of the history of chapter 86-296, the legislative intent is clear.” Magaw, at 567.

ARGUMENT - III

PUBLIC COUNSEL DOES NOT ASK THIS COURT TO REWEIGH EVIDENCE

Contrary to the PSC’s assertion, Public Counsel does not seek to have record evidence reweighed. As detailed in Argument - I, above, the Commission did not weigh in the first instance crucial evidence at the heart of OPC’s appeal. The PSC has ignored crucial facts, has made no findings and has no competent substantial evidence to support its conclusory finding that benefits outweigh costs. Because the Commission ignored a crucial record fact - - that residential customers will suffer a net harm of [REDACTED] - - the PSC has not complied with the essential requirements of law.

This court has reversed when the PSC findings were unsupported by the record. The Court addressed this in Florida Power Corp. v. Public Serv. Comm’n, 487 So. 2d 1061, 1063 (Fla. 1986):

[1] Although we will not reweigh or reevaluate the evidence presented to the Commission, we may examine the record to determine whether the order complained of meets the essential requirements of law. Citizens v. Public Serv. Comm'n, 464 So. 2d 1194 (Fla. 1985).

[2] The fundamental premise supporting the Commission's order is that FPC received no consideration when it assigned its interest in COM technology to EFC. This finding is wholly unsupported by the record and fails to comport with the essential requirements of law. Accordingly, we reverse the order of the PSC.

CONCLUSION

The Commission's action is arbitrary and unsupported by competent substantial evidence and fails to comport with the essential requirements of law.

The PSC must rely on competent substantial evidence to support its order.

Citizens of the State of Florida v. Public Serv. Comm'n, 425 So. 2d 534, 538

(Fla. 1982) (citing to Citizens of the State of Florida v. Hawkins, 356 So. 2d

254, 259 (Fla. 1978); DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957) (holding

that the standard of review is whether competent, substantial evidence supports

a Commission order). See also, Shevin v. Yarborough, 274 So. 2d 505, 509

(Fla. 1973) (holding that the Court also would not affirm if the Commission's

order is arbitrary and unsupported by substantial competent evidence). The

Commission ignored the factual evidence of net financial harm to residential

customers and erroneously determined that those customers would benefit.

Agencies have been reversed when they ignore facts, act arbitrarily or abuse

their discretion by placing too much emphasis on some criteria and failing to consider others in applying their statutes and rules. Balsam v. Dept. of Health & Rehab. Serv., 486 So. 2d 1341, 1346 (Fla. 1st DCA 1986) (holding that agency was not free to ignore facts, proved by substantial competent evidence and did not exercise its discretion in compliance with the applicable statutes).

The Commission's final order should be reversed and its order on reconsideration should be quashed.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply Brief (Redacted) is submitted in Times New Roman 14-point font and complies with Rule 9.100(1) of the Florida Rules of Appellate Procedure.

H F. MANN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the Reply Brief
(Redacted) of the Public Counsel has been furnished by U.S. Mail to the following,
this 7th day of December, 2004.

Rick Melson, Esquire
General Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Charles J. Crist, Jr.
Jack Shreve
Lynn C. Hearn
Christopher Michael Kise
Office of the Attorney General
The Capitol – PL01
Tallahassee, Florida 32399-1050

Michael B. Twomey
Post Office Box 5256
Tallahassee, FL 32314

De O’Roark
MCI WorldCom
Concourse Corporate Ctr. Six
Six Concourse Parkway, Ste. 3200
Atlanta, GA 30328

Donna McNulty
MCI WorldCom, Inc.
1203 Governors Square Blvd., Ste. 201
Tallahassee, Florida 32301

Nancy B. White
c/o Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Ste. 400
Tallahassee, Florida 32301

Floyd R. Self
Messer, Caparello & Self
Post Office Box 1876
Tallahassee, Florida 32302-1876

Charles Rehwinkel
Sprint-Florida, Incorporated
1313 Blair Stone Road, FLTH00107
Tallahassee, Florida 32301

George Meros
Gray Robinson
Post Office Box 11189
Tallahassee, Florida 32302

Tracy Hatch
Chris McDonald
AT&T
101 North Monroe Street, Ste. 700
Tallahassee, Florida 32301

John P. Fons, Esquire
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302

Susan Masterson, Esquire
Sprint-Florida, Incorporated
Post Office Box 2214
Tallahassee, Florida 32316

Richard Chapkis
Kimberly Caswell, Esquire
Verizon Florida, Inc.
201 North Franklin Street, FLTC007
Tampa, Florida 33602

Harris R. Anthony
400 Perimeter Center Terrace
Suite 350
Atlanta, Georgia 30346

H F. Mann
Associate Public Counsel
Florida Bar No. 736225

Office of Public Counsel
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400
(850) 488-9330

Attorney for the Citizens of the
State of Florida