

RUTLEDGE, ECENIA, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

STEPHEN A ECENIA
JOHN R ELLIS
KENNETH A HOFFMAN
THOMAS W KONRAD
MICHAEL G MAIDA
MARTIN P McDONNELL

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-6515

J STEPHEN MENTON
R DAVID PRESCOTT
HAROLD F X PURNELL
GARY R RUTLEDGE
GOVERNMENTAL CONSULTANTS
MARGARET A MENDUNI
M LANE STEPHENS

February 16, 2001

ORIGINAL

Docket No. 001762-TC

Mary Anne Helton, Esq.
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 301C
Tallahassee, Florida 32399-0850

Dear Ms. Helton:

Pursuant to discussions at the workshop held January 10, 2001, enclosed please find the City of Miami Beach's comments regarding the Public Service Commission's authority to regulate the location of pay telephones and the City's specific comments to proposed Rule 25-24.517, F.A.C. Thank you for allowing the City of Miami Beach an opportunity to participate in the process and we would welcome any chance to be a part of any future public discussion relating to this issue.

Sincerely,

Martin P. McDonnell

Martin P. McDonnell

MPM/rl

Enclosure

cc: Angela Green, Esq., with enclosure

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Proposed Rule No. 25-24.517 Regarding)
the Location of Pay Telephones)
_____)

Undocketed

Filed: February 19, 2001

**CITY OF MIAMI BEACH'S COMMENTS
REGARDING THE PUBLIC SERVICE COMMISSION'S
AUTHORITY TO REGULATE THE LOCATION OF
PAY TELEPHONES AND THE CITY OF MIAMI
BEACH'S SPECIFIC COMMENTS TO PROPOSED
RULE 25-24.517, F.A.C.**

On Wednesday, January 10, 2001, The Public Service Commission staff held a Rule Development Workshop. According to the workshop's notice, the purpose of the workshop was to "adopt a rule that establishes criteria for the location of pay telephones for the general public's use. The effect is to reduce the instances of pay telephones being installed in unlawful areas or without the appropriate permission." At the workshop, PSC staff requested input from the City of Miami Beach, and others, relative to various issues raised at the workshop.

The City of Miami Beach respectfully suggests that an initial fundamental question needs to be answered: Does the Public Service Commission have the authority to establish, by rule, statewide guidelines for the location of pay telephones for the general public's use, particularly when those pay telephones are within a municipality? Because the City of Miami Beach encounters unique public safety, aesthetic, and zoning issues, uniform statewide standards for the location of pay telephones may not be consistent with those local needs and conditions. The City alone has and should have the authority to regulate where within its boundaries pay telephones are located.

Article VIII, Section 2 of the Florida Constitution grants municipalities "proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law." That constitutional grant of authority has been codified by the Florida Legislature in section 166.021(1), Florida Statutes. There are no municipal functions more important than ensuring safety for the public and establishing reasonable zoning standards. It is clear that the City of Miami Beach, pursuant to Art. VIII, Sec. 2, has zoning authority unless that authority is expressly usurped by state or federal law. The authority of the Commission to regulate the location of pay telephones is not granted by Florida Statutes and therefore, respectfully, does not exist. Pay telephones have the

potential to obstruct pedestrian and vehicle traffic flow, facilitate the commission of crimes, impair the aesthetics of a historical district and promote loitering in some high crime areas. The magnitude of the impact of pay telephones to these important local issues is determined, in large part, by the location of the telephones. So long as the City of Miami Beach is constitutionally mandated to perform municipal functions and passes local ordinances that treat pay telephone companies in a competitively neutral manner, the ordinances are constitutionally sound, as the location of pay telephones is clearly an issue designated for local government regulation.

The Florida Public Service Commission is not a constitutional agency, but was created by statute. According to section 364.01, Florida Statutes, "The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers conferred by this chapter." Section 367.01(2), provides:

It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies, and such preemption shall supersede any local or special act or municipal charter where any conflict of authority may exist. (Emphasis supplied).

The Commission's relevant statutory authority to regulate pay telephones is set forth in Section 364.3375, Florida Statutes.

364.3375 Pay Telephone Service Providers. -

1(a) No person shall provide pay telephone service without first obtaining from the Commission a certificate of public convenience and necessity to provide such service, except that the certification provisions of this subsection do not apply to a local exchange telephone communications company providing pay telephone.

(b) In granting such certificate the Commission, if it finds that the action is consistent with the public interest, may exempt a pay telephone provider from some or all of the requirements of this chapter. However, the Commission may exempt a pay telephone provider from this section only to prevent fraud or if it finds the exemption to be in the public interest.

(c) A certificate authorizes the pay telephone provider to provide services statewide and to provide access to both local and intrastate interexchange pay telephone services except that the Commission may limit the type of calls that can be handled.

(2) Each pay telephone station shall:

(a) Receive and permit coin-free access to the universal emergency telephone number "911" where operable or to a local exchange company toll operator.

(b) Receive and provide coin-free or coin-return access to local directory assistance and the telephone number of the person responsible for repair service.

(c) Designate a party responsible for processing refunds to customers.

(d) Be equipped with a legible sign card or plate of reasonable permanence which provides information determined by the Commission, by rule, to adequately inform the end user.

(e) Be eligible to subscribe to flat-rate, single-line business local exchange services.

(3) Each pay telephone station which provides access to any interexchange telecommunications company shall provide access to all locally available interexchange telecommunications companies and shall provide for the completion of international telephone calls under terms and conditions as determined by the Commission. The Commission may grant limited waivers of this provision to pay telephone companies or operator service providers to prevent fraud or is otherwise determined in the public interest. A pay telephone provider may charge, as a maximum rate for local coin calls, a rate equivalent to the local coin rate of the local exchange telecommunications company. A pay telephone provider shall not obtain services from an operator service provider unless such operator service provider has obtained a certificate of public convenience and necessity from the Commission pursuant to the provisions of s. 364.3376.

(4) A pay telephone provider may charge, as a maximum rate for local coin calls, a rate equivalent to the local coin rate of the local exchange telecommunications company.

(5) A pay telephone provider shall not obtain services from an operator service provider unless such operator service provider has obtained a certificate of public convenience and necessity from the commission pursuant to the provisions of s. 364.3376.

The Commission's authority to promulgate rules, like any other Florida agency's authority, is codified in Chapter 120, Florida Statutes. The historical uncertainty of the rulemaking authority of the Commission, and other agencies in Florida has been eliminated by the 1999 amendments to Section 120.52(8), Florida Statutes, and the recent decision in Southwest Florida Water Management District v. Save the Manatee Club, 25 Fla. Law W. D 2747 (Fla. 1st DCA December 1, 2000), discussed below.

Rulemaking is a legislative function and as such it is within the exclusive authority of the Legislature under the separation of powers provision of the Florida Constitution. See Florida Constitution Art. II, Section 3. An administrative rule is valid only if adopted under a proper delegation of legislative authority. See Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978). It follows that the Legislature is free to define the standard for determining whether a rule is supported by Legislative authority. Section 120.52(8), Fla. Stat. was revised in 1999 by the Legislature and now reads as follows:

a grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth the general legislative intent or policy. Statutory language granting rulemaking authority or generally describing powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute. (Emphasis supplied).

The revised language of section 120.52(8), Fla. Stat. clarifies the authority of an agency to promulgate rules, and specifically rejects the judicially created broad interpretation of rulemaking powers granted agencies in St. Johns River Management District v. Consolidated-Tomoka Land Company, 717 So.2d 72 (Fla. 1st DCA 1998). As stated by the court in Southwest Florida Water v. Save the Manatee Club, the limitation in section 120.52(8) to rules that implement or interpret specific powers and duties granted by the enabling statute is clear and unambiguous. It is clear that the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute. Otherwise, the rule is not a valid exercise of delegated legislative authority. Id.

Chapter 364, as delineated above, grants the Commission specific limited authority to regulate certain facets of pay telephone service. Noticeably absent from the statute is any specific authority to regulate the location of pay telephones. Under the legal doctrine of *expressio unius est*

exclusio alterius, and Section 120.52(8), Florida Statutes, as interpreted by the court in Southwest Florida Water Management, in the absence of specific legislative authority to promulgate a rule that regulates the location of pay telephones in Florida, the Commission simply lacks the power to do so.

Although the regulation of pay telephone service, in general, is within the jurisdiction of the Commission, there is no legislative grant of authority to the Commission to promulgate a specific rule regulating the location of pay telephones. One significant feature of the 1999 amendment to Section 120.52(8) is that it contains an additional statement of the factors that are not sufficient to justify the adoption of an administrative rule. Section 120.52(8) now provides that an agency shall not have authority to adopt a rule merely because the rule is "within the agency's class of powers and duties."

In Department of Business and Professional Regulation v. Calder Race Course, Inc., 724 So.2d 100 (Fla. 1st DCA 1998), the court held that the statute authorizing the Division of Parimutuel Wagering to conduct investigations did not provide specific authority to promulgate a rule allowing agents to conduct searches and seizures in parimutuel wagering facilities during such investigations. In Calder, the court held that the Legislature merely empowered the Division of Parimutuel Wagering to

adopt reasonable rules for the control, supervision and direction of all applications, permittees, and licensees and for the holding, conducting, and operating of all race tracks, race meets, and races held in this state.

This general grant of rulemaking authority, while necessary, was not sufficient to validate a rule allowing agents to conduct searches and seizures in parimutuel wagering facilities. The court held a specific law was also required and nothing in the statute identifies the power that the rule attempts to implement, *i.e.*, to search. *Id.*, at 102. The court further stated that although the Division had the specific legislative authority to carry out "investigations" there was no specific grant of authority to the department to promulgate a rule allowing agents to conduct searches and seizures, even though conducting a search or seizure is a potential component of any government sanctioned investigation. Similarly, the distinction between the general authority of the Public Service Commission to regulate pay telephone service, and the specific authority of the Commission to regulate the location of pay telephones is significant. An exhaustive search of all legislative grants of authority to the Commission fails to reveal any specific authority to regulate the location of pay telephones.

Undoubtedly, the Florida Public Service Commission is granted exclusive jurisdiction in the matters set forth in Chapter 364. Nonetheless, the authority of the Commission is not unbridled, but is limited to only those matters over which jurisdiction is specifically granted in Chapter 364. For example, despite the Commission's "exclusive jurisdiction" over telecommunications providers, it is certainly beyond the Commission's authority to tell BellSouth or any other provider where it must

place a switching station within a municipality. Similarly, although the Commission has "exclusive" authority to regulate local telephone service, that authority is not so broad as to allow the Commission to dictate where within a home a phone must be located, or during what hours of the day or night the children residing in the home must have access to a telephone. Such decisions are clearly outside of the Commission's "exclusive" jurisdiction. Likewise the City of Miami Beach respectfully submits that the Florida Public Service Commission is not statutorily authorized to mandate to the City of Miami Beach where it must allow pay telephones to be constructed or erected. So long as the City of Miami Beach passes ordinances that are competitively neutral, and reasonably related to proper municipal purposes, Miami Beach alone has the authority to regulate where within its boundaries public pay telephones can be located. If the City purportedly exceeds its Constitutional grant of authority to perform municipal functions and render municipal services, a challenge can be raised by an effected pay telephone provider or landowner in the appropriate judicial forum. The physical location of pay telephones, simply stated, is not an issue that the Public Service Commission has been tasked to regulate.

Commission staff also requested that we address the applicability, if any, of s. 70.001, Fla. Stat., commonly referred to as the Bert J. Harris Private Property Rights Protection Act. Section 70.001, F.S. grants property owners a cause of action for relief or compensation when a new law, rule, regulation, or ordinance of the state or a political entity in the state unfairly affects that landowner. Because Sec. 70.001 does not affect the statutory authority of the Commission, it has no impact on the authority of the Commission, if any, to adopt rules concerning pay telephone service.

City of Miami Beach's Comments to Specific Draft Rule 25-24.517

25-24.517 Location, Installation, Maintenance, and Removal of Pay Telephones.

(1) A pay telephone provider must, obtain written authorization to install a pay telephone from the entity that owns or controls the location prior to installation.

City of Miami Beach's Comments: This language appears to restrict the City from its ability to fully enforce the zoning rules since it implies that if a pay telephone operator obtains authorization from a private property owner, then by statute they would be allowed to place a payphone on private property irrespective of the City's code. This language should be changed to recognize the City's Code and its enforcing powers.

(a) The written authorization must be retained by the provider as long as the pay telephone remains at the location.

City of Miami Beach's Comments: This subsection would be acceptable subject to the language change above.

(b) The provider must provide the Commission with a copy of the written authorization upon the Commission's request.

City of Miami Beach's Comments: This subsection would be acceptable subject to the language change above.

(2) Pay telephones shall not be installed:

(a) Within 50 feet of a fire hydrant; or

City of Miami Beach's Comments: The City does not have any recommendation in reference to this requirement. The current Ordinance states fifteen feet and this is sufficient. Fifty feet appears to be very restrictive though.

(b) On property zoned single family or duplex residential.

City of Miami Beach's Comments: This paragraph should also address multi-family residential occupancies both in and out of the Historic Districts. There are many small apartment buildings in the City within residential areas which should have limitations on the location of pay telephones both in the right-of-way as well as on private property. The language should be more inclusive of these occupancies.

(3) Local government approval is required for pay telephones installed at the following locations:

(a) On public rights-of-way;

City of Miami Beach's Comments: This subsection is acceptable.

(b) Mounted on or overhanging sidewalks; or

City of Miami Beach's Comments: This subsection is acceptable.

(c) On the facade of a building that is listed on the State or National Historic Register.

City of Miami Beach's Comments: This language fails to recognize that within the designated Historic Districts in the City, there are buildings which are not in the State or National registries but which are designated as "Contributing" in the City's Code. These buildings are of significant importance within the districts and should be included within this subsection..

(4) The pay telephone provider shall physically remove the pay telephone within 10 calendar days from:

(a) the day the provider's certificate is canceled; or

City of Miami Beach's Comments: This subsection is acceptable.

(b) The day the provider ceases operations.

City of Miami Beach's Comments: This subsection is acceptable.

(5) Local governments may remove abandoned pay telephones located on public rights-of-way or public property. A pay telephone shall be deemed abandoned if there is no dial tone to the phone for 10 consecutive days.

City of Miami Beach's Comments: This subsection addresses only abandoned pay telephones in the public right-of-way and not on private property. This language appears to preclude the City from enforcing its zoning rules and seems to give the PSC authority over local zoning and code issues. The City wants to maintain this authority and wants the right to enforce zoning laws independently of the PSC. Also the verification of pay telephones without dial tone for ten consecutive days is unduly burdensome and manpower intensive, and therefore enforcement would be cost prohibitive. The language should allow notification to an operator any time a phone is reported without dial tone and the burden should be placed on the operator, not the enforcing agency.

(6) The Commission has the authority to order the physical removal of any pay telephones that have been found to be in violation of Chapter 364, Florida Statutes, or the rules contained in this Chapter 25-24, Florida Administrative Code.

City of Miami Beach's Comments: This subsection is acceptable.

(7) Each pay telephone station shall conform to the National Electric Code, 1999 edition (NFPA 70-1999), approved by the National Fire Protection Association, Inc., and to the National Safety Code, 1997 edition (ANSI C2-1997), approved by the American National Standards Institute, which are incorporated by reference into this rule.

City of Miami Beach's Comments: This subsection is acceptable.

(8) All existing pay telephones shall meet the requirements of this rule by Decemer 31, 2002.

City of Miami Beach's Comments: This subsection is acceptable.