BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation to determine whether local exchange company pay telephone service (LEC PATS) is competitive and whether local exchange company pay telephone service (LEC PATS) should be regulated differently than it is currently regulated.	DOCKET NO. 920255-TL
In Re: Complaint of Florida Pay Telephone Association, Inc. against SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY for expedited relief to cease payment of commissions on monopoly revenues.	DOCKET NO. 910590-TL ORDER NO. PSC-93-1447-FOF-TL ISSUED: October 4, 1993

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
J. TERRY DEASON

ORDER DENYING MOTION FOR RECONSIDERATION AND CORRECTING CERTAIN PORTIONS OF PREVIOUS ORDER

BY THE COMMISSION:

I. BACKGROUND

By Order No. PSC-93-0289-FOF-TL, issued February 23, 1993, we made our determination on the question of whether local exchange company (LEC) pay telephone service (LPATS) is effectively competitive. We had initiated Docket No. 920255-TL on our own motion to answer that question. Additionally, this Order addressed the Florida Pay Telephone Association, Inc.s (FPTA's) complaint regarding whether the LECs should be permitted to pay commissions on monopoly revenues (Docket No. 910590-TL).

On March 10, 1993, FPTA filed a Motion for Reconsideration and Clarification of Order No. PSC-93-0289-FOF-TL (Motion) and a Request for Oral Argument. GTE Florida Incorporated (GTEFL) filed its Response to FPTA on March 22, 1993, while BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and

Telegraph Company (Southern Bell) filed its Response on March 23, 1993. Then, on April 7, 1993, FPTA filed a Motion to strike Southern Bell's Response.

II. ORAL ARGUMENT

We have determined that it is appropriate to deny FPTA's Request for Oral Argument (Request). Rule 25-22.060(1)(f), Florida Administrative Code, provides that oral argument on a request for reconsideration is granted solely at our discretion. We do not believe that oral argument would aid us in our consideration of FPTA's Motion. Accordingly, FPTA's Request shall be denied.

III. MOTION TO STRIKE

On March 23, 1993, Southern Bell filed its Response to FPTA's Motion for Reconsideration. On April 7, 1993, FPTA filed a Motion to Strike Southern Bell's Response. On April 9, 1993, Southern Bell filed a Response to FPTA's Motion to Strike (Response to Motion to Strike), along with a Motion for Waiver of Rule 25-22.037, Florida Administrative Code (Waiver Request).

Southern Bell's Response to the Reconsideration Motion is untimely because it was filed thirteen days after service of FPTA's Motion for Reconsideration. Rule 25-22.060(3)(c), Florida Administrative Code, provides that a response to a motion for reconsideration must be served within seven days of service of the motion for reconsideration to which the response is directed. Rule 25-22.028, Florida Administrative Code, permits five additional response days when a document has been served by mail. To be timely, Southern Bell's Response to the Reconsideration Motion should have been filed within twelve days of the date the Reconsideration Motion was filed, or by March 22, 1993.

In its Response to the Motion to Strike, Southern Bell states that its pleading was filed one day late due to inadvertent error in the calculation of the filing due date. Because of this error, Southern Bell has requested that it be allowed to file its pleading one day late and that we waive Rule 25-22.037 to allow it to do so.

Initially, we note that Southern Bell has cited the wrong rule in its Waiver Request. Rule 25-22.060 governs the time frames for requests for reconsideration, as well as responsive pleadings

thereto. The rule cited by Southern Bell, Rule 25-22.037, is the general rule governing the filing of pleadings. However, there is no material difference in these rules as pertains to the point at issue here; both provide for a period of seven days in which to file responsive motions. We shall not consider Southern Bell's Waiver Request to be fatally flawed for this error.

Further, FPTA has not demonstrated any prejudice as a result of the late-filed responsive pleading. We disagree with FPTA's view that the time limits in Rule 25-22.060 are jurisdictional and cannot be waived, at least for responsive pleadings. Accordingly, we find it appropriate to deny FPTA's Motion to Strike. This has the effect of granting Southern Bell's Waiver Request.

IV. COMPETITION

FPTA claims that the Order erroneously concludes that the Commission is under no obligation to encourage telecommunications competition. We disagree. We believe that the Order properly reflects the intent of Section 364.01(3)(c)-(e), Florida Statutes, that the Commission encourage competition if doing so benefits the public interest. The portion of the Order that FPTA claims is in error is located at page 15 and states:

> We believe the primary factor we should consider when determining whether any service should be classified as effectively competitive is the impact on the general body of ratepayers and on end users of the particular service. We do not believe we are under any particular obligation or mandate to alter the status quo in favor of competition.

FPTA claims that the Order contradicts statements made by Commissioners during the Special Agenda; that it overlooks the legislative intent of Chapter 364; and that it does not recognize the practical effect of the Commission's failure to assume its statutory obligation. FPTA states that such inaction permits the continuation of regulatory policy that favors the LEC, to the detriment of competition, monopoly ratepayers, and end users.

Contrary to FPTA's claim, we did not fail to consider the matters referenced by FPTA. Rather, FPTA has taken the quoted passage out of context. The Order does not imply that we are under no obligation to encourage competition; rather, we found that the

primary factor to consider when determining whether a service is effectively competitive is the impact on the general body of ratepayers and on the end users of the service. Further, FPTA is rearguing its position, which we considered and rejected. Our Order states at page 29:

> Referring to Section 364.01 (3)(c) and (d), FPTA argues that we must encourage cost-effective technology and competition and ensure that all providers are treated fairly. However, this statement is incomplete. Section 364.01(c) states that we shall take such action "if doing so will benefit the public by making modern and adequate telecommunications services available at reasonable rates."
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> . . .
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> The record in this proceeding shows, we believe, that we do consider the encouragement of cost-effective technology and competition, and do ensure that all providers are treated fairly. In considering whether the public interest is served, we believe we should also look at rates, quality of service, and the availability of service. All three of these factors require regulatory oversight and we believe such regulatory oversight should be continued.

Based upon the above factors, we see no error or oversight on our part on this issue. Accordingly, FPTA's Motion shall be denied on this point.

V. DEFINITIONS

FPTA asks that we reconsider our decision that the terms "competitive," "effectively competitive," and "subject to effective competition" are synonymous. First, FPTA claims that our decision mischaracterizes witness Cresse's testimony as "senseless" and "contradictory." This argument centers on witness Cresse's opinion about the various definitions and is merely a restatement of his testimony on this point. We did not err in concluding that witness Cresse's opinion of the definitions simply did not make logical sense when applied to the statute containing the terms in question.

FPTA next argues that there is no record evidence to support our decision, which we "presumably" grounded on witness Cresse's inability to produce legislative evidence to support his position. FPTA again reargues its case by stating that simply because all three terms were used in the statute, they must have separate meanings. FPTA also argues that witness Cresse's testimony regarding private line service was misconstrued in the Order.

These arguments are both incorrect and unfounded. FPTA is incorrect that our decision rests on witness Cresse's inability to produce evidence of legislative intent. Rather, we undertook what GTEFL describes as "a painstaking and thorough analysis of the plain meaning of Section 364.338" in the Order.

FPTA is also incorrect when it claims that witness Cresse's example of private line service was misconstrued. We agree with FPTA's restatement of the witness' testimony on this point. However, FPTA fails, as the witness fails, to apply this example to the statute. When "private line" is substituted for "competitive" in the statute, it contradicts FPTA's position. This simple logical step is where FPTA's argument disintegrates.

Finally, FPTA states that we have cited no specific case law authority for the rules of statutory construction we used, and even so, the rules we used actually support its position. However, as GTEFL points out, we have wide discretion in interpreting statutes and are under no obligation to take evidence on statutory construction. Accordingly, FPTA's Motion shall be denied on this point.

VI. PRICE CAPS

FPTA states that the Order erroneously concludes that effective competition cannot occur if price caps exist. This assertion is a mischaracterization of our Order which, in fact, acknowledged that price caps could theoretically exist in an effectively competitive market. What we did find was that for pay telephones, there was no evidence that effective competition could exist with price caps.

FPTA claims that nothing in Chapter 364 prohibits the use of price caps for an effectively competitive service. FPTA argues that the Legislature intends for ratepayers to be protected from excessive rates and charges as a precondition to effective

competition. According to FPTA, the unchallenged record evidence reflects that price caps are one means of providing such protection to ratepayers. Once again, FPTA is rearguing its prior position. FPTA does not point to any evidence that we overlooked or failed to consider. Accordingly, FPTA's Motion shall be denied on this factor.

VII. MONOPOLY REVENUES

FPTA states that our decision to take no action on the payment of commissions based on monopoly revenues is not supported by competent substantial evidence. FPTA argues that our decision is based on the erroneous conclusion that the revenue streams available to LPATS providers are not greater than those available to NPATS providers. FPTA also claims that our analysis on this issue is both misleading and incomplete.

We disagree with FPTA's claim that our decision is not supported by competent substantial evidence. This issue probably generated more discussion and scrutiny than any other issue in this proceeding. Contrary to FPTA's claim, the Order is not based on the conclusion that revenue streams available to LPATS providers are not greater than those available to NPATS providers. We did agree with witness Emerson that in an ideal world, both LPATS and NPATS would have access to the same sources of revenues. However, we noted that institutional restrictions do not permit this to become a reality. What we did find is that while the balance of revenue sources is not perfect, it is reasonable.

We disagree with FPTA that our analysis on this issue is misleading and incomplete. First, with respect to FPTA's claim that we mistakenly stated that the interexchange carriers (IXCs) receive no revenue from 0+ and 0- interstate surcharges, this is irrelevant when determining whether LECs have a competitive advantage over NPATS with respect to revenue sources for commissions. The ability of an IXC to impose an interstate surcharge is not affected by whether the pay telephone is provided by an LPATS provider or an NPATS provider. In addition, it is unclear from the evidence in this proceeding whether IXCs do receive revenues from interstate surcharges as claimed by FPTA. Southern Bell's witness Sims provided a chart showing the revenue streams available from LPATS and NPATS phones and this chart indicated that IXCs do not receive revenues from surcharges. On the other hand, FPTA's witness Cresse provided a chart showing that

IXCs do collect a surcharge from which they pay location providers for 0- and 0+ interstate calls. Therefore, it is unclear whether the chart listed in the Order is incorrect. But more importantly, our decision to take no action regarding commission payments was not based on whether revenue streams available to LPATS providers are greater or less than those available to NPATS providers.

We also disagree with FPTA that we should consider this issue from the perspective of the location provider. This is nothing more than a reargument of FPTA's position. We did consider the evidence regarding revenue streams available from the pay telephone provider and revenues available to the location provider. However, we found that prohibiting the LECs from paying commissions on monopoly revenues would place LPATS at a competitive disadvantage.

FPTA also argues that we cannot ignore record evidence demonstrating that the LECs aggressively market their ability to pay commissions on revenue streams unavailable to NPATS providers. Again, we believe that this is nothing more than an attempt by FPTA to reargue its position. We considered the evidence offered by witness Fedor, as well as the Southern Bell bid proposals. However, the evidence did not persuade us that any action was needed regarding the payment of commissions. While we recognize that the sources of revenue are not identical, we found them to be reasonable. Accordingly, FPTA's Motion shall be denied on this issue.

VIII. INTERCONNECTION RATE

FPTA states that the interconnection rates listed in the Order are incorrect and requests that the Order be clarified to require the LECs to immediately tariff the stated interconnection rates; and that the LECs be required to impute this rate in their future cost studies.

We are disturbed by FPTA's attempt to take advantage of a typographical error. FPTA merely needed to request that we correct our Order. FPTA is well aware that we had no intention of reducing the current interconnection rates. Accordingly, FPTA's request shall be denied. However, the Order shall be corrected on page 32 as follows:

> The current NPATS interconnection rate is 80% of the business rate plus usage charges of $.03 for the initial

minute and $.015 for each additional minute for peak time and $.02 for the initial minute and $.01 for each additional minute for off-peak time.

IX. PROFITABILITY

FPTA argues that there is no competent substantial evidence to support the finding that LEC payphone operations are either neutral or making some profit. FPTA states that the evidence demonstrates that the LECs do not know the profitability of their pay telephone operations. FPTA further argues that the Order ignores evidence that the incremental cost studies provided by Southern Bell have no relation to the company's books and records. Finally, FPTA states that the Order is inconsistent because it rejects witness Cresses's analysis regarding separate subsidiaries.

We agree that the evidence does not support the conclusion that all LEC payphone operations are neutral or making some profit. FPTA correctly points out that only Southern Bell provided cost studies in this proceeding and that the incremental cost studies show contribution rather than profit. However, Southern Bell did provide a late-filed exhibit which contains a profitability analysis based upon the books and records of the company. This exhibit demonstrates that Southern Bell's payphone operations provide a contribution to the common costs of the company.

The remaining LECs all stated that they have not conducted a recent cost study on their pay telephone operations. However, GTEFL and United did provide evidence that their pay telephone operations were making a contribution. We agree with FPTA that the cost studies presented by the LECs are not sufficient to fully analyze the profitability of LEC pay telephone operations; this was noted in the Order at page 25. However, our statement at page 17 that "it appears that LEC payphone operations are either neutral or are making some profit" is inconsistent with our finding that the cost studies are not sufficient to determine the profitability of LEC pay telephone operations.

Accordingly, we find it appropriate to clarify our Order to state that, based on the evidence, it appears that Southern Bell, GTEFL, and United's pay telephone operations are providing some contribution. Therefore, it is reasonable to conclude that placing LEC pay telephone operations into a separate subsidiary would

either have no impact or a negative impact on the LECs' regulated bottom line; this could result in a slight increase in local rates.

X. SEPARATE SUBSIDIARIES

FPTA states that we erroneously concluded that separate subsidiaries could result in a rate increase and would not reduce the LECs' revenue requirements. FPTA states that these findings are premised upon an incomplete and misleading analysis of witness Cresse's testimony. However, once again, FPTA fails to point to any evidence we overlooked or failed to consider when we concluded that "it is reasonable to believe that placing pay telephone operations into a separate subsidiary would either have no impact or a negative impact on the LECs' bottom line; this could result in a slight increase in local rates." This conclusion was based on our finding that the long-run incremental cost studies provided by Southern Bell demonstrate that its pay telephone operations are making a positive contribution.

Further, FPTA's present claim that witness Cresse's full testimony concerning this issue was that the ratepayer would benefit from a separate subsidiary requirement, and not that the benefit would be minimal, is a claim that is not supported by the evidence. We carefully considered witness Cresse's analysis, but after close scrutiny, rejected his conclusions. Accordingly, FPTA's Motion shall be denied on this factor.

XI. WORKSHOPS

FPTA states that our Order should be corrected because it does not reflect our discussion regarding the need to identify the steps necessary to bring about effective competition. We do not agree that this discussion should be addressed in our Order. Although we requested that further action be taken by our staff, it is neither necessary nor appropriate that this directive be incorporated into the Order. Accordingly, we shall deny FPTA's Motion on this point.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that each and every finding set forth herein is approved in every respect. It is further

ORDERED that the Request for Oral Argument filed by the Florida Pay Telephone Association, Inc. is hereby denied for the reasons set forth in the body of this Order. It is further

ORDERED that the Motion to Strike filed by the Florida Pay Telephone Association, Inc. is hereby denied for the reasons discussed herein. It is further

ORDERED that the Motion for Waiver of Rule 25-22.037 filed by BellSouth Telecommunications Inc. d/b/a Southern Bell Telephone and Telegraph Company is hereby granted to the extent set out herein. It is further

ORDERED that the Motion for Reconsideration and Clarification of Order No. PSC-93-0289-FOF-TL filed by the Florida Pay Telephone Association, Inc. is hereby denied to the extent set forth herein. It is further

ORDERED that certain portions of Order No. PSC-93-0289-FOF-TL have been clarified in the manner and for the reasons detailed in the body of this Order. It is further

ORDERED that Docket No. 910590-TL is hereby closed. It is further

ORDERED that Docket No. 920255-TL shall be closed administratively once all confidentiality requests have reached final disposition.

By ORDER of the Florida Public Service Commission this 4th day of October, 1993.

STEVE TRIBBLE, Director
Division of Records and Reporting

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by: Kay Flynn
Chief, Bureau of Records

NOTICE OF 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 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 wastewater 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.