BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by MCI Telecommunications Corporation against GTE Florida Incorporated regarding anti-competitive practices related to excessive intrastate switched access pricing.	DOCKET NO. 970841-TP ORDER NO. PSC-97-1370-FOF-TP ISSUED: October 29, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

FINAL ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

On July 9, 1997, MCI TeleCommunications Corporation (MCI) filed a Complaint Against GTE Florida Incorporated (GTEFL) for Anti-Competitive Practices Related to Excessive Intrastate Switched Access Pricing (Complaint). In its Complaint, MCI asserts that GTEFL is deliberately charging excessive intrastate switched access rates which constitutes an anticompetitive practice. Thus, MCI asks that we exercise our jurisdiction under Sections 364.3381(3) and 364.01(4)(g), Florida Statutes, to investigate GTEFL's intrastate switched access charges; hold a hearing on the matter; determine, after hearing, that GTEFL's practice violates Sections 364.3381(3) and 364.01(4)(g), Florida Statutes; order GTEFL to make reductions to its intrastate access charge rates as are necessary to eliminate such anti-competitive effects; and grant such other relief as the Commission may deem appropriate.

On July 29, 1997, GTEFL filed a Motion to Dismiss and Supporting Memorandum of Law. On August 11, 1997, MCI filed its Response to [GTEFL's] Motion to Dismiss and Supporting Memorandum of Law.

Standard of Review

In reviewing a motion to dismiss, we take all allegations in the petition as though true, and consider the allegations in the light most favorable to the petitioner in order to determine whether the petition states a cause of action upon which relief may be granted. See, e.g, Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963).

The Complaint

In its Complaint, MCI alleges that GTEFL charges excessive intrastate switched access rates and uses the profits derived from access charges to subsidize the entry of GTEFL's long distance affiliate, GTE-LD, into the competitive interLATA interexchange toll market. MCI asserts that this practice is intentional and, as such, constitutes anticompetitive behavior that is proscribed by Sections 364.3381(3) and 364.01(4)(g), Florida Statutes. MCI also asserts that Section 364.163, Florida Statutes, regarding network access services, does not preclude us from exercising our jurisdiction to investigate and take any action necessary to eliminate detected anticompetitive actions and practices.

MCI argues that GTEFL charges IXCs $.0539 per minute to originate, and $.0670 to terminate a Feature Group D intrastate toll call. MCI notes that in Order No. PSC-97-0064-FOF-TP, the incremental cost to terminate a call on GTEFL's local network was determined to be $.00375 per minute. In addition, MCI states that, in Order No. PSC-97-0128-FOF-TL, we noted that the network over which local and toll calls are terminated is the same. MCI argues that GTEFL's switched access prices are excessive and that the 1500% mark-up yields supracompetitive benefits relative to the cost-based price for local termination. MCI alleges that GTEFL, therefore, receives approximately $130 million in excess profits, based on 1996 demand data. MCI also argues that GTEFL has nearly 100% of the market share for access services in its territory; thus, it enjoys a *de facto* monopoly in the provision of access services.

Finally, MCI alleges that GTEFL uses the additional $130 million in annual profits to subsidize steep discounts for its intraLATA toll and vertical services; to waive nonrecurring charges

on vertical services and second residential access lines; to initiate substantial toll reductions by converting competitive 1+ toll routes to "local calling plans" for its residential customers, and to subsidize GTE-LD's entry into the competitive interLATA interexchange toll market. MCI states that because GTEFL funds these price breaks with excess profits derived from the access market, the practice constitutes anticompetitive behavior proscribed by Section 364.01(4)(g) and Section 364.3381(3), Florida Statutes.

GTEFL's Motion to Dismiss

GTEFL argues that we do not have jurisdiction to grant the relief MCI requests. Further, GTEFL argues that MCI has not properly alleged any violation of a Commission rule or of Florida Statutes.

First, GTEFL asserts that MCI's interpretation of our authority, as set forth in Section 364.163, Florida Statutes, is incorrect. GTEFL contends that Section 364.163, Florida Statutes, is a complete prescription of intrastate switched access rates. As such, GTEFL asserts that our authority is limited, as stated in Section 364.163(5), Florida Statutes, to "determining the correctness of any price increases resulting from application of the inflation index [following parity] and making any necessary adjustments." GTEFL also asserts that we are specifically charged with "determining the correctness of any rate decrease ... resulting from the application of this section and making any necessary adjustments to those rates" as set forth in Section 364.163(9), Florida Statutes.

GTEFL argues that the Legislature's consideration of access charge issues in the 1995 session, which resulted in the enactment of Section 364.163, Florida Statutes, was both comprehensive and deliberate. It was based, GTEFL maintains, on a proper understanding of the link between access charges and the provision of universal service. GTEFL points out that in capping intrastate access rates at July 1, 1995, levels and mandating that local exchange carriers make 5% annual reductions in those rates until parity with December 31, 1994, interstate switched access rates is achieved, the Legislature expressly rejected numerous other proposals, including proposals that would have authorized the Commission to order access rate decreases and to establish cost-based access charges. GTEFL concludes that we are without authority to override the Legislature's policy decisions regarding

access charges. Thus, GTEFL argues that if we were to decide that GTEFL's statutorily compliant access rates must be reduced because they are anticompetitive, our decision would be "ultra vires" and without legal effect.

In addition, GTEFL observes that Sections 364.01(4)(g) and 364.3381(3), Florida Statutes, vest us with a general authority to curtail anticompetitive behavior. In contrast, it states that Section 364.163, Florida Statutes, prescribes completely our authority to affect access rates. As such, GTEFL argues that we would have to ignore the statutory constraints on our jurisdiction over access charges and rely instead on a general grant of authority in order to sustain MCI's complaint. GTEFL asserts that such a reading of the statutes would be absurd. GTEFL further states that if we had complete jurisdiction over access charges, there would be no need for the specific grants of ministerial discretion set forth in Section 364.163, Florida Statutes. Applying a rule of statutory construction, GTEFL concludes that Section 364.163, Florida Statutes, a specific provision, must prevail over Sections 364.01(4)(g) and 364.3381(3), Florida Statutes, both of which confer general authority.

GTEFL further observes that MCI does not ground its complaint in subparts (1) and (2) of Section 364.3381, Florida Statutes, which prohibit anticompetitive cross-subsidization. Instead, GTEFL states that MCI has chosen to base its complaint on subpart (3), which confers us with only general regulatory oversight "over cross-subsidization, predatory pricing, or other similar anticompetitive behavior." GTEFL contends that the "anticompetitive evil" associated with cross-subsidization is below-cost pricing, and it asserts that MCI does not, and cannot, claim that it prices any of its services below cost. GTEFL also states that it has fully complied with Section 364.163, Florida Statutes, as demonstrated by tariff filing T-96-740.

Finally, GTEFL observes that it is widely recognized that access charges are high relative to costs because of longstanding social policies of subsidizing basic local service rates. Thus, GTEFL maintains that MCI cannot sustain its allegations of anticompetitive subsidization. In addition, GTEFL argues that whether the rates are anticompetitive or excessive is a purely legal issue. Thus, GTEFL asserts that there is nothing to investigate; this is a purely jurisdictional matter. GTEFL, therefore, asserts that we need not conduct a hearing on this matter.

MCI's Response to the Motion to Dismiss

In its response, MCI argues that Section 364.163, Florida Statutes, must be read in conjunction with Sections 364.01(4)(g) and 364.3381(3), Florida Statutes. MCI contends that when the Legislature restructured the regulation of the telecommunications industry in Florida to foster the development of competition, the Legislature intended that we should have the ability to prevent anticompetitive behavior. MCI maintains that we must read Section 364.163, Florida Statutes, within the context of the Legislature's ultimate charge to us to encourage competition. It argues that GTEFL's access rates represent a pricing practice that threatens that underlying goal; thus, we must prevent GTEFL's anticompetitive conduct.

MCI also argues that GTEFL incorrectly applies the rules of statutory construction. MCI asserts that we need not determine whether Section 364.163, Florida Statutes, or Section 364.3381(3), Florida Statutes, controls because our authority over anticompetitive behavior may be construed so that it is consistent with Section 364.163, Florida Statutes. MCI argues that because nothing in Section 364.163, Florida Statutes, states that we may not reduce access charges, we could do so under the authority granted to us by Section 364.3381(3), Florida Statutes. MCI acknowledges that we do not have broad authority over access rate levels, but it asserts that our jurisdiction over anticompetitive conduct does provide us with an avenue to address this issue.

Determination

Having reviewed the statutory provisions in question, we do not believe that we can grant the ultimate relief requested by MCI in this particular situation. The specific provisions of Section 364.163, Florida Statutes, clearly limit our authority to act with regard to switched access rates.

Section 364.163, Florida Statutes, provides, in part:

> (1) Effective January 1, 1996, the rates for network access services of each company subject to this section shall be capped at the rates in effect on July 1, 1995, and shall remain capped until January 1, 1999.

Upon the date of filing its election with the commission, the network access service rates of a company that elects to become subject to this section shall be capped at the rates in effect on that date and shall remain capped for 3 years.

(2) After the termination of the caps imposed on rates by subsection (1) and after a local exchange telecommunications company's intrastate switched access rates reach parity with its interstate switched access rates, a company subject to this section may, on 30 days' notice, annually adjust any specific network access service rate in an amount not to exceed the cumulative change in inflation experienced after the date of the last adjustment, provided, however, that no such adjustment shall ever exceed 3 percent annually of the then-current prices. Inflation shall be measured by the changes in Gross Domestic Product Fixed 1987 Weights Price Index, or successor fixed weight price index, published in the Survey of Current Business, or successor publication, by the United States Department of Commerce.

(3) After the termination of the caps imposed on rates by subsection (1), a company subject to this section may, at any time, petition the commission for a network access service rate change to recover the cost of governmentally mandated projects or programs or an increase in federal or state income tax incurred after that date. . . .

(4) . . . Notwithstanding subsections (1), (2), and (3), a company subject to this section may choose to decrease network service rates at any time, and decreased rates shall become effective upon 7 days' notice.

(5) Company proposed changes to the terms and conditions for existing network access services in accordance with subsection (1), (2), (3), and (4) shall be presumed valid and become effective upon 15 days' notice. Company-proposed rate reductions shall become effective upon 7 days' notice. Rate increases made by the local exchange telecommunications company shall be presumed valid and become effective on the date specified in the tariff, but in no event earlier than 30 days after the filing of such tariff. The commission shall have continuing regulatory oversight of local exchange telecommunications company-provided network access services for purposes of determining the correctness of any price increase resulting from the application of the inflation index and making any necessary adjustments, establishing reasonable service quality criteria, and assuring resolution of service complaints. . . .

(6) Any local exchange telecommunications company whose current intrastate switched access rates are higher than its interstate switched access rates in effect on December 31, 1994, shall reduce its intrastate switched access rates by 5 percent annually beginning October 1, 1996. Any such company shall be

> relieved of this requirement if it reduces such rates by a greater percentage by the relevant date or earlier, taking into account any reduction made pursuant to Florida Pubic Service Commission Order No. PSC-94-0172-FOF-TL. Upon reaching parity between intrastate and 1994 interstate switched access rates, no further reductions shall be required. Any telecommunications company whose intrastate switched access rate is reduced by this subsection shall decrease its customer long distance rates by the amount necessary to return the benefits of such reduction to its customers.
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> (9) The commission shall have continuing regulatory oversight of intrastate switched access and customer long distance rates for purpose of determining the correctness of any rate decrease by a telecommunications company resulting from the application of this section and making any necessary adjustments to those rates, establishing reasonable service quality criteria, and assuring resolution of service complaints.

Section 364.01(4)(g), Florida Statutes, provides that:

> (4) The Commission shall exercise its exclusive jurisdiction in order to:
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> * * *
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> (g) Ensure that all providers of telecommunications services are treated

> fairly, by preventing anticompetitive behavior . . . .

Section 364.3381(3), Florida Statutes, provides that:

> The Commission shall have continuing oversight jurisdiction over cross-subsidization, predatory pricing or similar anticompetitive behavior and may investigate, upon complaint or on its own motion, allegations of such practices.

First, Section 364.163, Florida Statutes, presents a specific and detailed process for the capping and reduction of access charges, and we have been given regulatory oversight over this process. The maxim *expressio unius est exclusio alterius* is applicable in this case. Under this principle, the mention of one thing implies the exclusion of another. It follows from this principle that when a statute specifies a certain process by which something must be done, it implies that it shall not be done in any other manner. See, Botany Worsted Mills v. US, 278 US 282; 73 L. ED. 379, 385 (1929)("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.") See also, In re Investigation of a Circuit Judge of the Eleventh Judicial Circuit of Florida, 93 So. 2d 601, 606 (Fla. 1957)(". . . where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner.") In accordance with this principle, the express enumeration of the process for reducing access rates set forth in Section 364.163, Florida Statutes, precludes reduction of access rates in any other manner.

Rules of statutory construction also require that specific statutory provisions be given greater weight than general provisions when the provisions in question cannot be harmonized. See Sutherland, Statutory Construction, 5th Ed., Volume 2A, §46.05; 49 Fla. Jur. 2d § 182; Bogue v. Fennelly, 1997 WL 276289 (Fla. 4th DCA 1997); and Suntrust Banks of Fla. v. Wood, 693 So. 2d 99 (Fla. 5th DCA 1997). In Adams v. Culver, the Court stated that

> It is a well settled rule of statutory construction, however, that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in

> general terms. In this situation 'the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any.'

111 So. 2d 665 at 667 (Fla. 1959), citing Stewart v. DeLand -Lake Helen, 71 So. 42, 47 (Fla. 1916), quoting State ex rel. Loftin v. McMillan, 45 So. 882 (Fla. 1908). Therefore, the specific limiting provisions of Section 364.163, Florida Statutes, must prevail over the general grants of authority in Sections 364.01(4)(g) and 364.3381(3), Florida Statutes, or act as an exception to our ability to investigate anticompetitive acts and complaints of cross-subsidization.

It is also well established that administrative agencies only have the power conferred upon them by statute and must exercise their authority in accordance with the controlling law. 1 Fla. Jur. § 71, p. 289. As such, grants of authority to an administrative body are generally limited to those powers either expressly enumerated or clearly implied by necessity. See Sutherland, Statutory Construction, 5th Ed., Volume 3, §65.02; and Keating v. State ex rel. Ausebel, 167 So. 2d 46 (Fla. 1st DCA 1964). If there is reasonable doubt as to the scope of a power, it should be resolved against the exercise of that power. State ex rel. Burr et al.,State Railroad Commissioners v. Jacksonville Terminal Co., 71 So. 474 (Fla. 1916). See also, Deltona Corp. v. Mayo, 342 So. 2d 510 (Fla. 1977), citing City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493 (Fla. 1973)(stating that any doubt as to the existence of a particular power must be resolved against the Commission). As stated in Edgerton v. International Company, 89 So. 2d 488, 490 (Fla. 1956),

> A commission may not assert the general power given it and at the same time disregard the essential conditions imposed upon its exercise. Officers must obey a law found upon the statute books until in a proper proceeding its constitutionality is judicially passed upon.

Section 364.163(9), Florida Statutes, states that we have "continuing regulatory oversight of intrastate switched access . . . for the purposes of determining the correctness of any rate

decrease . . . resulting from application of this section [364.163, Florida Statutes,]" and the ability to make any adjustments necessary to ensure compliance with this section. There is, however, no clear expression in either Section 364.01(4)(g) or 364.3381(3), Florida Statutes, that our authority to investigate anticompetitive practices and claims of cross-subsidization does apply or must be applied in the area of access charges, nor must such a grant of authority be implied in order for either set of provisions to operate effectively. Section 364.163, Florida Statutes, is a clear delineation of the process for reducing access charges and of our authority in this area. We do not believe that Sections 364.01(4)(g) and 364.3381(3), Florida Statutes, can be construed as authorizing us to reduce access charges in any other manner for any other reason.

Finally, MCI argues that the 1995 Legislature could not have foreseen the fact that the Telecommunications Act of 1996 would free GTEFL from the consent decree prohibiting GTEFL from offering integrated local and long distance service and that, thereafter, GTEFL would use its access charges to subsidize its entry into the competitive interLATA interexchange toll market. We agree that the 1995 Legislature could not have foreseen the effects of the 1996 Act. There is, however, reason to conclude that the Legislature in 1995 was fully apprised of the level of access rates in relation to costs and the significance of access rates for the development of competitive markets at the time. Nevertheless, the Legislature did not expressly authorize us to reduce access rates, beyond the statutorily-mandated reductions, upon a finding of anticompetitive behavior.

For all of the foregoing reasons, we hereby grant GTEFL's motion to dismiss MCI's complaint. We do not have the statutory authority to reduce access charges beyond the reductions set forth in Section 364.163, Florida Statutes, as MCI has requested. MCI's complaint, therefore, fails to state a cause of action upon which relief can be granted.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that GTE Florida Incorporated's Motion to Dismiss is granted. It is further

ORDERED that this docket is closed.

By ORDER of the Florida Public Service Commission this 29th day of October, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

BC

Dissent: Commissioners J. Terry Deason and Diane K. Kiesling dissent without comment from the decision contained in this Order.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 and/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.