

WC 10-101

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION DOCKET FILE COPY ORIGINAL

In re: Affirming Jurisdiction)
over Pole Attachments)
)
)
)

DOCKET NO. 780326-PU
ORDER NO. 8594
ISSUED: 12-11-78

The following Commissioners participated in the disposition of this matter:

PAULA F. HAWKINS, Chairman
WILLIAM T. MAYO
ROBERT T. MANN

FILED/ACCEPTED
APR 26 2010
Federal Communications Commission
Office of the Secretary

ORDER AFFIRMING JURISDICTION

BY THE COMMISSION:

On February 21, 1978, Public Law 95-234, amending the Communications Act of 1934, was approved by the President and became law. Among other things, that amendment provides for regulation of the "rates, terms and conditions" for cable television attachments to utility poles. Regulation is vested in the Federal Communications Commission unless and until a state certifies to the Federal Communications Commission (FCC) that "such matters are regulated by a State." See Section 224(c). As provided in Section 244(c)(2), jurisdiction is to be asserted by a state as follows:

- (2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that--
 - (A) it regulates such rates, terms, and conditions, the
 - (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.

Thus, Congress appears at first glance to have established a two part test for assertion of state jurisdiction: Regulation in fact of the rates, terms and conditions of attachment; and, consideration in fact of the interests of cable television subscribers as well as those of utility customers. Actually, this two part test may well be merely one part, since it is difficult to comprehend how a rate, term or condition could be fair and reasonable if it were not so to both parties. Further, it is not at all clear how a regulatory body could fail or refuse to consider the interests of substantially affected parties and afford them due process of law. However, these problems need not be addressed, since Chapter 120, the Administrative Procedure Act, as well as the Commission's own rules and the underlying statutes on which they are based, is replete with procedural due process for those affected by the Commission's actions. Such rights include, but are not limited to the rights: To petition to begin a proceeding; to intervene; to present witnesses, testimony, evidence and documentation; to discovery; to cross-examine; to rebut; to brief issues; to have oral argument; to petition for reconsideration; and finally, to appeal decisions of this Commission to the Supreme Court of Florida for review. Of course, under the Administrative Procedure Act (APA) all decisions of this Commission must be based on the record before it in any proceeding and matters judicially noticed. Thus, it should be abundantly clear that the full arsenal of American due process of law is available for presentation and consideration of the interests of cable television operators and their subscribers in any matter before this Commission. As noted above, we also

find it difficult to understand how a rate, term or condition can be fair and reasonable if it is not fair and reasonable to both parties. Within common understanding, the phrase "fair and reasonable" appears to require fairness and reasonableness to all; otherwise, it cannot be fair and reasonable.

Hence, in reality there is before us only the legal issue of whether the Commission has the power to regulate rates, terms and conditions of pole attachments. At the outset, we should point out that this Commission has historically been reluctant to interpret its jurisdiction expansively. The Commission has taken this view because a small waving wand of regulation, once grasped, often turns out to be the tail of a very large snake, whose ensnaring coils may well result in strangulation rather than regulation. Thus, were we faced with the question of whether there shall be regulation of pole attachment contracts or not, we would leave such contracts to the private sector, since regulation should be substituted for the marketplace only as a last resort. However, we are not faced with that choice; rather, we have only the choice of whether regulation shall be by this Commission or by the FCC. It would also be desirable to have some direct and unequivocal expression of the legislative will on this subject. There is none. Accordingly, the Commission has been forced to proceed by interpreting the current statute and case law in light of the relevant facts. The issues were also extensively briefed by the parties, who included several utilities and several cable television operators, as well as the Florida Cable Television Association.

It appears clear that there is no general power in this Commission to regulate "public utilities" as a class; rather, the legislature has enacted a specific statute dealing with each type of utility regulated by the Commission. Therefore, the question of whether cable television is a "public utility" in the generic sense is not relevant. Similarly, since the Commission does not seek to regulate cable television in any manner, it is not relevant to see where cable television operations fit within the definition of some specific type of utility which we do regulate. Rather, the narrow and precise question before us is whether pole attachments and the contracts which govern them are regulatable by this Commission.

If the Commission has regulatory authority at all, it must be found in Chapters 364 and 366, Florida Statutes, which deal with telephone and electric utilities respectively. On that point, all the parties before us appear to agree. The language of those chapters is quite broad and appears to include jurisdiction over pole attachments. The definitions applicable to regulation of telephone utilities include:

364.02(5) The term "telephone line," when used in this part, includes conduits, ducts, poles, wires, cables, crossarms, receivers, transmitters, instruments, machines, appliances, instrumentalities and all devices, including radio and other advancements of the art of telephony, real estate, easements, apparatus, property and routes used and operated to facilitate the business of affording telephonic communication service to the public for hire within this state. [e.s]

and

364.02(3) The term "service," is used in this part in its broadest and most inclusive sense.

Using the above definitions, Section 364.03(1) provides in pertinent part that the Commission is to regulate:

364.03(1) All rates, tolls, contracts and charges, rules and regulations of telephone companies and telegraph companies, for messages, conversations, services rendered and equipment and facilities supplied,....[e.s]

As to electric utilities, Section 366.041(1) provided in pertinent part that in regulating electric utilities:

366.041(1) In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction, the Florida Public Service Commission is authorized to give consideration, among other things, to the efficiency, and sufficiency, and adequacy of the facilities provided and the services rendered, the value of such service to the public,....[e.s]

From the statutory language quoted above, it is clear that the legislature vested very broad and comprehensive powers in the Commission. This presumption is strengthened by the well settled principle that the various statutes applicable to the Commission are to be read in pari materia and by the express language of Section 350.12(2) (m), which specifically prescribes the presumptions accorded to the Commission's jurisdiction and its actions in clear and unmistakable terms:

(m) To prescribe all rules and regulations appropriate for the execution of any of the powers conferred upon them by law either in express terms or by implication.... Every rule, regulation, schedule or order heretofore or hereafter made by the commissioners shall be deemed and held to be within their jurisdiction and their powers, and to be reasonable and just.... All presumptions shall be in favor of every action of the commissioners and all doubts as to their jurisdiction and powers shall be resolved in their favor, it being intended that the laws relative to the Florida public service commissioners shall be deemed remedial laws to be construed liberally.... [e.s.]

Therefore, it appears that, on balance, this Commission does possess the statutory authority to regulate rates, terms and conditions of pole attachments, since they undeniably involve, within the common understanding of the terms, a rate or charge for services rendered.

There remains one minor point which should be disposed of. In Docket No. 8316-TP, the Commission entered Order No. 4051, which is reported at P.U.R. 3d 117 (1966), and which has been

cited by several of the parties. It is essential to recognize that what was before this Commission in 1966 is not what is before this Commission now, nor have conditions remained as they were then. Basically, what this Commission was faced with in 1966 was the question of whether it should assume jurisdiction over the cable television industry as a whole, whether it should require telephone companies to enter into pole attachment contracts, or whether it should require telephone companies to provide communication channels for cable television operators, or both. Those issues are not now before us. Our brethren of 1966 concluded, we believe correctly, that there is no general power in the Commission to regulate "public utilities" however defined, and that there is no power to regulate the cable television industry. We do not depart from that decision, as this order makes clear. The Commission then stated:

We now consider the question: Should the Commission require telephone companies to enter into pole rental agreements with CATV systems, regardless of whether channels are provided by the telephone companies under their tariffs for television transmission for CATV. Here again, we must conclude that we have no jurisdiction over pole rental agreements for whatever purpose they may be intended to serve. The jurisdiction of this Commission over a public utility's poles is concerned only with their use in performing a regulated public service. We would not sit idly by, of course, and permit the rental of such poles for attachment purposes to interfere with the proper and efficient use of such poles by the utility, itself, in performing that service for which it has been certificated and which is regulated in the public interest. [e.s.]

From the quoted passage, it seems clear that in 1966 the Commission was addressing the question of jurisdiction only with respect to the Commission's ability to require a telephone company to enter into pole rental agreements, a power they found they did not have. The emphasized sentence makes this point even clearer. Obviously, if the Commission had no power, it would have to sit "idly by" for it would be without legal ability to do otherwise. That sentence can only mean that the Commission in 1966 felt it did have the power to control pole attachments if they interfere with utility service, in the judgment of the Commission. As a matter of fact, there are clearly relevant and substantial consequences for the reliability and cost of utility service which necessarily flow from pole attachments, or any other joint use of facilities. For example, the size pole required is affected by the attachments to that pole; maintenance costs tend to be higher for jointly used poles due to inadvertent damage to facilities by personnel of the other party working on the pole, which may also cause service interruptions. Pole replacement is complicated by the necessity to coordinate the activities of two users of the pole, which will add to operating expenses. Where cable television facilities are attached to poles already jointly used by telephone and electric utilities, there will be three users of the pole, and these factors will be magnified accordingly.

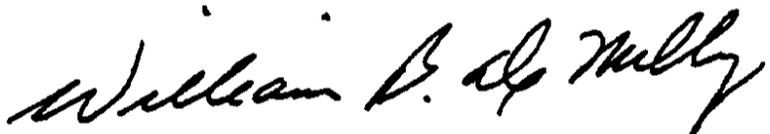
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In summary, it appears that this Commission does have statutory power to regulate the rates, terms and conditions of pole attachment contracts. Under the provisions of the Commission's rules, the underlying statutes, and the APA, the interests of cable television operators and of their subscribers will be considered on an equal footing with those of the regulated utilities and the ratepayers. Accordingly, this Commission can meet the tests set forth in Public Law 95-234, and can so certify to the FCC, based on the applicable law and the record in this case. It is, therefore,

ORDERED by the Florida Public Service Commission that the Commission has jurisdiction over pole attachment contracts between regulated utilities and cable television operators and that the Commission will consider the interests of cable television subscribers as well as the interests of utility ratepayers in dealing with the rates, terms and conditions of such contracts. It is further

ORDERED that the foregoing be certified to the Federal Communications Commission.

By ORDER of Chairman PAULA F. HAWKINS, Commissioner WILLIAM T. MAYO, and Commissioner ROBERT T. MANN, as and constituting the Florida Public Service Commission, this 11th day of December, 1978.



WILLIAM B. DEMILLY
COMMISSION CLERK

(S E A L)

MANN, Commissioner, Dissenting

We lack the power to enact legislation. I must accordingly dissent for the reasons so confusingly stated in the majority opinion.

BGJ