

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHESTER OSHEYACK,)
)
 Petitioner,)
)
 vs.) Case No. 97-1628RX
)
 PUBLIC SERVICE COMMISSION,)
)
 Respondent.)
 _____)

FINAL ORDER

On June 23, 1997, a formal administrative hearing was held in this case by televideo before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings. (The Administrative Law Judge and all participants except the Petitioner were in a specially-equipped hearing room in Tallahassee; the Petitioner was in a specially-equipped hearing room in Tampa, Florida. The two hearing rooms were connected by televideo.)

APPEARANCES

For Petitioner: Chester Osheyack, pro se
418 Kingstown Avenue, Apartment 2
Brandon, Florida 33511

For Respondent: Mary Anne Helton, Associate General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-6096

STATEMENT OF THE ISSUES

The issue in this case is whether Rule 25-4.113(1)(f), Florida Administrative Code, is a valid exercise of delegated

legislative authority.

PRELIMINARY STATEMENT

On or about April 4, 1997, Petitioner filed a Petition for Rescission [sic] of the Disconnect Authority Rule with the Division of Administrative Hearings (DOAH).

On April 14, 1997, the final formal administrative hearing (by video) was noticed for May 12, 1997; a Prehearing Order also was entered.

Petitioner served his response to Respondent's motion in opposition on April 15, 1997, and oral argument was heard at a telephone hearing on April 21, 1997.

An "Order Dismissing Petition With Leave To Amend, Continuing Final Hearing (By Televideo Conferencing), And Amending Prehearing Order" was entered on April 29, 1997. It dismissed Mr. Osheyack's petition with leave to file an amended petition within 15 days from the date of the order to focus "on the allegations supporting the Petitioner's contentions that the rule is invalid under Section 120.52(8)(c), (e) and (f), Florida Statutes (Supp. 1996)." It also continued the hearing to June 23, 1997, and amended the prehearing order.

Petitioner served his amended petition on May 12, 1997. In it, he alleged that Rule 25-4.113(1)(f), Florida Administrative Code is an invalid exercise of delegated legislative authority because: (1) the rule enlarges, modifies, or contravenes the specific provisions of the law implemented;

(2) the rule is arbitrary and capricious; (3) the rule is not supported by competent substantial evidence; (4) the requirements of the rule are not appropriate to the end specified in the legislative act; and (5) the rule or the requirements of the rule are not reasonably related to the purpose of the enabling legislation.

On May 29, 1997, Respondent Florida Public Service Commission's Motion for Official Recognition of Attachments A through II was filed. It was not opposed, and an Order Taking Official Recognition was entered on May 30, 1997.

On June 13, 1997, the parties filed a Prehearing Stipulation which, in part, narrowed the issues to be heard.

Final hearing was held on June 23, 1997, by video conferencing. At the hearing, Respondent did not object to Petitioner rephrasing the issues of fact set forth in the Prehearing Stipulation as follows: (1) whether the Florida Public Service Commission has jurisdictional and legislative authority to permit denial, interruption, or disconnection of basic local exchange telephone service for nonpayment of services not regulated by the Commission, including but not limited to interstate long distance service; (2) whether the disconnect authority rule as currently applied unreasonably expands the legislative authority provided to the Commission by the Florida Statutes to the detriment of the consumers; (3) whether the disconnect authority rule, as currently applied, contravenes the

mandate of the Florida Telecommunications Statutes as amended in 1995, which call for the Commission to promote competition by approving trade practices that encourage fair competition and consumer choice while eliminating anticompetitive rules and regulations; (4) whether the Florida Public Service Commission has the authority to approve policies that are (allegedly) arbitrary and capricious in nature and are inconsistent based on competent evidence; and (5) whether the Florida Public Service Commission has the authority to approve or sustain policies, such as the disconnect authority rule, which (allegedly) contravene the mandates of state law and the principles of conduct defined in federal law, or the mandates of applicable federal law with respect to the specific issue of universal service. Petitioner withdrew issues concerning the Federal Fair Debt Collection Practices Act, the Florida Consumer Collection Practices Act, and the statute of limitations; Petitioner also admitted the antitrust issues raised in his amended petition were not relevant.

Petitioner called Ms. Beverlee DeMello, Mr. Julian O'Pry, and Mr. Mark Long. Mr. Osheyack also called Ms. Sally Simmons, even though she was not listed as a witness for Petitioner. Instead, Petitioner's cross-examination of Ms. Simmons was allowed to go outside the scope of Respondent's direct examination. When Petitioner attempted to testify in his own behalf, Respondent objected because Petitioner never identified

himself as a witness, and Petitioner did not testify.

Petitioner withdrew Exhibits 4 through 6; 10 through 12; 14 through 17; and 24. Ruling was reserved on Respondent's objections to the Petitioner's remaining exhibits to allow Petitioner to file written responses to the objections.

Respondent called Ms. Sally Simmons and had Respondent's Exhibits 28 through 32 admitted in evidence. In addition, Respondent's Second Motion for Official Recognition was granted, and the Federal Communication Commission's (FCC's) Report and Order, Order FCC 86-31, adopted January 14, 1985, in CC Docket No. 85-88, In the Matter of Detariffing of Billing and Collection Services, was designated as Official Recognition document (O.R.) JJ.

At the close of the evidence the Commission ordered the preparation of the transcript of the final hearing. The transcript of the hearing was filed on July 1, 1997. Respondent filed its proposed final order on July 11, 1997; Petitioner did not file a proposed final order. Nor did the Petitioner file any response to Respondent's evidentiary objections.

On July 28, 1997, the Petitioner filed a request for an extension of time to file his proposed final order, along with his response to Respondent's evidentiary objections and a Motion to Accept Late Filed Exhibits. On July 29, 1997, the Respondent filed a Response in Opposition to Petitioner Chester Osheyack's Motion to Accept Late Filed Exhibits and Letter Concerning

Exhibit Objections; by letter dated August 4, 1997, the Petitioner replied. The Respondent indicated telephonically on August 5, 1997, that it also opposes the Petitioner's request for an extension of time to file his proposed final order.

It is now ruled that the Petitioner's Motion to Accept Late Filed Exhibits and request for an extension of time to file his proposed final order are denied. However, the Petitioner's late response to the Respondent's evidentiary objections does not prejudice the Respondent, and it has been considered.

Based on the written arguments, it is now ruled that Respondent's objections to Petitioner's Exhibits 1, 2 and 3 are overruled, and the exhibits are admitted in evidence as party admissions. Respondent's objections to Petitioner's Exhibits 13 and 18 through 23a, b, and c, and 25 through 26 are sustained. (Petitioner's Exhibit 27 is received without objection.)

(There is confusion in the record as to whether the Petitioner intended to withdraw Petitioner's Exhibits 7 through 9. If not, Respondent's objections to them, stated in the Prehearing Stipulation, are sustained.)

FINDINGS OF FACT

History of the Rule

1. The Commission first adopted a rule setting out its policy on disconnection and refusal of service in August of 1955. In re: Adoption of rules and regulations governing telephone companies, Order No. 2195 (June 24, 1955) (O.R. E). (Prehearing

stipulation p. 10) Rule 20 provided that: "Service may be denied to any subscriber or applicant for failure to comply with these rules, the telephone company's tariff, municipal ordinances or state laws." Id.

2. Effective December 1, 1968, the Commission revised its disconnect rule to specifically provide that a company could disconnect telephone service for nonpayment. In re: Proposed revision of rules and regulations governing telephone companies, Order No. 4439 (October 17, 1968) (O.R. F). (Prehearing stipulation p. 10) Since adoption of Rule 310-4.66(1) in 1968, the Commission's disconnect rule has been revised seven times: In re: Proposed revision of Chapter 2-4 relating to telephone companies and radio common carriers, Order No. 7132 (March 1, 1976) (O.R. G); In re: Amendment of Rules 25-4.113 and 25-10.74 - Relating to Refusal or Discontinuance of Service, Order No. 13787, 84 F.P.S.C. 10:208 (1984) (O.R. J); In re: Amendment of Rules 25-4.109 - Customer Deposits, 25-4.110 - Customer Billing, and 25-4.113 - Refusal or Discontinuance of Service, Order No. 16727, 86 F.P.S.C. 10:157 (1986) (O.R. K); In re: Amendment of Rule 25-4.113 - F.A.C., pertaining to Refusal or Discontinuance of Service by Company, Order No. 23721, 90 F.P.S.C. 11:75 (1990) (O.R. M); In re: Adoption of Rule 25-4.160, F.A.C., Operation of Telecommunications Relay Service and Amendment of Rules 25-4.113, F.A.C., Refusal or Discontinuance of Service by Company; 25-4.150, F.A.C., The Administrator; 25-24.475, F.A.C., Company

Operations; Rules Incorporated, Order No. PSC-92-0950-FOF-TP, 92 F.P.S.C. 9:208 (1992) (O.R. N); In re: Proposed Amendment of Rule 25-4.113, F.A.C., Prohibiting Refusal or Discontinuance of Service for Nonpayment of a Dishonored Check Service Charge Imposed by the Utility, Order No. PSC-92-1483-FOF-PU, 92 F.P.S.C. 12:543 (1992) (O.R. P); In re: Proposed Amendment to Rule 25-4.113 F.A.C., Refusal or Discontinuance of Service by Company, Order No. PSC-95-0028-FOF-TL, 95 F.P.S.C. 1:50 (1995) (O.R. T). (Prehearing stipulation p.11)

3. By Order No. 12765, issued December 9, 1983, the Commission expanded its disconnect policy to allow local exchange companies (LECs) that bill for interexchange carriers (IXCs) to disconnect local service for nonpayment of the long distance portion of the bill. In re: Intrastate telephone access charges for toll use of local exchange services, Order No. 12765, 83 F.P.S.C. 12:100, 125 (1983) (O.R. H). (Tr 118-119) The Commission believed that "by granting LECs disconnect authority bad debts for toll charges will be less than without this authority." Order No. 12765 at 12:125. (Tr 120) In addition, the Commission found that if the IXCs encounter excessive bad debt expense, the IXCs may increase their toll charges to recoup expenses, which would cause Florida subscribers to pay higher toll rates. Order No. 12765 at 12:125. (Tr 120) The disconnect authority for nonpayment for IXC toll charges was limited only to LECs who performed billing and collection services for IXCs.

Order No. 12765 at 12:125. (Tr 120)

4. By Order No. 13429, issued June 18, 1984, the Commission ordered Florida's LECs to file a uniform tariff that specified their billing and collection procedures and rates when billing for IXCs. In re: Intrastate telephone access charges for Toll Use of Local Exchange Services, Order No. 13429, 84 F.P.S.C. 6:221 (1984) (O.R. I). The LECs complied with this requirement. (Tr 126-127; Ex 30)

5. Since the Commission first adopted its disconnect policy, the Legislature has never enacted legislation to invalidate the Commission's policy. (Tr 155) Nor has the Joint Administrative Procedures Committee ever objected to any version of the Commission's disconnect rule. (Tr 155-156)

The Current Version of Rule 25-4.113(1)(f)

6. Today, Rule 25-4.113(1) provides:

the company may refuse or discontinue telephone service under the following conditions provided that, unless otherwise stated, the customer shall be given notice and allowed a reasonable time to comply with any rule or remedy any deficiency:

* * *

(f) For nonpayment of bills for telephone service, including the telecommunications access system surcharge referred to in Rule 25-4.160(3), provided that suspension or termination of service shall not be made without 5 working days' written notice to the customer, except in extreme cases. The written notice shall be separate and apart from the regular monthly bill for service. A company shall not, however, refuse

or discontinue service for nonpayment of a dishonored check service charge imposed by the company. No company shall discontinue service to any customer for the initial nonpayment of the current bill on a day the company's business office is closed or on a day preceding a day the business office is closed.

* * *

(O.R. CC)

7. LECs that bill for IXCs can still disconnect for nonpayment of toll calls. (Tr 122, 158) No company, however, can disconnect for nonpayment of unregulated services, such as customer premises services like inside wire maintenance and information services like voice mail. Rule 25-4.113(4)(e), Florida Administrative Code. (Tr 124-125, 130) In addition, the billing and collection tariffs are not uniform today because LECs have individually lowered many of the rates they charge for billing and collection services. (Tr 128-129; Ex 31).

Two Separate, Pertinent Service Contracts

8. It is important for understanding the Commission's rationale for its disconnect rule to recognize that two separate, pertinent service contracts are involved. (Tr 151-152) One is the billing and collection services contract between the LEC and the IXC. (Tr 126, 152) The other is the contract for service between the company providing telephone service and the subscriber. (Tr 152)

9. As discussed above, LECs who perform billing and collection services for IXCs have a tariff on file with the Commission that sets out the terms, conditions, and rates upon

which the LECs offer this service. (Tr 126 -129; Ex 31)

10. Pertaining to the contract for telephone service, the Commission has specified by rule the terms and conditions upon which a company may refuse or disconnect service. (Tr 137) Each company has a tariff on file with the Commission that sets out the terms and conditions upon which it will refuse or disconnect service. (Tr 137; Ex 32)

The Commission's Dispute Policy

11. If service is going to be disconnected for any authorized reason, separate notice must first be provided to the customer. Rule 25-4.113, Florida Administrative Code; In re: Complaint of Aristides Day Against BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company regarding interruption of service, Order No. PSC-94-0716-FOF-TL, 94 F.P.S.C. 6:157 (1994) (O.R. R). If a customer has a pending complaint concerning disputed charges, Rule 25-22.032(10), Florida Administrative Code, prohibits disconnection for nonpayment of the disputed charges. (Tr 129) (O.R. FF) The customer, however, is expected to pay the charges not in dispute. In re: Complaint of Ron White against AT&T Communications and GTE Florida Incorporated regarding responsibility for disputed calling card charges, Order No. PSC-92-1321-FOF-TP, 92 F.P.S.C. 11:274 (1992) (O.R. O); In re: Complaint of Leon Plaskett against BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company regarding unpaid long distance

bills, Order No. PSC-94-0722-FOF-TL, 94 F.P.S.C. 6:177 (1994)
(O.R. S).

12. When a LEC contracts with an IXC to perform an IXC's billing and collection functions, the Commission acts to resolve disputes over both intra and interstate toll calls. In re: Complaint against AT&T Communications of the Southern States, Inc. and United Telephone Company of Florida by Health Management Systems, Inc., regarding interLATA PIC slamming, Order No. PSC-97-0203-FOF-TP, 97- F.P.S.C. 2:477, 482 (1997) (O.R. AA). (Tr 55)

Rationale for Rule 25-4.113(1)(f)

13. The reasons the Commission gave in 1983 to allow companies to disconnect for nonpayment of toll are still viable today. (Tr 122, 158). If LECs could not disconnect for unpaid IXC bills, the IXCs uncollectible expenses would probably increase. (Tr 122-123, 138, 158) Moreover, if local service was not disconnected, a consumer could run up bad debts with different IXCs without ever paying for a toll call. (Tr 124, 135) This bad debt would have to be passed on to Florida consumers through increased rates to cover the uncollectible expenses. (Tr 122-123, 135, 158) Good paying customers should not have to pay for the fraud created by those who switch from carrier to carrier leaving behind unpaid toll charges. (Tr 124, 135)

14. Additional reasons for the policy also exist because of

the 1995 changes to Chapter 364, Florida Statutes (1995). If the Commission prohibited LECs from disconnecting local service for nonpayment of toll, LECs would be economically disadvantaged and alternative local exchange companies (ALECs) would be advantaged. (Tr 123, 147-148) This is because LECs could not disconnect local service for nonpayment of toll, but the ALECs could continue to disconnect due to the Commission's limited jurisdiction and regulation over ALECs. (Tr 123, 147-148)

15. Moreover, deposit requirements are affected by the disconnect policy. If LECs could not disconnect for nonpayment, deposit requirements would probably increase. (Tr 123-124, 195) Large deposits are a barrier to access to telecommunications services and would have an adverse effect on subscribership. (Tr 124)

16. Finally, the Rule puts costs on the cost causer. (Tr 158)

The Rule's Impact on Universal Service

17. The obligation to provide universal service is the obligation to offer access to basic telephone service at reasonable and affordable rates. Section 364.025(1), Florida Statutes (1995). (Tr 139, 167; Ex 29) As long as a customer pays the nondisputed portion of his bill, service will not be disconnected. (Tr 143) Therefore, Rule 25-4.113(1)(f) does not preclude a subscriber from obtaining basic local service, as long as he pays the undisputed portion of his telephone bill.

(Tr 142-143)

18. Basic service includes access to all locally available IXCs. Section 364.02(2), Florida Statutes (1995). (Tr 133-134) Any consumer who pays his bill can have access to any available carrier in the market where he resides. (Tr 133-134, 149)

The Rule's Impact on Competition

19. Today the toll market is reasonably competitive. (Tr 144) In 1995, the Legislature authorized competition in the local market. However, very few providers are actually providing basic local service; therefore, market conditions have not substantially changed since Rule 25-4.113 was last amended. (Tr 144-145) The basic local market is still largely a monopoly despite the legislative changes at the state and federal level. (Tr 145; Ex 28)

20. The Commission is charged with regulating telecommunications companies during the transition from monopoly to competitive services. Section 364.01(3), Florida Statutes (1995). (Tr 156, 197-198)

21. To a certain extent, all rules and regulations restrict competition. (Tr 147) In this case, the benefits of the rule outweigh any negative impact the rule may have on competition, because the rule keeps uncollectible expenses lower than they would otherwise be and it also puts costs on the cost causer.

CONCLUSIONS OF LAW

Burden of Proof

22. The burden of proof in this proceeding is on Petitioner to prove by a preponderance of the evidence that Rule 25-4.113(1)(f) constitutes an invalid exercise of delegated legislative authority. Adam Smith Enterprises, Inc. vs. Department of Environmental Regulation, 553 So. 2d 1260 (Fla. 1st DCA 1989); Agrico Chemical Co. vs. Department of Environmental Regulation, 365 So. 2d 759 (Fla. 1st DCA 1979). (Prehearing Stipulation p. 11-12)

The Statutory Tests for Validity of the Rule

23. The Federal Telecommunications Act of 1996 may be instructive regarding the jurisdiction which has been reserved to the states concerning the regulation of telecommunications companies. However, when determining whether a rule is an invalid exercise of delegated legislative authority under Section 120.56, the appropriate question is whether the agency action "goes beyond the powers, functions, and duties delegated by the [Florida] Legislature." Section 120.52(8), Florida Statutes (Supp. 1996). Besides, the FCC has specifically deferred to the states to determine whether they will allow LECs to disconnect "local services for nonpayment of interstate toll services that are not offered by the LEC." FCC Order No. 86-31, p. 31 (O.R. JJ). The FCC continues to defer to the states concerning disconnection of local service for nonpayment of interstate toll

for non-lifeline customers. (Tr 143-144)

24. The Florida Legislature has defined what makes a rule an invalid exercise of delegated legislative authority in Section 120.52(8), Florida Statutes (Supp. 1996). The Petitioner has identified three instances that may apply here. They are:

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

• * *

(e) The rule is arbitrary or capricious; [and]

(f) The rule is not supported by competent substantial evidence. . . .

Section 120.52(8), Florida Statutes (Supp. 1996).

Competent Substantial Evidence

25. As demonstrated by Respondent at the hearing, Rule 25-4.113(1)(f) is supported by competent substantial evidence. The Commission has determined that long distance rates may increase if LECs are not allowed to disconnect for nonpayment of toll bills. (Tr 122-123, 138, 158) In addition, the Commission has shown that companies may increase their deposit requirements if they are not allowed to disconnect for nonpayment. (Tr 123-124) This could constitute a serious barrier to subscribership.

(Tr 124) Moreover, Petitioner failed to show that subscribership in Florida is lower than it would be otherwise because of the Commission's policy. To the contrary, subscribership in Florida has increased over the last ten years. (Tr 139) The

Commission's rule is consistent with its policy to put costs on the cost causer. In re: Review of Southern Bell Telephone and Telegraph Company's Late Payment Charge, Order No. 17915, 87 F.P.S.C. 7:300 (1987) (O.R. L). (Tr 158) Finally, if the Commission were to prohibit LECs from disconnecting local service for nonpayment of toll, ALECs would be economically advantaged to the LECs' disadvantage. (Tr 123)

26. Reasonable persons should accept the above evidence as adequate to support the Commission's policy to allow LECs to disconnect for nonpayment of toll. Agrico, 365 So. 2d at 763 ("Competent substantial evidenced has been described as such evidence as a reasonable person would accept as adequate to support a conclusion.") Rule 25-4.113(1)(f) is therefore found to be based upon competent substantial evidence.

Lawful Implementation of Statutory Authority

27. As discussed above, one of the statutes implemented by Rule 25-4.113 is Section 364.19, Florida Statutes (1995). It provides:

The commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons.

Section 364.19 Florida Statutes (1995). The rulemaking authority contained in this statute is very broad. It does not limit the contract terms to be regulated. Nor does it limit the types of service contracts that the Commission may regulate.

28. As pertains to Rule 25-4.113, the Commission interprets

Section 364.19 as authorizing the Commission to regulate two types of service contracts: billing and collection contracts between the LEC and IXC, and contracts for service between the LEC and consumer. (Tr 151-152)

29. All well-drawn service contracts spell out the terms for terminating the contracted for service. It is black letter law that consideration is an element of a binding contract. In this case, payment is required to obtain service. Accordingly, a reasonable contract term is that serviced may be refused or disconnected for nonpayment of a portion of the contracted for service. By allowing companies to disconnect for nonpayment, the Commission has simply spelled out what to do in the case of a breach of contract for service as authorized by Section 364.19, Florida Statutes (1995).

30. In this case, only LECs that bill and collect for IXCs may disconnect local service for nonpayment of toll. Order 12765 at 12:125. (Tr 120) Because the LEC is authorized to collect all charges that are due to the IXC, it follows that if any one of those charges are not paid, the LEC should be able to disconnect for nonpayment. It does not matter whether the charge is an intra or interstate call because the charge is due and payable to the LEC.

31. If a LEC decides to disconnect telephone service, it must do so under the terms and conditions set forth in Rule 25-

4.113 and in the company's limitations and use of service tariff. (Tr 137); Ex 32) For instance, the LEC generally cannot disconnect service without providing five days' separate written notice. Rule 25-4.113(1)(f), Florida Administrative Code. The remainder of Rule 25-4.113 provides additional restrictions upon the company's ability to refuse or disconnect service.

32. Petitioner failed to produce any evidence to show that Section 364.19 is insufficient authority for the rule. Moreover, Petitioner acknowledged the "broad discretionary powers" Section 364.19 provides the Commission. (Amended Petition p. 2)

33. The rule also implements Section 364.03, Florida Statutes (1995), which provides in pertinent part:

Every telecommunications company shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto suitable and proper telecommunications facilities and connections for telecommunications services and furnish telecommunications service as demanded upon terms to be approved by the commission.

34. Under the 1995 changes to Chapter 364, the Legislature exempted price-capped LECs, ALECs, and IXC's from the provisions of this statute. Sections 264.051(1)(c) and 364.337(2) and (4), Florida Statutes (1995). (Tr 153) Rate-of-return regulated LECs, however, are still subject to Section 364.03. (Tr 152) Thus, Rule 25-4.113 implements Section 364.03 by setting the terms upon which a rate-of-return regulated LEC may refuse or disconnect telephone service. (Tr 153)

35. Finally, Rule 25-4.113 implements Section 427.704, Florida Statutes (1995). Paragraph (1) (f) of the rule implements this statute by allowing companies to disconnect for nonpayment of the telecommunications access system surcharge which the Commission imposes pursuant to Section 427.704, Florida Statutes. (Tr 155) The surcharge provides the funds to implement the "statewide telecommunications access system to provide access to telecommunications relay services by persons who are hearing impaired or speech impaired, or others who communicate with them." Section 427.704(1), Florida Statutes (1995).

36. The Commission's interpretation of Sections 364.03, 364.19, and 427.704, Florida Statutes (1995), is reasonable and rationally related to the implementing statutes. Florida Waterworks Association vs. Florida Public Service Commission, 473 So. 2d 237, 240 (Fla. 1st DCA 1985) (citation omitted) (Respondent has wide discretion to interpret the statutes which it administers "and will not be overturned on appeal unless clearly erroneous.")

37. Moreover, weight should be given to the presumption that Rule 25-4.113(1)(f) is valid because the Commission's disconnect policy has been codified since 1955. Jax Liquors, Inc. vs. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, 388 So. 2d 1306, 1308 (Fla. 1st DCA 1980) ("[T]he presumption of the Rule's validity gains added weight

from its having laid upon the public record in Florida Administrative Code for several legislative sessions without disapproval or interference by either the legislature or its Administrative Procedures Committee.”)

38. Rule 25-4.113(1)(f) does not contravene, enlarge, or modify the statutes which it implements. Nor does Rule 25-4.113(1)(f) contravene, enlarge, or modify the universal service and competition requirements in Chapter 364. The rule allows end users to access basic local service, which includes access to all locally available interexchange companies, as long as the bill is paid. Moreover, the Commission has the discretion and exclusive jurisdiction to determine what regulation is necessary in this transition phase from the provision of monopoly service to competition.

The Rule is Not Arbitrary and Capricious

39. Petitioner has also failed to show Rule 25-4.113(1)(f) was enacted without thought, reason, or irrationally. Agrico, 365 So. 2d at 763 (“A capricious action is one which is taken without thought or reason or irrationally.”) Petitioner has also failed to show that Rule 25-4.113(1)(f) is despotic or unsupported by facts or logic. Id. (“An arbitrary decision is one not supported by facts or logic, or despotic.”) In addition, Petitioner has failed to show that the rule is without a rational basis or that it is not related to the statutes that it implements. Jax Liquors, 388 So. 2d at 1308.

40. Instead, Respondent has shown that the Commission's policy is consistent with its role authorized by the legislature, which is to exercise appropriate regulatory oversight during "the transition from the monopoly provision of local exchange service to the competitive provision thereof . . . to protect consumers and provide for the development of fair and effective competition" Section 364.01(3), Florida Statutes (1995). The Commission has the exclusive jurisdiction to determine what is the appropriate regulatory oversight necessary during this transition phase. Section 364.01(2), Florida Statutes (1995). Moreover, as acknowledged by Petitioner, Sections 364.03 and 364.19 Florida Statutes (1995), "provide the Commission with broad discretionary powers to regulate the telecommunications industry." (Petitioner's Amended Petition p.2)

41. During the hearing, Petitioner questioned Mark Long concerning the Commission's ultimate denial of GTE Florida Incorporated's Advanced Credit Management (ACM) tariff. In re: Request for approval of tariff filing to clarify blocking of specific calls related to the Advanced Credit Management tariff by GTE Florida Incorporated, Order No. PSC-96-0530-FOF-TL, 96 F.P.S.C. 4:293 (1996). The Commission denied the ACE tariff because it precluded customers from getting basic local service by blocking access to all locally available IXCs. Id. At 4:294. Thus, customers were paying for basic local service and not

getting it. (Tr 110, 135) This is different, however, from the application of Rule 25-4.113(1)(f). When a customer is disconnected for nonpayment, he is not getting basic local service, but neither is he paying for it. (Tr 110-111, 135)

42. In addition, Petitioner questioned Mr. Julian O'Pry concerning the Commission's denial of Southern Bell's proposed tariff which, if approved, would have allowed Southern Bell to refuse or disconnect service for debt associated with telephone service initiated in other states. In re: Request for approval of tariff filing to change the definition of "Company" and allow denial of service for monies owed in other states by BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company, Order No. PSC-93-0069-FOF-TL, 93 F.P.S.C. 1:397 (1993) (O.R. Q). (Tr 62) Respondent included this order in its motion for official recognition to show that the Commission would not allow a company to refuse or disconnect service for non-payment if the Commission did not regulate or have any control over the service. The Commission stated: "Even if a debt would otherwise be sufficient grounds for refusal of service, the Commission has no review of or control over the circumstances surrounding the creation of the debt in another state." Order No. PSC-93-0069-FOF-TL at 1:399. In the case at bar, the Commission does have control over the debt created in Florida, especially where the LEC performs the billing and collection service pursuant to Section 364.19, Florida Statutes

(1995). (Tr 62). Thus, the Commission has control over the circumstances that create the debt in Florida.

43. Finally, if the Commission does not have jurisdiction to permit LECs to disconnect local service for nonpayment of interstate toll for which the LEC provided the billing and collection service, the public interest would not be served. It would then follow that the Commission would not have jurisdiction to preclude a LEC from disconnecting service for nonpayment of the interstate toll. This would create a situation in which a LEC could disconnect without following the notice provisions and other restrictions set out in Rule 25-4.113. Furthermore, if the Commission has no disconnect authority whatsoever, it could place no restrictions on refusal or discontinuance of service. A company could then disconnect service for any reason at any time. (Tr 157)

44. Petitioner has failed to prove by a preponderance of the evidence that Rule 25-4.113(1)(f) is arbitrary and capricious.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, the amended petition seeking to invalidate Rule 25-4.113(1)(f), Florida Administrative Code, is denied.

DONE AND ORDERED this 11th day of August 1997, in
Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
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Tallahassee, Florida 32399-1300

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida rules of appellate procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.