

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Primary jurisdiction referral)	DOCKET NO. 880815-TL
from the Circuit Court for the Sixth)	
Judicial Circuit, Pinellas County,)	ORDER NO. 20980
in Circuit Court No. 87-14199-7)	
)	ISSUED: 4-4-89

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD
 BETTY EASLEY
 GERALD L. GUNTER
 JOHN T. HERNDON

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

On June 2, 1988, the Honorable Howard P. Rives, Circuit Judge in Pinellas County, Florida, ordered that Count XII of the First Amended Complaint of Home Shopping Network, Inc. (HSN) in the case of Home Shopping Network, Inc. v. GTE Corporation, General Telephone Company of Florida and GTE Communications Corporation, Civil Case No. 87-14199-7, be referred to the Commission for findings. Count XII alleged that the defendants had failed to meet their obligations to provide reasonable and sufficient telephone facilities and equipment as required by Section 364.03, Florida Statutes. The Court premised this referral on Florida case law, empowering courts to refer technical matters to the Commission for findings. See Southern Bell Tele. and Tele. Co. v. Mobile America Corp., 291 So.2d 199, 201 (Fla. 1974) (Southern Bell).

In accordance with the Court's referral, GTE Florida Incorporated (GTEFL), filed a petition with the Commission on June 17, 1988 (the Petition), requesting that we initiate proceedings concerning the referral. HSN petitioned to intervene and moved to stay the requested proceedings on July 11, 1988.

On July 6, 1988, HSN moved to dismiss Count XII of its complaint in the Court. GTEFL filed a Cross Motion in the Court on August 1, 1988, seeking a referral of the majority of the factual allegations relating to quality of service to the Commission on the grounds of our primary jurisdiction.

The parties to the above-referenced proceeding met on September 13, 1988, to frame issues for us to consider on the referral of Count XII of the First Amended Complaint. Due to the uncertainty as to what was before the Commission and the disputes over issues proposed by the parties, our Staff scheduled a hearing before the Prehearing Officer to hear HSN's motion for a stay and to rule on the disputed issues; that hearing was held on September 21, 1988. By Order No. 20083, issued September 28, 1988, the Prehearing Officer granted HSN's stay request, pending a ruling on referral. On September 29, 1988, Judge Rives issued an order (the Referral Order) granting GTEFL's Cross Motion for primary jurisdiction referral to the Commission. In the Referral Order, HSN's motion to withdraw

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Count XII was also granted. On November 22, 1988, Judge Rives denied HSN's Motion for Rehearing on the primary jurisdiction referral.

In the Referral Order, Judge Rives referred several questions relating to three specific paragraphs of HSN's Second Amended Complaint. Paragraph 34 of this complaint states:

In late 1986, HSN anticipated a substantial increase in call volume as the result of market expansion through the acquisition of UHF television stations and the further addition of cable affiliates. During this period GTE Florida and GTE Communications repeatedly told HSN that GTE's telecommunications systems and the OMNI equipment were capable of processing HSN's anticipated increased volume of calls and were in fact operating effectively in all respects. This representation was false.

Based on this paragraph, the Court proposed the following question:

Were GTE's telecommunications system and OMNI equipment capable of processing HSN's: (1) Then-present volume; (2) its anticipated volume; and (3) Was the equipment then operating effectively? All as contemplated by F.S. 364.03 and/or applicable rules and regulations of the Florida Public Service Commission, if any.

Paragraph 35 of HSN's Second Amended Complaint states:

In late 1986, HSN became concerned about whether it was receiving all of the customer calls that were being placed to HSN, and raised this question with GTE Florida and GTE Communications. GTE Florida and GTE Communications told HSN that all customer calls were being passed to HSN and that any problems that existed were solely the result of HSN's operator staffing decisions, and not due to GTE's equipment or services. These statements were false.

The Court proposed the following question with respect to the above allegations:

Did the equipment and service employed by the Defendants in the within cause comply with standards under F.S. 364.03 and/or applicable P.S.C. rules, if any?

Paragraph 62 of HSN's Second Amended Complaint states:

By making fraudulent statements, selling deficient equipment and then failing to service the equipment, willfully concealing the equipment's flaws, failing to advise HSN of the

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problems that the local and long distance networks had in handling the volume of HSN calls, and the other misconduct described above, defendants acted in bad faith and breached and violated their duties to HSN.

Based on these allegations, the Court referred the following three questions to the Commission:

- (1) Was there a breach of duty under F.S. 364.03 of "selling deficient equipment"?
- (2) Was there a breach of duty under F.S. 364.03 in the service of any equipment so sold?
- (3) Was there a breach of either (1) or (2) above under any rule, regulation or applicable requirement of the P.S.C. with respect to said equipment?

Each of the questions referred by Judge Rives seeks a determination of the responsibilities of GTE Communications Corporation (GTEC), GTE Corporation (GTE) and GTEFL for providing service pursuant to Section 364.03, Florida Statutes, and related Commission Rules. Since GTEFL is the only entity providing telecommunications services pursuant to Chapter 364, Florida Statutes, issues relating to GTEFL's affiliates were deleted by the Prehearing Officer in Order No. 20083. Based on Staff's recommendation, the Prehearing Officer limited the issues to those specifically addressing GTEFL's actions. The final issues list was provided to the parties as an attachment to Order No. 20343, issued November 21, 1988.

On November 18, 1988, HSN filed a Motion to Dismiss the Petition, maintaining that the referral was inappropriate and should be dismissed because HSN is not alleging in its civil suit that GTEFL has violated a statute or rule enforceable by the Commission. According to HSN, the Florida Supreme Court held in Southern Bell that the allegations contained in a court's referral to the Commission for guidance must allege the violation of a regulation, statute or administrative standard.

Further, HSN alleges that we lack jurisdiction over the subject matter addressed in the referral inasmuch as the questions involve equipment. Moreover, HSN believes that we are being asked to rule on the conduct of parties who are not within our regulatory purview, e.g., GTEC and GTE, and to review GTEFL's unregulated activities. Finally, we are said to lack authority under Chapter 120, Florida Statutes, known as "the Florida Administrative Procedures Act" (the APA), to issue non-binding answers or recommendations or both. In this regard, HSN charges that the APA, enacted after Southern Bell was decided, contemplates that we shall issue only binding and appealable rules and orders. For this reason, HSN concludes that any opinion that we issue on the referral would violate the APA. Based on its belief that any action taken by the Commission on the matters referred would exceed our statutory authority, HSN requests that the Petition be dismissed.

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On December 5, 1988, GTEFL filed a Motion to Strike HSN's Motion to Dismiss, claiming that HSN's motion is procedurally defective and substantively erroneous. GTEFL charges also that the Motion to Dismiss is inappropriately addressed to the Commission. HSN is claimed by GTEFL to be merely rehashing here an argument -- that the referral is inappropriate -- which has been rejected both when raised initially and later on reconsideration by the Court. GTEFL asserts that HSN cannot attack a court order in an administrative proceeding.

The source of the Commission's authority is Chapter 364, Florida Statutes, governing our regulation of telephone companies, according to the Motion to Strike. The APA is said by GTEFL to only set forth procedural requirements and therefore does not furnish statutory authority to the Commission. GTEFL believes the Commission should proceed to issue the findings requested by the Court without regard to whether the Court will treat them as binding.

Procedurally, the Motion to Dismiss is untimely because it was filed beyond the twenty-day deadline for filing such pleadings and thus should be stricken, in GTEFL's view, since HSN has thereby waived its right to seek dismissal. Moreover, GTEFL contends that the Motion to Dismiss contains no valid jurisdictional allegations supporting this challenge to the Commission's lack of jurisdiction over the subject matter.

After considering the arguments, we find that HSN's initial argument that the referral is inappropriate because HSN does not specifically allege a violation of any statute or Commission Rule is a too narrow reading of Southern Bell. The Supreme Court in that case stated:

If a complaint raises intricate problems of a technical nature requiring an expert determination of whether the standards set by statute and implemented by more detailed regulations have been met in a particular instance, the court should be free, though not required, to refer such matters to the PSC for its findings, in order to obtain the benefit of the state regulatory agency's specialized expertise in the field.

The PSC is uniquely qualified to determine difficult technical questions regarding the adequacy of telephone service and has a technical staff whose functions include dealing with difficult issues.

291 So.2d at 202.

The Supreme Court made it clear that the trial court could refer questions of compliance with the statutory standards set forth in Section 364.03, Florida Statutes, to the Commission. That case should not be read to be applicable only when a specific allegation is before a court. Reading the paragraphs of HSN's complaint referred by the Court, it is

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clear that HSN has raised technical issues regarding the adequacy of GTEFL's network service to HSN. The questions referred by the Court are specifically referenced to Section 364.03. The issue of the adequacy of network provisioning by GTEFL is highly technical and is particularly within the Commission's purview. Based on the contents of HSN's allegations and the Supreme Court's language in the Southern Bell case, it is clear that the Court's referral is consistent with the Southern Bell case and is, therefore, appropriate. It is also important to note that, according to GTEFL, these same allegations raised here by HSN have been argued and rejected by Judge Rives.

With respect to HSN's argument that we lack the subject matter jurisdiction to address the questions referred by the Court, we conclude that this argument belies a thorough reading of the questions submitted by the Court. Each of the questions seeks a determination of the duties and responsibilities of GTEFL, GTEC and GTE with respect to the equipment and service provided to HSN pursuant to Section 364.03 and related Commission Rules. We do not have regulatory jurisdiction over the activities of GTE and GTEC, e.g., such as the terms and conditions under which the OMNI system was provided to HSN. However, we do have jurisdiction over the services and facilities provided by GTEFL. The three paragraphs of HSN's complaint referred by the Court have clearly raised allegations directed expressly at GTEFL's service quality provided to HSN. We have the clear statutory authority to address these issues. Our lack of authority to regulate the activities of GTE and GTEC does not deprive it of jurisdiction to answer the questions posed by the Court; namely, a determination of the statutory duties, if any, of each of the entities involved. Accordingly, we find that we have subject matter jurisdiction to consider the Court's referral.

The last major argument raised by HSN is that the APA supercedes the decision in Southern Bell and allows the Commission to issue only binding and appealable rules or orders, and thus we cannot issue non-binding answers or recommendations to the Court. Initially, we agree with GTEFL's argument that the APA is procedural in nature and not a substantive limit on our jurisdiction to act in accordance with our statutory responsibilities. Additionally, we note that HSN does not cite any specific provision of the APA that is inconsistent with the Southern Bell case. Presumably, HSN refers to the appellate provisions of Section 120.68, but we can find nothing in that section which is inconsistent with the Southern Bell case. Our orders are binding on those who were parties to the proceeding or who had notice and a reasonable opportunity to participate in the case. This is not inconsistent with the Southern Bell case wherein the Supreme Court held that:

...PSC findings, where sought, are not conclusive but should be considered together with any other evidence before the court on the issue of liability, and on the issue of damages if applicable to that issue. The judge should consider the total evidence in arriving at his

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conclusions and a jury should be similarly governed by the weight of all of the evidence before it. The PSC findings in such a case would be much like that of the report of a referee or special master which the court, or jury, could act upon as all of the evidence might indicate.

Id. at 201&2.

The Supreme Court further states that such determination "shall not be binding on the circuit court, or upon a jury, if there be contradictory evidence sufficient to support a contrary verdict." While the Supreme Court noted that an order of the Commission would not bind either the court or the jury, it is clear that it would be binding on the parties to our proceeding. As the Supreme Court said, our order setting forth our findings in this case would be evidence to be considered in the Court trial. This is not inconsistent with the APA.

Further, HSN also intimates without any explanation that our order in this proceeding would somehow not be appealable under the APA. We believe that the proper forum for an appeal of our order in this proceeding is a question for the appealing party to answer. Beyond this, the appealing party must comply with the appellate requirements of the APA, Chapter 364 and Article V, Section 3(b)(2), Florida Constitution.

For the reasons stated above, HSN's Motion to Dismiss is denied because the Court has referred questions which are within our jurisdiction to resolve. We have the authority under case law to act in accordance with the Court's referral, and we believe that the APA should not be interpreted as barring such action.

It is, therefore,

ORDERED by the Florida Public Service Commission that Home Shopping Network, Inc.'s Motion to Dismiss filed on November 18, 1988, is hereby denied. It is further

ORDERED that this docket shall remain open for further proceedings.

By ORDER of the Florida Public Service Commission,
this 4th day of APRIL, 1989.



STEVE TRIBBLE, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.