

IN THE SUPREME COURT OF FLORIDA

1968
C
COURT
Clerk

GENERAL TELEPHONE COMPANY OF FLORIDA)
)
 Appellant,)
)
 v.)
)
 JOHN R. MARKS, III, GERALD A. GUNTER,)
 KATIE C. NICHOLS, MICHAEL MCK. WILSON &)
 THOMAS HERNDON, AS AND CONSTITUTING THE)
 FLORIDA PUBLIC SERVICE COMMISSION)
 Appellee.)

Case No. 68,691

On Appeal From The Florida Public Service Commission

REPLY BRIEF OF APPELLANT
GENERAL TELEPHONE COMPANY OF FLORIDA

James V. Carideo
Vice President-General Counsel
Thomas R. Parker
Associate General Counsel
P.O. Box 110 MC 7
Tampa, Florida 33601
(813) 224-4001

Attorneys for General
Telephone Company of Florida

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	i
Table of Citations.....	ii
I. Introduction.....	1
II. Summary of Argument.....	3
III. Reply Argument.....	5
A. The Commission and Public Counsel have presented the wrong standard of judicial review pertaining to administrative rules under the facts and circumstances of this case.....	5
B. Section 364.037 is not a general statute which delegates specific implementation issues to the Commission.....	7
C. The legislature is not presumed to be aware of FPSC past practices under the facts of this case contrary to the Commission's assertion.....	8
D. The Commission's undue subsidization argument is contrary to the legisla- tive history and plain language of Section 364.037.....	9
E. The Public Counsel's argument that the plain language of 364.037 does not forbid inclusion of white page expenses is wrong.....	11
IV. Conclusion.....	14

TABLE OF CITATIONS

<u>Cases:</u>	<u>Page</u>
<u>Barr v. Delta and Pine Lane Company,</u> 199 So.2d 269, 271 (Miss.1967).....	9
<u>Dept. of Business Reg. v. Salvation Limited, Inc.,</u> 452 So.2d 65 (1st DCA 1984).....	6
<u>Fogarty Bros. Transfer, Inc. v. Boyd,</u> 109 So.2d 883, 886 (Fla. 1959).....	7
<u>General Telephone Company v. Florida Public Service</u> <u>Commission, 446 So.2d 1063, 1067 (Fla. 1984).....</u>	3, 5, 6
<u>Grove Isle, Ltd. v. Dept. of Environmental Regulation,</u> 454 So.2d 571, 574 (1st DCA 1984).....	6
<u>National Lead Co. v. United States, 252 U.S.</u> 140, 147, 40 S.Ct. 237, 64 L.Ed. 496 (1920).....	9
<u>Nicholas v. Wainwright, 152 So.2d 458 460 (Fla. 1963).....</u>	6
<u>Seitz v. Duval County School Board,</u> 366 So.2d 119, 121 (Fla. 1st DCA 1979).....	6
<u>Southern Bell Telephone and Telegraph Co. v. Florida</u> <u>Public Service Commission, 443 So.2d 92, 94 (Fla. 1983).....</u>	3
<u>State Department of Health and Rehabilitative Services</u> <u>v. McTigue, 387 So.2d 454 (Fla. 1st DCA 1980).....</u>	6
<u>State ex rel. Szabo Food Service, Inc. of N.C. v.</u> <u>Dickinson, 286 So.2d 529, 531 (Fla. 1973).....</u>	8, 9
 <u>Florida Statutes:</u>	
Section 364.037, Fla. Stat. (1985).....	1-3, 6-9, 11-13
Section 350.127(2), Fla. Stat. (1985).....	5

I. INTRODUCTION

Appellant, General Telephone Company of Florida (hereinafter referred to as "GTFL") responds herein to the major arguments presented by the Appellees, Florida Public Service Commission (hereinafter referred to as "FPSC" or "Commission") and Citizens of the State of Florida (hereinafter referred to as "Public Counsel") in their respective briefs.¹ The fact that GTFL does not respond to any particular point contained in Appellee's Briefs should not be construed as a concession thereto. Rather, such a situation is an indication that further discussion is not warranted and GTFL's Initial Brief should be consulted for Appellant's position.

The basic issue presented in this appeal is whether the FPSC exceeded its authority in promulgating a rule, which includes white page directory expense, to reduce the amount of any incentive monies which go to a utilities shareholders pursuant to Section 364.037 Fla. Stat. (1985).² GTFL contends that the Commission's rule goes beyond and is in conflict with the specific grant of statutory authority enacted by the legislature to control this situation. As such, the Commission's rule is null and void as an invalid exercise of delegated legislative authority.

The Court should consider the following as it reaches a decision in this proceeding. GTFL presented its Initial Brief based on the

¹ GTFL will cite to the respective briefs of the FPSC and Public Counsel as follows: "FPSC Brief at ___" and "PC Brief at ___."

² All further references are to Fla. Stat. (1985) unless otherwise indicated.

argument that the Commission's rule was contrary to the legislative history, intent and the plain language of Section 364.037. The Commission has all but ignored any reference or argument regarding the history of this statute as it came into being in the halls of the Capitol.³ In regard to the plain language of the statute, the FPSC makes the following charge against GTFL's Initial Brief:

By seeking to focus only on the subject matter of the legislation, directory advertising, General attempts to make the statute say that only those expenses associated with directory advertising should be included in the gross profit calculation. (FPSC brief at 13, emphasis added)

GTFL is curious where it is supposed to focus its attention in an appeal concerning the Commission's misinterpretation and unlawful modification of a statute, if not on the actual language and the legislative history of the statute.

GTFL submits that the above quote from the Commission's Answer Brief sums up the admittedly opposite positions of the Appellant and Appellees as presented to this Court. GTFL has focused on the actual statute itself. Appellees have presented various arguments which do not answer GTFL's Initial Brief.

³ GTFL notes that Public Counsel did devote one-half page to this topic in its Answer Brief. PC Brief at 22.

II. SUMMARY OF ARGUMENT

GTFL's position in this case is simple and straightforward. Section 364.037 is the sole authority under which the Commission can make a directory advertising adjustment and such statute does not allow the inclusion of white page directory expenses to reduce the amount of incentive monies which the legislature decreed should go to the utility's shareholders. Quite simply, it is GTFL's position that a plain reading of the statute requires the conclusion that white page expenses are beyond the scope of the statute.⁴

The FPSC and Public Counsel have presented various arguments which attempt to shift the focus from the legal arguments presented by Appellant. First, GTFL will demonstrate herein that the substantial reliance of the Commission and Public Counsel on General Telephone Company v. Florida Public Service Commission, 446 So.2d 1063 (Fla. 1984) is misplaced. Therefore, Appellee's arbitrary and capricious review standard is not relevant to the facts of this case. Second, GTFL will refute the contention that 364.037 is a general statute which gives the Commission discretion to dictate specific implementation terms. Third, GTFL takes issue with the assertion that the legislature

⁴ GTFL submits that this Court's dismissal of the directory issue in a 1983 Southern Bell appeal is an example of GTFL's position herein. Naturally, only this Court can state what its internal thought process was in dismissing the issue as moot. However, it appears that the Court looked at the statutory language in question and concluded that only the investments, revenues, expenses and taxes "associated with the publication of the yellow pages" were appropriate. Southern Bell Telephone and Telegraph Co. v. Florida Public Service Commission, 443 So.2d 92, 94 (Fla. 1983). The expenses associated with the white page directory have nothing to do with the yellow page directory.

was aware of past Commission practices at the time this statute was enacted. Finally, GTFL will address the argument that the Commission's rule is necessary to avoid undue cross-subsidization. GTFL submits that this FPSC argument reveals why white page expenses are included in the Commission's rule. The Commission was not content with the legislature's determination on this issue and sought to modify the statute with an unlawful rule.

III. REPLY ARGUMENT

- A. The Commission and Public Counsel have presented the wrong standard of judicial review pertaining to administrative rules under the facts and circumstances of this case.

The Commission and Public Counsel cite the Court to General Telephone Company of Florida v. Florida Public Service Commission, 446 So.2d 1063, 1067 (Fla. 1984), for the proposition that the applicable standard of review to be utilized in this case is whether the rule is reasonably related to the Commission's enabling legislation and is not arbitrary and capricious. FPSC and PC Briefs at 6 and 8, respectively. Appellee's reliance on such authority is not relevant to the issue raised by GTFL.

In the GTFL case, supra, the issue concerned the Commission's adoption of a rule pertaining to parent debt on corporate income tax. The Commission promulgated the rule under its general rulemaking authority contained in Section 350.127(2) which gives the Commission power to adopt rules to implement any law it administers. The attack on appeal was: (1) no substantial evidence; and (2) confiscation of property. There was no issue regarding whether the Commission misinterpreted a specific statute. In affirming the Commission, this Court held where the agency's rulemaking authority is general, the regulations will be sustained if they relate to the legislation and are not arbitrary and capricious. 446 So.2d at 1067.

In the case under review, GTFL is not making an issue out of a "discretionary" decision regarding the Commission's general rulemaking

powers such as was at issue in the GTFL case supra. Here, GTFL is alleging that the Commission has absolutely no authority to include white page expenses in its rule as a matter of law, because such action is contrary to the language of a specific statute. Therefore, the judicial review standard presented by Appellees is not applicable to the facts of this case. Discretion is not at issue.

The appropriate authority in this situation is found in Dept. of Business Reg. v. Salvation Limited, Inc., 452 So.2d 65 (1st DCA 1984), which recently reaffirmed the case law in this state regarding the situation where an agency oversteps its jurisdiction and promulgates a rule which is contrary to statute:

It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute. Seitz v. Duval County School Board, 366 So.2d 119, 121 (Fla. 1st DCA 1979); State Department of Health and Rehabilitative Services v. McTigue, 387 So.2d 454 (Fla. 1st DCA 1980). A rule which purports to do so constitutes an invalid exercise of delegated legislative authority. Nicholas v. Wainwright, 152 So.2d 458 460 (Fla. 1963). (452 So.2d at 66)

In this case, GTFL alleges that the Commission has enlarged, modified and contravened the terms of Section 364.037 by including white page expense. If GTFL is correct, the Commission's rule is null and void as an invalid exercise of delegated authority. Grove Isle, Ltd. v. Dept. of Environmental Regulation, 454 So.2d 571, 574 (1st DCA 1984). The arbitrary and capricious standard has no applicability to this case.

B. Section 364.037 is not a general statute which delegates specific implementation issues to the Commission.

In an effort to buttress its position that the adoption of the rule under review was a proper discretionary decision on behalf of the Commission, the FPSC alleges that the formulation of a precise methodology was left to its administrative expertise by the legislature. The Commission cites the Court to Fogarty Bros. Transfer, Inc. v. Boyd, 109 So.2d 883, 886 (Fla. 1959), for the proposition that the legislature cannot cover every specific situation which will be encountered and, as a result, administrative agencies were created.

The Commission's argument would have great appeal if this were 1982 and the Southern Bell directory appeal was pending before this Court. In 1982, the legislature had not spoken on this topic and the implied powers of the Commission presented an argument that the adjustment was related to the Commission's general powers. The problem with the Commission's argument in this appeal is that the legislature acted in 1983 to put legislation on the books which told the Commission how to specifically perform this adjustment.

Section 364.037 is not a general statute. It goes on at length to express exactly how the Commission will perform the adjustment. The specific mechanics of the adjustment are spelled out and nowhere is the inclusion of white page expenses mentioned.

The legislature left no room for doubt in how the directory adjustment was to be performed and the "proper accounting" to be

utilized as evidenced by the step-by-step detail in the statute. The legislature left the Commission without any discretion regarding directory adjustments and the rule enacted is contrary to the statute.

C. The legislature is not presumed to be aware of FPSC past practices under the facts of this case contrary to the Commission's assertion.

The Commission argues that the legislature was aware of the Commission's long practice of including all revenues and expenses relating to directories, both the white and yellow page sections, in setting telephone rates. Therefore, it is argued that white page expense would have been specifically excluded by the legislature if it was not meant to be included. FPSC Brief at 12-14. This argument has no applicability to the facts of this case.

The Commission relies on State ex rel. Szabo Food Service, Inc. of N.C. v. Dickinson, 286 So.2d 529, 531 (Fla. 1973), for the proposition that when the legislature reenacts a statute, it is presumed to be aware of Commission past practices regarding that statute. FPSC Brief at 12. Specifically, the Commission states as follows:

The legislature is presumed to be aware of the Commission's long-standing practice. This was especially true in light of its reenactment in 1980 of Chapter 364, Florida Statutes, during its sunset review of statutes governing the Commission's practices. (Id)

The problem with the Commission's position is that Section 364.037 was not in existence in 1980 when the sunset review was performed. Section 364.037 was originally enacted in 1983. How is the legislature

supposed to know about a Commission practice when there is no relevant statute involved? Based on the Szabo case, how is the legislature supposed to gain knowledge of the Commission's use of a statute when it has never been reenacted? Furthermore, Szabo does not use the term "past practices" as argued by the Commission. GTFL will let the Supreme Court's opinion speak for itself.

When the legislature reenacts a statute, it is presumed to know and adopt the construction placed thereon by the State tax administrators. Barr v. Delta and Pine Lane Company, 199 So.2d 269, 271 (Miss.1967); National Lead Co. v. United States, 252 U.S. 140, 147, 40 S.Ct. 237, 64 L.Ed. 496 (1920). (286 So.2d at 531) (emphasis added)

GTFL would like to know how the legislature is supposed to be aware of the Commission's "construction" of a statute when it was not in existence in 1980 when Chapter 364 was reenacted and 364.037 has not been reenacted since 1983. The Commission's argument fails to meet the criteria of the Szabo case, supra.

D. The Commission's undue subsidization argument is contrary to the legislative history and plain language of Section 364.037.

At pages 14 through 19 of its brief, the Commission alleges that the rule prevents undue subsidies flowing from monopoly services to a company's competitive directory advertising operations. FPSC Brief at 14. The Commission then correctly states that one of the major reasons 364.037 was enacted was to "benefit stockholders." FPSC Brief at 15. The problem with the Commission's argument is that it is internally inconsistent. On one hand, the Commission recognizes that the legislature took specific action to create a situation where the utility's

stockholders would receive a portion of directory advertising profits if certain conditions were met. On the other hand, the Commission says undue subsidies are a concern and that the shareholder is getting too much money.

Undue subsidies cannot be a concern because the legislature created a specific statute which provides for a sharing of monies between ratepayers and shareholders. If the legislature was not concerned about this item, it is not a proper matter for an administrative rule. Furthermore, if this was a concern as the Commission alleges, the legislature could have easily avoided the matter altogether by including white page expenses in the statute.

GTFL submits that the Commission's argument on this point reveals nothing more than the real reason why the Commission included white page expenses in its rule--to reduce the monies which should flow to shareholders pursuant to statute. The Commission goes to great lengths to show that the 1984 incentive amount to GTFL shareholders is \$7,400,000 with white page expenses included in the calculation. The Commission then performs the same calculation correctly with white page expenses excluded which produces a \$13,700,000 incentive amount to shareholders. FPSC Brief at 18. The conclusion drawn from this comparison is that financial detriment results to ratepayers when white page expenses are excluded.⁵

⁵ The Commission notes that the example given by GTFL at page 7 of its Initial Brief contains an inconsistent methodology. GTFL took this example from the transcript where it stood untouched by cross examination or argument. (Tr.44) However, after review, GTFL has concluded the Commission is correct. GTFL will accept the Commission's example at page 18 of its Answer Brief which shows an even larger detriment to shareholders than GTFL's own example.

The foregoing concern is totally irrelevant to the interpretation of the statute. The legislature spoke when 364.037 was enacted as to how the monies would be divided. The Commission's argument was obviously considered by the legislature and rejected as indicated by the terms of the statute which divides monies between shareholders and ratepayers. Indeed, Commissioner Leisner testified against the adoption of a statute which gave any benefit to shareholders. Yet, the statute was enacted as it exists today.⁶

The Commission's argument on this point demonstrates that if the legislature wanted to limit the money flowing to shareholders, it would have included unrelated white page expenses in the statute to produce such a result. It did not, and the Commission cannot rewrite the statute to produce a different distribution of monies more to its own liking.

**E. The Public Counsel's argument
that the plain language of
364.037 does not forbid
inclusion of white page
expenses is wrong.**

Public Counsel advances two arguments in support of its position that white page expenses can be included in the directory advertising rule. First, Public Counsel alleges the GTFL witness agreed that expenses in furnishing directories includes white page expenses. PC Brief at 12. Public Counsel's interpretation of GTFL's testimony is

⁶ As noted in our Initial Brief, Commissioner Leisner presented a minority position regarding this legislation.

totally at odds with GTFL's position in this case and misconstrues the evidence. GTFL's witness agreed that white pages is an expense in furnishing directories. Such a statement is nothing more than an agreement that the sun rises in the east each day. The white pages are a directory and there is an expense associated therewith. But, Public Counsel ignores that GTFL witness Johnson explicitly stated that the statute only dealt with directory advertising. Simply put, regular white page listings do not constitute directory advertising.

(By witness Johnson) It is my opinion that Section 3 of the statute, the first sentence, "For the purpose of this Section, the amount of gross profit of a company from directory advertising for the year 1982 is the actual gross profit derived from such advertising for that year." It seems to limit what we are speaking of to advertising. (Tr.34)⁷

Therefore, GTFL never agreed as alleged by Public Counsel that white pages should be included in any portion of Section 364.037. The statute deals with directory advertising or yellow pages which does not relate to white page directories. The plain language of 364.037 relates only to directory advertising.

Second, Public Counsel alleges that since white page expense is used to determine 1982 trended gross profit, it should also be used for test year gross profit. PC Brief at 13. This contention loses all of its thrust when Mr. Johnson's testimony supra, is properly analyzed.

⁷ Public Counsel omits this answer from the extensive quote contained from pages 11-12 of its brief. The quote supra frames the remainder of the Public Counsel's quote.

GTFL has never agreed that white page expense is utilized in determining 1982 trended gross profit. Therefore, there is not an apples to orange comparison being made as alleged. Public Counsel has not presented any compelling argument to sustain its position that 364.037 by its terms refers to anything other than directory advertising.

IV. Conclusion

General Telephone Company of Florida has found nothing in the Answer Briefs of Appellees, Florida Public Service Commission and Citizens of the State of Florida to justify the Commission's promulgation of the rule under review. The rule should be declared null and void as an invalid exercise of delegated legislative authority.

Respectfully submitted this the 4th day of September, 1986.

JAMES V. CARIDEO
THOMAS R. PARKER
LORIN H. ALBECK
LESLIE R. STEIN

By: 

Thomas R. Parker, Associate General Counsel
General Telephone Company of Florida
Post Office Box 110 MC 7
Tampa, Florida 33601
Telephone: 813-224-4001

Attorneys for General Telephone
Company of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of General Telephone Company of Florida's Reply Brief in Case No. 68,691 (FPSC Docket No. 840128-TL) has been hand delivered this the 4th day of September, 1986, to:

Charles Beck, Esq.
Public Counsel's Office
624 Fuller Warren Building
202 Blount Street
Tallahassee, FL 32301

Bill Harrold
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

A handwritten signature in black ink, appearing to read "Thomas R. Parker", written over a horizontal line.

Thomas R. Parker
Associate General Counsel