

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Initiation of show cause) DOCKET NO. 911214-TP
proceedings against TELECO) ORDER NO. PSC-94-1304-FOF-TP
COMMUNICATIONS COMPANY for) ISSUED: October 21, 1994
violation of Rule 25-4.004,)
F.A.C., Certificate of Public)
Convenience and Necessity)
Required.)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
JULIA L. JOHNSON

FINAL ORDER DISPOSING OF SHOW CAUSE PROCEEDING

APPEARANCES:

JOHN R. MARKS and MARTIN R. DIX, Esquire, Katz, Kutter, Haigler, Alderman, Davis, Marks & Bryant, P.A., Post Office Box 1877, Tallahassee, Florida 32302.
On behalf of Teleco Communications Company.

FLOYD R. SELF, Esquire, Messer, Vickers, Caparello, Madsen, Lewis, Goldman & Metz, P.A., Post Office Box 1876, Tallahassee, Florida 32302-1876.
On behalf of Regency Towers Owners' Association, Inc..

PATRICIA A. KURLIN, Esquire, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32399-0863.
On behalf of the Commission Staff.

BY THE COMMISSION:

I. BACKGROUND

In May 1991, Teleco Communications Company (Teleco) sued the Regency Towers Owners Association (RTOA) in the Circuit Court in Panama City, Florida, for nonperformance of contract terms related to a lease agreement for telephone wire at the Regency Towers condominium complex. On July 29, 1991, RTOA filed a motion for referral to this Commission of those matters over which the Commission has jurisdiction. That motion was granted on December

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10, 1991; however, the Circuit Court retained jurisdiction over the issues related to the contract dispute between Teleco and RTOA. This docket was opened on December 21, 1991, as a result of the court's action.

On January 4, 1993, the Commission issued Proposed Agency Action Order No. PSC-93-0009-FOF-TP wherein Teleco was found to be operating as a local exchange company in violation of Section 364.33, Florida Statutes, and Rule 25-4.004, Florida Administrative Code. Teleco was ordered to relinquish all claims to the station wire at the Regency Towers Condominium. On January 25, 1993, Teleco filed a protest to the PAA order and requested a formal hearing.

RTOA was granted intervention by Order No. PSC-93-1141-PCO-TP, issued August 5, 1993.

A Prehearing Conference was held August 23, 1993, and Prehearing Order No. PSC-93-1246-PHO-TP was issued on August 27, 1993. The parties agreed that the issues could be addressed in an informal proceeding governed by Section 120.57(2), Florida Statutes. At the Prehearing the parties stipulated to the following enumerated list of facts:

1. The Regency Towers is a 340-unit condominium built by Major Development Company (MDC) in Panama City Beach, Florida.

2. MDC was a real estate development partnership owned by Charles E. Faircloth and William C. Grimsley.

3. Advisors Realty is a real estate and property management firm owned by MDC.

4. Advisors Realty was the management company for the Regency Towers Owners Association from November 1982 until September 1988.

5. The Regency Towers Owners Association (RTOA) is a condominium association which represents the unit owners at Regency Towers.

6. All 340 units at the Regency Towers are privately owned.

7. Most of the units are in the RTOA rental program and are rented on a temporary basis to the general public.

8. At least some of the units are owner-occupied.

9. All owner-occupied units receive telephone service from Southern Bell.

10. All units have access to telephone service from Southern Bell.

11. Generally, at least some of the units move in and out of the rental program during the year.

12. In February, 1985, Regency Towers was paying Southern Bell \$1,072 per month for lease of the wiring within Regency Towers.

13. Affidavits from former members of the Board of Directors of the Regency Towers Owners Association reflect instruction to Advisors Realty to acquire the station wire from Southern Bell, at no more than the lease amount paid to Southern Bell. Regency Towers Owners Association is stipulating to this fact only for purposes of this docket.

14. The purchase of the 360 pairs of station wire from Southern Bell Telephone and Telegraph Company for \$11,566, in May, 1986 was negotiated by Paultronics, Inc.

15. The \$11,566 purchase price for the wire was paid to Southern Bell by Teleco Communications Company (Teleco).

16. Paultronics assigned its rights to the wire to Teleco in 1986.

17. Teleco is owned by Rodney Faircloth and Jason Grimsley.

18. Affidavits from former members of the Board of Directors also reflect that payments of \$1,072 per month, maintenance included, would be made for 84 months with ownership reverting to the RTOA at the end of the 84 months. Regency Towers Owners Association is stipulating to this fact only for purposes of this docket.

19. For the period of June, 1986, through September, 1988, monthly checks in the amount of \$1,072 drawn on the Regency Towers Operating and Maintenance account were made payable to Teleco.

¹The affidavits are included in the record of this proceeding and are identified as Exhibit 1.

20. The total amount paid to Teleco was approximately \$29,176.

21. In September, 1988, the RTOA took over management of the Regency Towers from Advisors Realty.

22. In November, 1988, the RTOA contacted the Commission staff regarding the dispute with Teleco.

23. Teleco currently has an action against RTOA pending in the Circuit Court in Panama City, Florida for breach of contract.

24. Teleco has not applied for, nor has it been issued a certificate of public convenience and necessity from the Florida Public Service Commission.

25. Attachment A,² provided separately, contains a copy of the site plan for the telephone wiring at Regency Towers, and a letter from Rodney Faircloth describing the telephone wire at Regency Towers.

26. Attachment A is a current and accurate description of the telephone wiring at Regency Towers.

The prehearing order also stated that each party would have 20 minutes to present oral argument at the Section 120.57(2) hearing. The hearing was held on September 1, 1993 and each party filed Posthearing Briefs on the issues. We have considered the arguments and evidence presented at the hearing and the final arguments set forth in the posthearing briefs. Our decision is set forth below.

II. INTRODUCTION

The central question in this case is whether the activities of Teleco regarding the inside wire at Regency Towers Condominium violates any of the provisions in Chapter 364 governing the provision of telecommunications service. The focus of this case is on inside wire. In this case, inside wire means the actual wires that are used to connect the telephone instruments in the condominium units used by residents or guests to the Private Branch Exchange (PBX) telephone switch. The PBX is the equipment that switches the calls to connect with other telephone instruments within Regency Towers or switches the calls for termination on

²Attachment A is included in this record and is identified as Exhibit 2.

Southern Bell's or other telephone companies' networks. As discussed in greater detail below, Teleco's activities in owning and operating the inside wire at Regency Towers violates Section 364.33, Florida Statutes, and Rule 25-4.004, Florida Administrative Code.

III. REGULATORY STATUS OF TELECO'S OPERATIONS

The statutes and rules governing the provisions of telecommunication services to the public for hire are set forth in Chapter 364, Florida Statutes and Chapter 25-4., Florida Administrative Code, respectively. Section 364.02 grants the Commission exclusive jurisdiction over the provision of telecommunication service. More specifically,

A person may not begin the construction or operation of any telecommunications facility, or any extension thereof for the purpose of providing telecommunications services to the public, or acquire ownership or control thereof, in whatever manner, including the acquisition, transfer or assignment of majority organizational control or controlling stock ownership, without prior approval.

Section 364.02(8) states:

"Telecommunications facility" includes real estate, easements, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire within this state.

Rule 25-4.004, Florida Administrative Code, provides that:

...no person shall begin the construction or operation of any telephone line, plant or system or an extension thereof or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Florida Public Service Commission a certificate that the present or future public convenience and necessity require or will require such construction, operation or acquisition.

Teleco argues that its operations at Regency Towers do not constitute operating as a telecommunications company which would require certification by the Commission. Teleco claims that it entered into a lease-purchase arrangement with RTOA wherein Teleco was merely financing the purchase of the wire by RTOA by allowing RTOA to pay for the wire over an 84 month period and, therefore, exercises no control over the wire.

Alternatively, Teleco argues that, since RTOA is exempt from the Commission's jurisdiction and since Teleco is an agent of ROTA, Teleco's lease of telecommunications facilities to RTOA is exempt from the Commission's jurisdiction. Teleco states that RTOA is exempt from Commission jurisdiction by Orders Nos. 13367, 15989 and 16760. Teleco further states that it is an agent of RTOA and its actions in obtaining the inside wire and providing maintenance were at the direction of RTOA. Based on this, Teleco claims RTOA's exemption from jurisdiction as its own. Teleco further states that because RTOA is exempt from the Commission's jurisdiction, then its lease of telecommunications facilities to an exempt entity is also exempted from the Commission's jurisdiction.

In another vein Teleco argues that RTOA is not required to be certificated because, like hotels, it is subject to the "transient exemption". Teleco further explains that Section 364.02(7), Florida Statutes, exempts entities which provide telecommunications facilities exclusively to certificated telecommunications companies. Therefore, according to Teleco, it qualifies for this exemption because it provides the wire to Regency Towers which, though not certificated, would have to be but for the transient exemption granted by the Commission.

RTOA argues that Teleco purchased the 360 pairs of station wire at Regency Towers, that title to the wire has never passed to RTOA and that Teleco owns, operates and maintains the station line wire at Regency Towers. RTOA further states that monthly lease payments from RTOA to Teleco were for the use, maintenance, and operation of the wire which was used by RTOA to provide telecommunications service to the units of Regency Towers. Based on this, RTOA argues that Teleco is providing a telecommunication facility to the public for compensation without the prior approval of the Commission.

With respect to Teleco's argument that the lease purchase arrangement between Teleco and RTOA is simply a financing arrangement, RTOA argues that the stipulated facts and affidavits in Exhibit 2 clearly indicate that Teleco bought, paid for, and owned the wire, with title to pass at some future date.

In support of its arguments RTOA cites particularly to the Commission's decision in Order No. 14583 regarding whether Lightnet was a telephone company pursuant to Chapter 364. As described in that Order, Lightnet built, owned, and maintained fiber-optic transmission facilities and leased the use of these facilities to the public for hire. The Commission determined that Lightnet was a telephone company subject to the Commission's jurisdiction. RTOA contrasts the Lightnet decision with the Monsanto decision. In the

affidavits in Exhibit 2 of former RTOA Board members that the Board was aware of and endorsed the conveyance, RTOA did not acquire title from Southern Bell. There is no indication that Teleco was an agent of RTOA in the transaction. If that were so, Teleco would have acquired the title when Teleco, as agent for RTOA, completed the transaction with Southern Bell.

To characterize this situation as a "financing arrangement" implies that Teleco, as the source of financing, loaned RTOA the \$11,566 to purchase the inside wire. There is nothing in this record that suggests that this is what happened. Even if one assumes that Teleco "loaned" the purchase money, based on a monthly payment of \$1,072 for 84 months, the interest rate on such a loan would be approximately 111%. Based on the \$1,072 monthly payment, RTOA could have paid the acquisition price itself in a little less than eleven months. It does not seem rational or logical that RTOA would enter into a "loan" of this nature. Hence, we are unpersuaded that this is a simple financing arrangement.

Teleco's jurisdictional arguments are similarly unpersuasive. Teleco's reliance on Orders Nos. 13367, 15989 and 16760 to confer a jurisdictional exemption is misplaced. By Order No. 13367 the Commission denied a petition asking the Commission to promulgate rules for hotels that would limit the charges for long distance calls to hotel guests to the actual direct-dialed rate charged to the hotel and prohibit the hotel from imposing any surcharge. In denying the petition, the Commission reiterated the criteria adopted in Order No. 11206 by which the Commission declined to impose extensive regulation over the provision of telephone service to transient guests. Those criteria are:

1. "Transient resellers offer and provide service only to in-house customers, not the general public at large;
2. Offering of resale service is ancillary to the primary business of these entities;
3. The sheer number of these entities exceeds the capacity of the Commission to regulate in any meaningful way;
4. Evidence of record indicates that, at least for the hospitality industry, provision of resold telephone service is not a profit-making venture;
5. These entities are already subject to regulation on an industry-wide basis, making the opportunity or incentive

Finally, Teleco's reliance on the jurisdictional exemption in Section 364.02(7), Florida Statutes, for entities providing service exclusively to a certificated carrier is misplaced. As pointed out by RTOA, since RTOA is not a certificated carrier, Teleco's claim fails from the plain language of that provision. Moreover, Teleco's acquisition of the inside wire took place in 1986, four years before the legislature amended Section 364.02(7) to add the jurisdictional provision upon which Teleco relies.

As discussed above, Teleco acquired the wire and leased it to RTOA. It is also clear that the station line wire is used to provide telephone service to the occupants of the Regency Towers rental units. The fact that Teleco owns the wire and is charging RTOA for its use makes Teleco a telecommunications company within the terms of Section 364.02. Although Teleco does not bill individual endusers directly for phone services and cannot discontinue service for nonpayment in the same manner as a LEC, it has retained the ability to effectively discontinue phone service by repossessing the wire for nonpayment of the \$1,072 monthly bill. The ability of an uncertificated entity to control another's access to the regulated telecommunications network creates a situation which is prohibited by Section 364.33, Florida Statutes and Rule 25-4.004, Florida Administrative Code. Accordingly, we find that Teleco's operations constitute the provision of telecommunications service in violation of Section 364.33, Florida Statutes, and Rule 25-4.004.

Teleco also argues that even if it is found to have violated Section 364.33, that it disclosed its activities regarding the PBX to the Commission in 1986 and that under these circumstances, no penalty is warranted.

RTOA argues that Teleco never had the right to own the station wire since it did not have a certificate from the Commission. Therefore, RTOA states that Teleco must immediately relinquish control of the station wire in order to no longer be in violation of Section 364.33 and 364.335. Notwithstanding the violations, RTOA seeks no further penalty and seeks the remedy originally set forth in the initial proposed agency action, Order No. PSC-92-0009-FOF-TP.

Since Teleco has never been authorized to own or provide service through the inside wire to RTOA, Teleco can have no legitimate claim for the outstanding balance of unpaid lease payments. Any claim that Teleco may have had for recoupment of its payment to Southern Bell appears to have been well satisfied. We note that RTOA apparently endorsed and to some degree may have induced the purchase of the inside wire from Southern Bell. RTOA

has also received the benefit of the wire and the maintenance. It also appears that Teleco has been adequately compensated for its investment in the wire by the payments already made. Although Teleco is technically subject to a penalty under 364.285, Florida Statutes, under these circumstances we decline to impose any fine. Since we find that Teleco has no claim to further payment for the wire at Regency Towers, the wire should be transferred as follows: 1) to Southern Bell for those customers who permanently reside in their units or for those units not in the RTOA rental program; and, (2) to the RTOA for those units in RTOA's rental program.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the activities of Teleco Communications Company at Regency Towers Condominium violate the provisions of Section 364.33, Florida Statutes, as set forth in the body of this Order. It is further

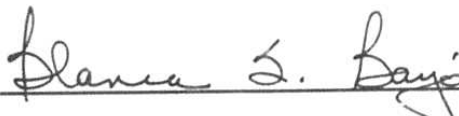
ORDERED that the activities of Teleco at Regency Towers Condominium violate the provisions of Rule 25-4.004, Florida Administrative Code, as set forth in the body of this Order. It is further

ORDERED that Teleco has no claim against Regency Towers Owners Association for payment for the inside wire at the Regency Towers Condominium as set forth in the body of this Order. It is further

ORDERED that the wire should be transferred as follows: 1) to those customers who permanently reside in their units or for those units not in the RTOA rental program; and, (2) to the RTOA for those units in RTOA's rental program.

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 21st day of October, 1994.



BLANCA S. BAYÓ, 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.