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IN THE SUPREME COURT OF FLORIDA

MANATEE COUNTY,)
)
 Appellant,)
)
 -vs-)
)
 FLORIDA PUBLIC SERVICE)
 COMMISSION,)
)
 Appellee.)
)
 _____)

CASE NO. 68,657

REPLY BRIEF OF APPELLANT

On Appeal from
The Florida Public Service Commission
Proceeding on Manatee County's Request
for Boundary Change
From Sarasota Exchange
to Bradenton Exchange

Florida Public Service Commission
Docket No. 850127-TL

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PRELIMINARY STATEMENT

MANATEE COUNTY files this Reply Brief in order to point out misstatements in the Answer Briefs filed on behalf of General Telephone Company of Florida (GenTel) and the Florida Public Service Commission (PSC).

Appellees' briefs tend to confuse the issues and distort the position of Manatee County. Contrary to their assertions, Manatee County is not asking this Court to reweigh the evidence. Rather, Manatee County would demonstrate that the Order of the Public Service Commission was not supported by competent and substantial evidence, and that the only competent and substantial evidence presented was supportive of Manatee County's position.

The Answer Brief of the PSC will be addressed first, followed by a reply to the Answer Brief of GenTel.

ARGUMENT

I. THE ANSWER BRIEF OF THE FLORIDA PUBLIC SERVICE COMMISSION

A. WHERE IN THE RECORD IS THE COMPETENT, SUBSTANTIAL EVIDENCE SUPPORTING THE PSC/GENTEL POSITION?

1. CUSTOMER PREFERENCES

Under the heading "Customer Preferences" (PSC Brief at page 8), the PSC urges that the record is "replete with competent, substantial evidence supportive of the Commission's determination that ...future residents of the disputed area would prefer service out of the Sarasota Northside office." No citation to the record is made, but the brief goes on to discuss the survey introduced through the testimony of General Telephone's witness, Mr. Cacciatore.¹

At page 3 of its Answer Brief, the PSC stated that "abundant evidence" was presented that future residents of the subject area would prefer the existing arrangement. Again, there is no reference to the record.

At page 10 of its brief, the PSC referred to the testimony of witness Cacciatore that future development in the affected area would identify with Sarasota. This, obviously, is

¹As demonstrated in the initial brief of Manatee County, the survey was without statistical validity or reliability. It collected the opinions of the wrong group of people. It contained improperly biased and loaded questions. It was based on completely unwarranted and speculative assumptions. All of these are addressed in some detail in Manatee County's Initial Brief. (See pages 20 thru 24).

nothing more than Cacciatore's unsupported speculation. It is neither competent nor substantial evidence, but it is, apparently, the only "evidence" to support this finding other than the survey.

In response, Manatee County would simply ask: Specifically, "What evidence was presented?" and "Where in the record was it presented?" The answer is, of course, that there is no substantial, competent evidence to support this finding.

2. ECONOMIC CONSIDERATIONS

Under the heading "Economic Considerations" at page 11, the PSC asserts that "substantial, competent evidence was presented that the transfer would present significant cost to General Telephone's rate paying customers". Once again, Manatee County would ask "Where?". Significantly, there is no citation to the record to show the Court exactly what the "substantial, competent evidence" was.

In other portions of the brief focusing on the economic argument, the PSC refers to pages 38 and 39 of the record and Exhibit 1-A. (PSC Brief, page 3). Pages 38 and 39 of the record are parts of the Prehearing Order which was generated by the PSC itself. It is not evidence.

Exhibit 1-A is a letter that was included in the record. The letter is from Nicky L. Eary, Government Relations Administrator for General Telephone Company. It recites, among other things, that the estimated cost of serving the subject area from the Manatee County Bay Exchange would be "in excess of

\$200,000". It is hearsay. It is self-serving. It is the letter of a "PR" person, not a person with knowledge of the economic factors under discussion. It does not rise to the level of competent, substantial evidence.

Nowhere in the record did General Telephone Company present any itemization or documentation to support its assertion that it would incur costs in excess of \$200,000 to comply with Manatee County's request. On page 11 of its brief, the PSC cites transcript page 146 in support of this assertion. Careful review of transcript page 146 shows the truth, i.e., that the General Telephone Company witness could not substantiate that it would be more costly to serve the area from Manatee County. Thus, the following colloquy occurred:

Q. Is there anything about that that makes it more expensive to serve it from Tara, rather than from Palm Aire?

A. Right. You are asking just for an opinion, which gauges come into play the more distance you get involved with, and I don't know if these gauges would change or not. I am also going to tell you that there are different ways by a developer of providing service throughout an area that weigh upon this type of cost as well. Again, I will say that generally the further the distance the more the cost.

Q. So basically, your answer is that you don't know?

A. That is basically what I am trying to say, yes.

At page 12 of its brief, the PSC quoted from pages 181-182 of the transcript of the final hearing. Here Mr. Cacciatore, General Telephone Company's witness, was quoted for the

proposition that, generally speaking, the greater distance involved in providing service, the higher the cost.

However, the Public Service Commission did not point out the context of Mr. Cacciatore's statement. The statement was made in his prefiled testimony. Thus, although it appears in the transcript at a point subsequent to the colloquy excerpted from transcript page 146 as set forth above, it occurred prior in time.

This is a significant point. The chronological order of events was that the witness first made a general statement in writing, to wit, that ordinarily the greater the distance involved, the higher the cost. Subsequently, when forced on cross-examination to focus on the particular subject area, the witness had to admit that he did not know whether it would be more expensive to serve the subject area from Manatee County, rather than from Sarasota.

3. THE CONFUSION QUESTION

With regard to the confusion question, the Public Service Commission argued, at page 15 of its brief, that "clearly, the problem is the proximity of the two adjacent political entities", rather than the source of the telephone service. However, the Public Service Commission neglects to consider that Sarasota County is not the only county that is adjacent to Manatee County. Pinellas, Hillsborough, Hardee and DeSoto Counties are also adjacent to Manatee County, and similar problems between Manatee County and those adjacent counties

simply do not exist.

4. THE EVIDENCE OF RECORD

The crucial point is this: the Public Service Commission and General Telephone Company rely on two basic positions: (1) that customer preferences favor the existing arrangement; and (2) that it would cost in excess of \$200,000 for General Telephone to alter the existing arrangement as requested by Manatee County.

Manatee County has conclusively demonstrated that the record contains no competent substantial evidence that supports the "customer preference finding". Rather, it is based on sheer speculation and reliance on a "survey" that is totally inapposite, invalid and unreliable.

The "competent, substantial evidence" to support the cost finding consists of hearsay or unsupported, undocumented and unsubstantiated conclusions by General Telephone. Nowhere in the record is there any itemization or documentation to show how this figure was derived. Rather, the record shows that when challenged on cross-examination, the only witness presented in support of General Telephone's position candidly admitted that he did not know whether it would be more expensive to comply with Manatee County's request.

In effect, there is nothing to support the Public Service Commission Order except speculation and hearsay. Of course, under the Florida Administrative Code, hearsay is admissible in an administrative proceeding, but is not

sufficient, in itself, to support a finding of fact. Fla. Admin. Code Rule 25-22.48(3). See also, Franklin v. District School Board, 356 So.2d 931 (Fla. 2d DCA 1978); and Poirier v. Division of Health, 351 So.2d 50 (Fla. 1st DCA 1977). See also, Section 120.58(1)(a), Fla. Stat. (1985).

II. THE ANSWER BRIEF OF GENERAL TELEPHONE COMPANY OF FLORIDA

A. CAREFUL REVIEW OF THE RECORD SHOWS THAT THE ORDER OF THE PSC IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

1. THE EVIDENCE OF RECORD

In its initial brief Manatee County argued, with extensive citations to the record, that the "evidence" supporting the notion that customers preferred to have service from the Sarasota Northside Exchange was not competent. Further, Manatee County argued, again with extensive citations to the record, that General Telephone's position, that it would incur excessive costs in complying with Manatee County's request, was not only unsupported by competent and substantial evidence, but was actually contradicted, or at least undercut, by the absence of knowledge admitted by General Telephone Company's witness. General Telephone Company's response is to devote four pages of "additions to Manatee County's statement of facts" and to assert that Manatee County's statement of facts was "argumentative and biased". (GenTel Brief, page 3).

In reply, Manatee County invites the Court to carefully

check the arguments and statements in the parties' briefs, and the citations to the record included therein. Careful review will show that, indeed, the General Telephone Company position, as set forth in its own brief, is without competent, substantial evidence to support it.

2. THE JURISDICTIONAL ARGUMENT

The legal arguments in General Telephone Company's Answer Brief are too frivolous and lacking in substance to warrant a detailed reply. Manatee County, for the most part, will rely on the arguments and authorities asserted in its initial brief. However, at pages 13 and 14 of its brief, General Telephone Company misstates the law and this misrepresentation cannot be ignored.

Thus, in its jurisdictional argument, General Telephone Company quotes from Section 364.14(2), Florida Statutes. The quote set forth by General Telephone Company is as follows:

"Whenever the Commission finds...that the equipment, facilities, or service of any telephone company are inadequate, inefficient, improper, or insufficient, the Commission shall determine the just, reasonable, proper, adequate and efficient...equipment, facilities and service to be thereafter installed, observed, and used and shall fix the same by order or rule as hereinafter provided."

After setting forth this incomplete excerpt from the statute, General Telephone concludes "pursuant to the above statute, the evidence presented for an equipment or facilities change must relate to inadequate or improper service being rendered to the public". (emphasis added) (GenTel Brief, at 14).

General Telephone Company conveniently omitted critical language from its excerpt of Section 364.14(2). The statute actually says:

"Whenever the commission finds that the rules, regulations, or practices of any telephone company are unjust or unreasonable, or that the equipment, facilities, or service of any telephone company are inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities, and service to be thereafter installed, observed, and used and shall fix the same by order or rule as hereinafter provided."

The words that are underscored above were omitted from the excerpt in General Telephone Company's brief. Obviously, when the words are included, it is not correct to say that "pursuant to the above statute, the evidence presented for an equipment or facilities change must relate to an inadequate or improper service being rendered to the public." The truth is that unjust or unreasonable practices may also be the basis for an order or rule by the Public Service Commission.

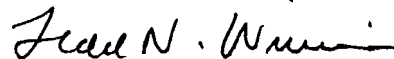
Under Section 364.10, Fla. Stat. (1985), a telephone company is prohibited from giving any undue or unreasonable preference or advantage to any person or locality. Similarly, it is prohibited from subjecting any person or locality to an undue or unreasonable prejudice or disadvantage "in any respect whatsoever". As a matter of law, a violation of Section 364.10 would constitute an unjust or unreasonable practice under Section 364.14 which the Public Service Commission would have jurisdiction to address. General Telephone's argument that the

PSC lacked jurisdiction is totally without merit.

CONCLUSION

Careful review of the citations to the record in the Public Service Commission Order, as well as the briefs of Manatee County, the Public Service Commission and General Telephone Company of Florida, will demonstrate that the Order was not supported by competent, substantial evidence. This court should enter an order reversing the March 19, 1986 decision of the PSC. The Court should remand the proceedings to the PSC, ordering the PSC to order that the subject area be served from the Manatee Bay Exchange.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief was mailed to JAMES V. CARIDEO and THOMAS R. PARKER, Attorneys for General Telephone Company of Florida, P. O. Box 1110, MC7, Tampa, Florida 33601; and to WILLIAM S. BIKENKY and

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the 7th day of August, 1986.

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