IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

ORIGINAL

CHESTER OSHEYACK, Pro Se
Petitioner/Appellant

v

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
&
FLORIDA PUBLIC SERVICE COMMISSION
Respondant/Appellee

Appeal No. 97-03581

DOAH Case No. 97-1628RX

INITIAL BRIEF

Pursuant to Florida Statutes §120.68, CHESTER OSHEYACK Private Citizen, residing at 418 Kingstowne Avenue, Brandon, Fla. 33511, Apt #2, the Appellant in the above captioned case, who is a substantially affected party, herewith requests a review of all documents in the above captioned case including but not limited to the submissions of the Appellant and the Respondant [Florida Public Service Commission (FPSC)], the Orders of the Division of Administrative Hearings (DOAH), correspondance between the parties, Motions and Exhibits as enumerated in the DOAH Index previously provided to the Court.

Subject Issue: Rule 25.113 FAC (1)(f) DISCONNECT AUTHORITY, defined as the right granted by regulatory tariff to local exchange telephone companies to block and/or terminate local and emergency telephone service; and, access to competing long distance telephone networks, as a tactic for use in the collection of toll call bills in dispute or default.

ACK ____
AFA ____
APP I
CAF ____
CMU ____
CTR ____
EAG ____
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The nature of this appeal is the challenge of an existing rule.

The substance of the Appeal is based in the Appellant's belief that (1) the DOAH was substantially misled by the witnesses and Counsel for the FPSC by testimony which consisted largely of speculation, unsubstantiated opinion, misstatements and distortions of fact, ommissions of the record which altered the context and perverted the meaning of the record. (2) the DOAH on its part did little to check the accuracy of the testimony against the record, and in fact merely put its name to a self-serving and almost verbatim copy of the Respondant's (FPSC) Proposed Final Order.

The Appellant respectfully requests that the Court consider the following exceptions in addition to the above described record:

EXCEPTIONS

1. Subscriber Indebtedness

Throughout the testimony of witness Sally Simmons in response to direct examination Tr pgs 117 through 159) which was affirmed in the FPSC's Proposed Final Order and the DOAH FINAL ORDER, there is a continuing focus on "telephone subscriber indebtedness" and an implied condemnation of debtors aka people who for whatever reasons, have not paid or cannot pay their telephone bills in full or in part. There appears to be an underlying theme that all will be well if only people would pay their bills. This is actually a tactic consistant with that used by the representatives and lobbyists of the telecommunications industry during prior hearings on the subject of the disconnect authority rule which is under challenge. It is, in fact a ploy designed to divert attention from the real issues. The true fact is that neither the Appellant nor the supporters of repeal of the disconnect authority rule have ever publicly or privately espoused non-payment of valid debts or bills by persons who are financially able to pay them. Payment of bills or debts, or the responsibility therefor, is not, nor was it ever an issue in this or prior actions. What is at issue, is (1) Who has the lawful right to collect which debts? (2) What are the acceptable trade practices that may be utilized in effecting the collection of bills in dispute or default? and, (3) What is the role of government in such activities?

It may be helpful in the consideration of questions relative to telcom industry debt collection practices to position the current conventions in a historical context. In ancient nations, debt was associated with slavery because the insolvant debtor and his household were, in many cases, turned over to the creditor to perform compulsory services. In early Rome, the insolvent was given to the custody of the creditor for 60-days prior to his or her sale as a slave, during which time he was subject to such treatment as pleased the creditor. That arrangement was mitigated in the year 494 BC as a result of the first of many uprisings among the Roman people. Subsequent public turbulence in Rome was to a very large extent occasioned by a desire to restrain creditors In Greece, the reforms of Solon, the reknown Athenian statesman who introduced a humane code of law to that civilization, had a similar origin in public rejection of grossly excessive punishment for

indebtedness. In ancient Isreal (aka Palestine), every 50th year...the year of Jubilee....Hebrew debtors were freed and their obligations were canceled. Imprisonment for debt, which once was the cause of overcrowded prisons, was ended in theory, in both England and the United States by laws enacted in the 19th Century Today, virtually every country in the world...at least every civilized country in the world.....has some form of laws which enable relief from debt and limitation on prosecution therefor. In the United States Constitution, the founders in the Bill of Rights, and their successors in following amendments, made provisions for the protection of the public from excessive abuse by creditors in debt collection as follows:

Amendment No. VII: "In suits at common law, where the value in controversy shall exceed twenty (20) dollars, the right of trial by jury shall be preserved."
Amendment No. XIV: "........nor shall any state deprive any person of life, liberty or property, without due process of law....."

In enacting subsequent legislation, the US Congress institutionalized the denial of the right of any debt collector to take non-judicial punitive action.....specifically rejecting the disablement of property (sic disconnection of the telephone) as a right or remedy in debt collection. Now, conflicting interests and conflicting rights may be arguable within the context of applicable law, but there can be no reasonable argument to support the setting aside of constitutional guarantees in the pursuit of profit.... particularly when there are viable alternatives available. Yet, the FPSC promulgates a policy which it says, ".....puts the costs on the cost causer," (FO pg 12, Tr 158), but it offers no evidence, much less substantial evidence, that, given the available alternatives, there would be any additional costs of a substantial or deleterious extent. The issues of law will be addressed in a subsequent section of this brief, but let it be stated here that in addition to contravention of Common and Constitutional law, there are clear violations of federal and state statutes that will be described. Non-judicial punishment for breach of rules contrived unilaterally by a group of entities (sic telecommunications corporations) should not be supported by rules or policies advocated by the government. The right of

local exchange companies (third parties) to disconnect basic local telephone service for non-payment of toll (long distance) bills incurred for services rendered by a party other than themselves, is totally inappropriate. The imposition of the disconnect authority rule creates a de facto prison of an apparently permanent nature by denying the victim of this abusive trade practice the opportunity to interact with his community and his family under conditions which disregard morality and law. While the intent of the act may well be the curtailment of fraud, there is no effort to identify or prosecute such fraud and accordingly, there are no statistics available to support the actual extent of criminal behavior. Consequently, the people who are damaged are the working poor, the infirm, the working mothers with infants or school age children, and the elderly on fixed incomes. These are the helpless, the powerless, the voiceless....the most vulnerable people in our society. The State grants early release from prison to thieves, rapists and murderers, but denies reasonable statuatory debt relief to the public which it is mandated to protect, and permits debtors to be punished for life...,.to accomodate the perceived fears of the telephone companies.

2. Constitutional Issues as related to juristiction

The FPSC and the DOAH correctly opined that the DOAH does not have juristiction over questions of constitutional law.

For the purpose of this appeal, the Appellant cites the following: Key Haven Associated Enterprises, Inc. v Board of Trustees of the Internal Improvement Trust Fund et al, 427 So 2d 153, 18 ERC 2014 Supreme Ct of Fla., Dec 18, 1982 states in substance that [ref para (10) "sitting in their review capacity, district courts provide proper forum to resolve constitutional challenges to agency application of a facially constitutional (or unconstitutional) rule because those courts have the power to declare agency action improper and to require any modification in administrative decision-making process necessary to render final agency order constitutional."] Also note: [ref Rice v Department of Health & Rehabilitative Services, 386 So 2d 844, (Fla 1st DCA 1980) "..:...If the agency fails to correct a rule, then the district court may review both the constitutionality of the rule and the agency action comprehensively, on all appropriate issues, in a single judicial forum."]

The one qualification stated in the Key Haven decision is the requirement that "administrative remedies must be exhausted to assure that responsible agency has had full opportunity to reach sensitive, mature and considered decision upon complete record appropriate to issue."

This criteria has been met.

3. Issues of Federal Law and other questions related to juristiction
The above referenced citation of the decision in Rice v Dept of Health & Rehab Svcs "....."on all appropriate issues, in a single judicial forum." clearly places juristiction with the district court to enable review of questions of federal law and/or the guiding principles of conduct embodied therein; relevant issues that have been foreclosed due to time, process or juristiction other than federal law; and other matters including but not limited to motions and exhibits.

4. Issue(s) of State Law related to juristiction
The DOAH, in dismissing the Appellant's originally filed Petition for Recission of the Disconnect Authority Rule, agreed with the FPSC in concluding that [Order Dismissing Petition With Leave to Amend - pg (1)(A)] "The grounds asserted.....for invalidating FAC Rule 25-4.113 (1)(f) which come under §120.52 (8)(b) FS are shielded under §120.536 (3) FS until November 1, 1997."

This date has come and gone and the "shield" is no longer in force.

As a general statement of fact, the Appellant's Petition for Recission with Brief and his subsequently filed Amended Petition address issues of significance concerning facts and law relating to the constitution, federal and state statutes, and FPSC Orders which will be reviewed and considered by the Court in their deliberations. There are the following exceptions, modifications and additions submitted below for consideration:

5. Breach of Contract
The FPSC, in its direct examination of witness, Sally Simmons, posed the question of whether or not the telephone service subscriber "owns" the

access to the telecommunications wire line for which they pay a flat fixed fee to establish. (Tr 150, 151) The witness responded with the opinion that ".....what you are doing is purchasing a service.....the right to access the line." The Appellant accepts this line of response which he finds to be consistant with his own interpretation of the facts as expressed in his own brief. Now extrapolating on the line of reasoning put forth to its logical conclusion, if you purchase access to the line, and for some unrelated reason, you are denied access, then you have paid for something that you are not getting. Whether it is a product or service that you have purchased is immaterial, because in a purely commercial sense, a service is as much a commodity as a product. Therefore, denial of a paid for access to a service is, in fact, a breach of contract which should be actionable in a court of proper juristiction. Now, if the state were to promulgate a rule which by implementation thereof, supports this denial of paid for access, the rule would have the effect of providing the contractor with a legal defense against litigation. Thus you would be denied, by the rule, which might be facially constitutional, of the constitutional guarantee of due process. Ergo, what you have is a facially constitutional rule which by implementation promotes an unconstitutional action.

6. Unfair Methods of Competition/Unfair or Deceptive Practices in the Conduct of Trade or Commerce

The Florida Statute addressing the above noted description (ref FS 501.204 (2) Appellant's Brief filed in original petition, DOAH Index pg fr pg 001, Brief pg 17) is not relevant and was withdrawn by the Petitioner. The fact is that this is a statute that proves the proverbial rule, because it contains a very specific exception for telephone companies. This provides competent evidence that the legislature, where there is "intent", does provide exceptions to sustain their intent....and if there are no exceptions, it can be assumed that there is no intent to provide them. This is significant because the Florida Statutes that address issues such as restraint of trade, consumer protection including but not limited to debt collection practices and debt limitations, state very specifically that they apply to individuals and/or corporations "engaged in trade and commerce within the State of Florida..." without exceptions.

7. Statute of Limitations on debt

This Florida Statute [ref 95.11 (2), contained in the Appellant's amended petition DOAH Index fr pg 101, see pg (5)], should be changed to reference FS Ch 95.11 (3) - "four years", (p) "Any action not specifically provided for in these statutes".

8. Billing and Collection - Federal Telecommunications Act of 1996

Ref Title III, §301 (a)(2) emphasizes the "substantial similarity to credit billing", and requires that rules adopted or amended be substantially similar with respect to resolution of credit disputes", and those which are set forth in the federal "Truth in Lending and Fair Credit Billing Acts" (ref 15 USC 1601 et seq., (3) determines that rules issued be treated as being "issued under §18 (a)(1)(B) of the Federal Trade Commission Act [ref 15 USC 57 (a)(1)(B)].

Ref Title III, §302 (a) protects the rights of states to make applicable laws and rules, except to the extent that such laws and rules "are inconsistant" with the above referenced provisions. Where the Commission (FCC) determines that such state actions provide the consumer with greater protection than the federal laws or rules, the law which provides the greater protection to the consumer will prevail.

Ref Title III, § 303 provides the FCC with the authority to enforce the Title thereby establishing the supremacy of federal law, while § 302 preserves states rights within that framework.

Ref Title VI, § 601 (c) states that "This Act and the amendments made by this Act shall not be construed to modify, impair or supercede the applicability of the anti-trust laws." (exceptions are sub-§ (a) of §221 47 USC is repealed; and, § 7 of 15 USC 18 is amended in last para by striking FCC.)
note: none of the exceptions affect the Appellant's interpretations.

Thus it can be safely stated that the federal Telecommunications Act supports the propriety of the application of the Fair Debt Collection Practices Act in the determination of what are acceptable principles of conduct in the collection process for the telecommunications industry in 1996 et seq.

(9) Public Service Commission Orders have significant weight

There are three (3) FPSC Orders which are material to these appellate proceedings. I will identify them below and then address the specific questions that they raise as exceptions to the positions shared by the PSC and the DOAH.

(A) PSC Order No. 93-0069-FOF-TL in Docket 920836-TL issued Jan 14, 1993
This order deals with a tariff proposed by Bell South (aka Southern Bell) denies telephone service to a Florida subscriber who owes the corporation money in any one of eight states which are served by the corporation. The following is the substance of the PSC Order which denies the tariff:

> ".....we find it appropriate to deny the tariff as proposed for reasons discussed below. It is inappropriate to allow the Company to refuse service for circumstances beyond the control or review of this Commission. 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 a debt in another state. A customer complaint dealing with refusal of service for a debt incurred in another state would require the Commission to adjudicate the factual and legal basis of a debt beyond the Commission's juristiction. In addition, Rule 25-4.113 (4)(e) FAC, provides that non-payment for a non-regulated service is not sufficient grounds to refuse service. By its terms, this provision precludes a tariff of the nature proposed by the Company since any debt from another state is by definition a non-payment 'for a service rendered by a utility which is not regulated by the Commission' ". [ref FS 364.27, DOAH Index Attachment 1 (B)(Q)(T)].

The FPSC and DOAH have agreed upon a narrow interpretation of this Order, however I argue that the application of Rule 25-4.113 (4)(e) FAC is specifically identified as being " in addition" to the fact of there being another state involved, and further defines the law as being applicable to any service "not regulated by the Commission", notwithstanding where the location might be. It is also important to focus on what are the definitions of the different kinds of "service referenced. A "non-regulated" service is one which may be

provided by a regulated company, but which is not subject to regulation (ref Tr pgs 124, 125 ".....customer premises type services such as inside wire maintenance, ...information services such as voice mail".) A service "not regulated" is one which is not within the scope of Commission juristiction as established by law (ref Tr pg 125 ".....the Commission does not have juristiction over interstate transmissions and rates."

The Commission has argued that although it has no juristiction over interstate and foreign transmissions or rates, it does in fact have juristiction over inter-state and foreign billing and collection by virtue of its authority to regulate service contracts. ref FS 364.19 as follows:

> "The Commission may regulate by reasonable rules, the terms of telecommunications contracts between telecommunications companies and their patrons."

The focus on what are "reasonable rules" must draw the attention of the Court. This limitation is subject to broad interpretation and can lead to many inconsistancies which could have a deleterious effect on the credability of government. What is convenient, may not always be "reasonable". What appears to be reasonable might not always be "lawful".

Taking these facts into consideration, the rules of statuatory construction require that specific statuatory provisions be given greater weight than general provisions (sic FS 364.19) when the provision in question cannot be harmonized. [ref Sutherland Statuatory Construction, 5th edition, vol 2 (A), §46.05; 49 Fla Jur 2d §182; Boque v Fennelly, 1997 WL 276289 (Fla 4th DCA 1997); and Suntrust Banks of Fla v Wood, 693 So 2d 99 (Fla 5th DCA 1997)]. Further, in Adams v Culver [ref 111 So 2d 665 at 667 (Fla 1959) citing Stewart v Deland-Lake Helen, 71 So 42, 47 Fla (1916) quoting State ex rel Loftin v McMillan, 45 So 882 (Fla 1908)], the Court stated as follows:

> " It is a well settled rule of statuatory construction, however, that a special statute covering a particular subject matter is controlling over a general statuatory provision covering the same an other subjects in general terms. In this situation 'the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of repugnancy, if any.' "

Now, therefore, the following specific provisions of law (et seq, et al) must be considered by the Court:

Florida Statute 364.01 (4) states that "The Commission shall exercise its exclusive juristiction in order to:

> (a) Protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices.
>
> (b) Protect the public health, safety, and welfare by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective, price, rate and service regulation.

Florida Statute 364.27 defines the powers and duties of the state PSC as being limwith respect to interstate (and foreign) telecommunications, to transmission of messages and conversations, where any act relating to (such activities) takes place within the State of Florida." The Commission is also mandated by this statute, to investigate and present to the FCC "all facts coming to its knowledge as to..... .....violations of the Act of Congress (the Telecommunications Act of 1934 as amended in 1996 and other applicable federal Acts of Congress) .....rules of practice which are in the opinion of the Commission .....excessive or discriminatory.....(or) violations of the rulings, orders or regulations of that commission (FCC) or as to violations of the Act to regulate commerce or acts amendatory thereof or supplimentary thereto (Federal Trade Commission Act-FTCA). Thus any action that would appear to contravene such federal laws as apply to consumer protection and restraint of trade as well as other anti-trust acts should be at the very least investigated and should they not be actionable under state law, they should be referred on to a proper juristiction.

The FPSC has opined that the disconnect authority rule has validity since there are no state of federal statutes prohibiting such action. In fact there are no state or federal statutes that directly support this kind of activity, however there are many which directly address matters of juristiction and trade practices which if considered in the context of "statuatory construction" (ref pg 9 this brief) do prohibit the implementation of this rule.

In the Federal Communications Commission (FCC) Order No. 86-31(Detariffing of Billing and Collection), pg 2, II (2)(10), the FCC states as follows: "This Commission had no occasion to consider the regulatory status of billing and collection for interstate services by local exchange carriers prior to the Modification of Final Judgement (MFJ)" (aka Consent Decree) [ref US v AT&T, 552 F Supp 131 (DDC 1982, aff'd sub nom Maryland b US, 460 US 1001, 1983)]. The MFJ required divestiture of the Bell System local exchange operations but did not preclude them from continuing to provide billing and collection services for AT&T, or to discontinue service to customers for non-payment of interexchange carrier bills provided it offered to provide billing and collection services to all interexchange competitors. Thus the underlying support for the disconnect rule is the MFJ which is a court order derived in 1983 as a part of a negotiated settlement. It is important to note in this regard, that Title VI of the (federal) Telecommunications Act of 1996, (DOAH Index Attachment 1, FPSC Exhibit (D), §601 (a)(b)(c) states that ".... any conduct or activity that was, before the date of enactment (1996) of this Act subject to any restrictions or obligations imposed by the AT&T Consent Decree (MFJ) on and after such date, shall not be subject to the restrictions and obligations imposed by such Consent Decree (MFJ). " Accordingly, the MFJ and all of the rules and regulations which were based in its conclusions are currently subject to challenge on the basis of surviving state and federal law as applicable.

The juristiction of the FPSC with respect to billing and collection is an essential question for this Court to consider. It is the contention of the FPSC that they do have juristiction over billing and collection of all toll charges including interstate and foreign charges.

FCC Order NO. 86-31, Title II (Juristiction)

pg 22, para 32 "Billing and collection service does not employ wire or radio facilities and does not allow customers of the service (IXCs) to communicate or transmit intelligence of their own design and choosing. 47 as stated supra in note 2, the functions encompassed by third party billing and collection service are essentially the recording and aggregation of billing data corresponding to a completed telephone call, and application of the IXC's rates to these calls in order to create a customer invoice, the mailing of bills, the collection of customer deposits and bill payments, the handling of customer inquiries concerning their bill (if required by terms of the contract between the IXC and the LEC), and the investigation of customer fraud or billing evasion activities. In short, billing and collection is a financial and

administrative service".
pg 22, para 34 ".....we reach the conclusion that billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the (Federal Communications) Act.
pg 23, para 37 "the exercise of.....juristiction requires a record finding that such regulation would 'be directed at protecting or promoting a statuatory purpose' ".

Title II (Local Cut-Offs)
pg 31,32, para 69 ".....any revenues from such charges (interstate billing and collection service by LECs for IXCs) must be deemed to be interstate revenues for purposes of the Part 67 juristictional separation rules."

pg 16, para 23 In reporting carrier comments, the FCC in its Order stated; "Several LECs maintain that Parts 67 and 69 (juristictional separation rules) are adequate to assure that detariffed billing and collection costs are not charged to regulated accounts." The aggregate of comments made by the parties provides competant evidence that all were well aware of the provisions of the juristictional separation rules (Part 67,69) which require that interstate and foreign billing and collection revenues and costs be allocated to non-regulated accounts by the LECs which provide that service for IXCs.

pg 31, para 51 "We shall continue to defer to state regulatory authorities with respect to the practice of local cut-offs (disconnections to leverage the collection of interstate charged bills) .....we do not intend by this action to give tacit approval to this activity".

With respect to the position of the FCC in connection with federal statutes, § 2(a) of the Telecommunications Act [47 USC § 152 (a)] gives the FCC juristiction over "all persons engaged within the United States in such (interstate and foreign) communications", and, § A (a) [47 USC § 153 (a)] defines "communication by wire" which is subject to FCC juristiction, to include "services" (sic billing and collection) .....incidental to such (interstate and foreign) transmission." § 4 (i) [47 USC § 154 (i)] empowers the commission (FCC) "to perform any and all acts,make such rules and regulations, and issue such orders not inconsistant with this Act (the Telecommunications Act of 1936 as amended in 1996) as may be necessary in the execution of its functions." This gives the FCC the authority to regulate carrier provision of billing and collection for interstate and foreign telecommunications if it deems appropriate, but the FCC chose to forbear such regulation.

Now, therefore, the cconclusions that may be drawn from the above referenced citations, that; (1) the FCC has sole juristiction over all facets of interstate and foreign telecommunications executed by wire and radio; (2) the FCC has determined that federal law precludes the regulation of billing and collection services provided by LECs for IXCs; (3) an exception was made to accomodate the AT&T Consent Decree (aka MFJ), however this court order was repealed by Congress in the Telecommunications Act of 1996; (4) the FCC "defered" the option of local cut-offs to the LECs as an accomodation to the above referenced court order; and, (5) the FCC withheld tacit approval of local cut-offs since it had no way of knowing whether or not the implementation thereof by the LECs would be reasonable or lawful.

Further the Act of "forbearance" by the FCC with regard to regulation of carrier provision of billing and collection services is also relevant.

Title IV of the Telecommunications Act of 1996 amends Title I of the Act of 1934 by inserting a new Section (§ 10) which overrides § 332 (c)(1)(A) of the original Act. In § 10 (e) entitled State Enforcement After Commission (FCC) Forbearance, it states as follows: " A State commission may not apply or enforce any provision of this Act that the Commission (FCC) has determined to forbear from applying under sub-§ (a)". Under § 402 of Title IV as above captioned; ref (b)(3) entitled Forbearance Authority Not Limited it states, "Nothing in this sub-§ shall be construed to limit the authority of the Commission (FCC) to waive, modify, or forbear from applying any of the requirements to which reference is made in para (1) under any provision of this Act."

Since the FCC detariffed the interstate billing and collection service of the local telephone companies in 1986 (FCC Order No 86-31 Jan 14, 1986), which is an act of forbearance of regulation, the force of current law (1996) as referenced above, should apply.

The FPSC has argued that the circumstances surrounding the creation of a debt and State in which payment is due and payable are determining factors in the matter of juristiction.

The interstate call originates in Florida but leaves Florida's borders on wire lines which are neither owned or leased by the LEC. Moreover, interstate and foreign calls are measured rate calls, meaning they are subject to time and distance. Accordingly, a debt cannot be incurred until and unless the call is completed at its destination and terminated. Further, it is the interexchange company that pays the termination charge on the call (which it recovers from the user) while the user pays the origination charge. It has been stipulated by the parties in FCC Report and Order No.86-31 (1986) that billing and collection is a financial and administrative service, not a communications service . As such, the process for charging the aggregate of time and distance to the customer through the LEC originates with the IXC. The LEC is no more than a recorder and a debt collector which sells its service to IXCs.

The fact that the bill is due and payable in Florida is irrelevant. AT&T bills and collects for customers located in Georgia and Alabama, and the bills are due and payable to AT&T in Orlando, Florida. This does not place the customers residing in Georgia or Alabama under the control of the FPSC.

The FPSC argues that the circumstances surrounding the creation of a debt for interstate and/or foreign telephone service are subject to review by the state commission.

Since the FCC has full juristiction over interstate and foreign telecommunication, the responsibility for review and the authority to remedy is with the federal agency. If a customer complaint involves both intrastate and interstate long distance bills, and if the contract between the IXC and the LEC calls for the handling of inquiries by the LEC for the IXC (which is a administrative charge in addition to billing and collection), the LEC may attempt to mediate disputes, but only with the voluntary participation of the parties. But , should the customer agree to pay all intrastate and local charges and withhold his payment to support direct negotiations with the interexchange company vis a vis interstate and international charges , the FPSC has no power to impose a remedy on either party. However, even under these circumstances, the LEC can,under the rules, (and does) disconnect local service and access to all other available interexchange carriers...and there is no further recourse available to the subscriber either through the FPSC or the FCC,that can rescind this action.

Thus the state commission (FPSC) approves and authorizes non-judicial punitive action against subscribers who are disputing a bill, but cannot compel remedial action in settlement thereof. (ref DOAH Index, Attachment I, Petitioner's Exhibit 1)

Now, therefore, the matter of the propriety and legality of the disconnect authority rule, which by definition denies basic local telephone service including but not limited to access to all locally available interstate and international telephone carriers, was decided in 1993 (PSC Order No. 93-0069-POF-TL) by the FPSC. Moreover, their 1993 decision, which is consistant with the views of the Appellant, are well supported by evidence of actions of the FCC and state and federal laws that both precede and follow that decision.

(B) PSC Order No. 96-0865-FOF-TL in Docket No. 96-0556-TL (July 2, 1996)

This proposed petition for a variance from commission Rule 25.4-113 FAC indicates that the petitioner (GTEFL) has been experiencing an adverse trend in its uncollectible accounts and desires to impose a credit limit on subscribers. The proposal involved establishment of credit limits by GTEFL on residential and small business customer toll call usage and permitted the blocking of both intrastate and interstate access when a customer exceeded the credit limit. If a bill is not paid, the proposal called for disconnection of all service including local service and issuance of an "out-of-service" order. In the conclusion of its order, the FPSC expressed the following views:

(1) "It is inappropriate to block toll service for non-payment of local service"

(2) "....a blocked customer would be denied access to all IXCs. This violates § 364.051 (2)(c) and 364.02 (2) FS which require that price regulated LECs provide, with basic local service, access to all locally available IXCs. Although IXCs which have a billing and collection agreement with GTEFL may support the (PBTB) plan, We do not believe that GTEFL should block access to those IXCs with which it has no contractual arrangement for billing and collection."

(3) "The decision to provide or deny toll access to any customer should rest with the IXC, not GTEFL."

(4) "Another problem with the (PBTB) procedure is that it proposes to block outgoing collect calls, third party billed calls, and credit card billed calls. There is no reason or purpose for GTEFL to block access to calls carried by a different provider, when GTEFL will have no financial risk associated with the calls."

(5) "In addition, the ability to provide toll blocking presents a competitive advantage in billing and collection services for GTEFL. Since other billing and collection agencies do not have the ability to block toll, GTEFL can use this advantage to market its billing and collection services."

The GTEFL petition was denied by the FPSC Order ".....because it violates Ch 364.051 (2)(c) FS."....and Ch 364.02 (2) FS.

The problem here is that the Commission is attempting to create a difference between "blocking" and "disconnection" in order to defend their position. The fact is that both acts serve to block interstate and intrastate telephone service, albeit "toll blocking" as referenced in the above described Order may be limited and temporary, while "disconnection" is unlimited and permanent.

Here again the Commission witness attempts to apply a narrow interpretation of the Commission Order. The witness would have the court believe that the laws were made to accomodate "involuntary blocking", rather than "denial of access to all available IXCs", and in this case, even those "with which it has no contractual arrangement."

This is another case where this PSC Order No. 96-0556-TL is consistant with the Prior PSC Order No. 93-0069-FOF-TL in substance and law, and both are consistant with the views of the Appellant.

(C) PSC Order No. 95-1302-NOR-TP and PSC Order No. 96-1371-FOF-TP (Oct 23,1995, and Nov 19, 1996)

The Docket addressed in the above referenced orders (PSC No 95-1123) embodies the PSC staff recommendation, made after more than a year of intensive study ordered by the Commissioners, that Rule 25-4.113 FAC be amended to eliminate the authority of the LECs to disconnect the local telephone service of subscribers as a means of leveraging the collection of unpaid toll (long distance) bills. The recommendations of the commission staff were as follows:

Rule 25-4.113 (f) should be changed to read "For non-payment of regulated charges billed for local exchange company provided telephone service, including telecommunications access system sur-charge 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.

"Partial payments of a customer bill shall be applied first toward satisfying any upaid balances related to regulated local exchange company provided service. ....."

(1)(i)"Without notice in the event of conditions likely to cause imminent danger to persons or equipment or tampering with the equipment furnished and owned by the company."

(4)(h)"Nonpayment of charges billed and collected by a local exchange company for interexchange company provided service." "..... ....shall not constitute sufficient cause for refusal or discontinuance of service to an applicant or customer."

This recommendation was presented at an agenda conference comprised of the full Commission and their decision was to put it over for a staff hearing. The hearing officer appointed was the Director of Appeals, Mr. David E. Smith. After a six (6) hour hearing in which more than sixteen (16) telephone companies were participants, the Hearing Officer brought forth a recommendation consistant with that of the staff of the PSC. The recommendation was again presented at an Agenda Conference attended by the full Commission, and the Commissioners voted to deny the recommendations of the staff and hearing officer without comment and subsequently withdrew the Docket...also without comment. (DOAH Index I Attachments, REspondent's Exhibit W)

In the Final Order, pg 15, para 25, the DOAH states as follows:

> "As demonstrated by the respondent at the hearing, Rule 25.113 (1)(f) is supported by competant substantial evidence. (Tr 122, 123, 138,and 158)"

If one were to read the record as referenced above in Docket No 95-1123, it would seem to support the thesis that the Commission was exposed to competant sustantial evidence presented by its staff and its duly appointed hearing officer which it chose to ignore. Further, it offered no reason for denial or withdrawal of the Docket on the record presented to the file.

Now therefore, it can be said that the Commission decision was not supported by competant substantial evidence.

Moreover, it is apparent that there are inconsistancies in the interpretation of law and the application of rules in the framework of the PSC Orders (paras A,B and C as referenced above). While it is possible for reasonable people to draw differing conclusions from the same body of evidence, rules and statutes are meaningless unless they are applied with consistancy. There is an implied covenant of fairness imposed on any judicial body. The FPSC is supposed to be at least a quasi-judicial body...but that covenant was violated by the FPSC when they withdrew the staff recommended amendments to the disconnect authority rule without comment.

(10) Universal Service

The (federal) Telecommunications Act of 1996, § 254 (c) offers a definition of Universal Service as follows:

" (1) In general - Universal Service is an evolving level of telecommunications services that the Commission (FCC) shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." [see (A) (B) (C) (D) below]

The Joint Board (staffed by representatives of both federal and state regulators) was established by the above captioned legislation under § 410 (c) in order to implement § 214 and § 254 including but not limited to the definition of services related to the Universal Service issue. This "Board" is mandated to make recommendations to the FCC for their consideration and rule-making under their authority.

The Joint Board defined Universal Service as services which;
(A) are essential to education, public health, or public safety;
(B) have, through the operation of market choices by customers, been subscribed to by a majority of residential customers;
(C) are being deployed in public telecommunications networks by telecommunications carriers; and,
(D) are consistant with the public interest, convenience and necessity

There are two (2) additional principles set forth in this section of the telecommunications reform legislation (sic §254) which are relevant to the subject issue.

(1) Sub-§ (f) states that;

(a) " A State may adopt regulations not inconsistant with the Commission's (FCC) rules to preserve and advance universal service."

(b) " A State may adopt regulations to provide for additional standards to preserve and advance universal service within the State only to the extent that such regulations adopt specific, predictable and sufficient mechanisms to support such definitions that do not rely on or burden federal universal service support mechanisms."

It is apparent that this sub-section of the statute mandates a minimum level of regulation, but does not prohibit the states from going beyond the prescribed minimum standard in the interest of better serving their constituency.

(2) Sub-§ (i) states that;

" The Commission and the States should ensure that universal service is available at rates that are just, reasonable and affordable."

It is significant to note, with respect to sub-§ (i), the use of the word "ensure", which, according to Webster's International Dictionary (unabridged) means "to make certain" or "to guarantee". This is an important definition because it appears that the FPSC has adopted a more liberal interpretation of this word "ensure".....one which calls for a more passive regulatory role. Florida Statute Ch 364.01 (4)(a) is consistant with the federal telecommunications law with respect to the application of the word "ensure" in connection with a mandate that "all consumers should have access to telephone service at rates that are just, reasonable and affordable." The importance of this definition lies in the Appellant's belief that the FPSC is misinterpreting the word "ensure" by placing the emphasis on "availability" instead of "just, reasonable and affordable".

This brings us to a consideration of what is "just, reasonable and affordable"? Perhaps a modicum of pragmatism and compassion would help to find the answer to that rather simple question. What is "just" is what is lawful and fair! What is "reasonable" is what best serves the public interest without putting an undue burden on the service provider! What is affordable is a relative matter.....perhaps a challenge, but not unsurmountable. One can begin with the recommendation of the Joint Board made to the FCC on November 7, 1996 in which they suggest that telephone service be subsidized for LIFELINE and LINKUP residential customers due to their low income. Previously, both state and federal commissions mandated that disabled persons be provided with subsidized telephone service to accomodate their need for health maintenance and safety. PSC Order No. 97-1262-FOF-TP, issued October 14, 1997 in Docket No. 97-0744-TP mandates that price-capped LECs within the State of Florida will be prohibited from disconnecting local telephone service to collect toll bills. They may disconnect long distance service for failure to pay toll charges, but must continue to provide basic local service. Now, LIFELINE and LINKUP

subscribers are recipients of government subsidies in the form of welfare or such, and a guarantee of the integrity of their telephone service in consideration of their low income is extremely important to them. But there are those of equal and perhaps in some cases greater need of such protection albeit who have no government subsidy to lean on. Recent announcements out of Washington and Tallahassee have made it abundantly clear that government policy at all levels demands that persons receiving welfare will be required and even helped to find employment. State government sources in Tallahassee have announced recently that Florida has been successful in reducing its welfare rolls by half....the other half having been moved into productive jobs. However, the fact that they have jobs and some income does not by any stretch of imagination make them rich! In many cases they are receiving less than what they received when on welfare, but now they may not have a phone, even though they might be able to pay for it. In fact, because they now have jobs, a conveniently located telephone becomes even more of a necessity.

Thus, the working poor, the infirm, the elderly on fixed income, single working mothers with children, especially have a pressing need for a conveniently located telephone which provides the occasion for interaction with their community, their family, their health maintenance providers, police and fire protection, other emergency services and important information services.....and while they are probably able to pay for the service, they need for their government to "ensure" that they have "just, reasonable and affordable rates", and to protect the integrity of the service to the extent permitted by relevant law,

Here again the word "reasonable" becomes a critical standard. (sic FS 364.19 "The Commission may regulate, by reasonable rules....."; FS 364.03 "Every telecommunications company shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto, suitable and proper telecommunications....."

Now, consider this! By what "reasonable" logic can any "reasonable" man differentiate between a family on welfare (LIFELINE) receiving government assistance in an amount of $10,000 per annum, and a family which head of household is working at or near minimum wage for a total income of less than that amount? Further, by what "reasonable" logic can a "reasonable" man differentiate between the same family on welfare and an elderly retiree whose health care needs are ever increasing disproportionately to his fixed income, but whose sole income is from Social Security and amounts to the same $10,000 per annum? or more, but less than provide them with comfort?

No rule which violates applicable law and principles of conduct established in legislative intent, can be considered "reasonable", but in the absence of what is fair, the continuation of disconnect authority by rule of unelected agency officials is an abuse of discretion.

(11) What is Competant Substantial Evidence

The testimony of the Commission's principle witness (Sally Simmons) consists, in essence, of speculation, unsubstantiated opinion, misstatements and distortions of fact. (Tr 122, 123, 124, 138, 139, 158) The following are examples selected from the DOAH Final Order:

(a) "The Commission has determined that long distance rates may increase if LECs are not allowed to disconnect for non-payment."

(b)"The Commission has shown that companies may increase their deposit requirements if they are not allowed to disconnect for non-payment"

(c) ".....subscribership in Florida has increased over the last ten years." purportedly because of the Commission's disconnect policy.

The facts are that rates have increased or lowered in response to market forces; deposits have been increased by IXCs in relation to credit risks; and Florida subscribership has increased in proportion to the increase in households which, it is widely known, has doubled in the last fifteen (15) years.

These statements are not evidence. They are speculation and distortions of fact. Can reasonable persons accept unfounded projections and deliberate misstatements as evidence? The DOAH did! This is a clear abuse of discretion!

As a further basis for their decision, the DOAH states as follows:

"Moreover, the Petitioner failed to show that subscribership in Florida is lower than it would be otherwise because of the Commission's policy."

This is a total distortion of the facts. Note the following:

(a) ref Tr 161, 162 [Cross-examination of Sally Simmons] where the Appellant attempted to introduce evidence in the form of a survey by the National Association of Regulatory Commissions (State) which documents offer a competant study of states which have, during the years 1985 through 1996, abolished the policy of disconnect authority. The number in aggregate amounts to about 40% of the total United States. This survey was presented by PSC Analyst to the Commissioners at an Agenda Conference on the subject issue, and by her calculations, it indicates that there is at least a six percent (6%) greater increase in subscribership in the states that have abolished the policy when compared to the national increase during the same period of comparison. The Commission objected to the exhibit; Ms. Simmons indicated a lack of rememberance of the documents, despite the fact that she admitted being present at the Conference when it was presented; and, the Appellant ceased the questioning on this point, but did put the bar on notice to the effect that he might"introduce this (study) later " (Tr 161, 162). There was no opportunity at the hearing, therefore the attempt was made to file this material evidence as a late filed exhibit. The Commission objected, and the DOAH sustained the objection. This exhibit and the accompanying motion are available to the Court for consideration. (ref DOAH Index fr pg 369).

(b) ref Tr 97, 98, 99, 100 [Direct Examination of Mark Long] where he addresses PSC Order No 93-0879, Respondent Exhibit U, pg 2; which states: " In an average month, GTEFL states that it has 10,000 to 12,000 uncollectible accounts, of which it is "only able to collect 14.4% ..." (of them). If the monthly number were cumulative, as the Appellant believes, the LEC would be disconnecting about 90,000 subscribers per year (450,000 over a five year period). It was Mr. Long's belief that the number was

progressive by rolling over 85% of the total and adding about 1,500 new disconnects per month, which would mean that there would only be about 18,000 disconnects per year.
It has been the stated policy of GTEFL to provide five (5) days notice of non-payment in accordance with PSC rules; temporarily block all service after a two (2) week period if payment is not received within that time; and after a one (1) week grace period, should payment still not be received, service is permanently disconnected. Accordingly, after one month and five days, the 85% (ref above) that Mr. Long believes are "rolled Over", are taken off the books.
This is consistant with the "true-up" provision in the contracts (see tariffs in Attachment I) which require the LECs to bill back uncollectibles to the IXCs on a monthly basis. (Respondant Exhibit I, PSC Order 13429)

(c) ref Tr 137, 138 [Direct Examination of Sally Simmons] where she states that ".....during 1995 and 1996 for BellSouth and GTE(FL), ...the disconnections were less than six-tenths (0.6%) of 1% on average." (note: this is consistant with what Sprint representatives testified to at the Commission Agenda Conference on the subject issue). In response to a direct question " And that would be per month?", Ms Simmons replied "Yes".

Now, in the FPSC Annual Report of 1995, there is a chart that puts the number of telephone access lines in the State of Florida at 9,256,947. Extrapolating off that statistic and applying the disconnects at the above noted 0.6% per month, the LECs, by their own admission, are disconnecting almost 67,000 subscribers per year for non-payment of bills, and the cumulative number of subscribers who would be denied telephone service for an indefinite period, is around the 340,000 mark.

This number is extremely important for the following reasons:

(1) LIFELINE participants number approximately 155,000 (ref PSC Order No 97-1262-FOF-TP in Dockets No. 97-0644-TP and 97-0744-TP.)

(2) Under FCC Order No 97-157 in FCC Docket No 96-45 issued 5/8/97; "....limited disconnection prohibition (prohibition of application of the disconnect authority rule) because it believes only low-income consumers experience dramatically lower subscribership levels that can be attributed to toll charges"(ref PSC Order No. 97-1262-FOF-TP). ".....The FCC stated that if it subsequently finds that subscribership levels among non-LIFELINE subscribers begin to decrease, it will consider whether this rule should apply to all consumers."

Now in consideration of the facts that (a) GTEFL for one has already stated for the record (ref PSC Docket No 96-0556-TL) that it "has been experiencing an adverse trend in its unollectible accounts ....."; and, this trend was confirmed by at least sixteen (16) industry participants in testimony provided in PSC Docket No 95-1123-TL; (b) the number of subscribers that were disconnected for non-payment of toll bills in 1995 already exceeded the number of LIFELINE subscribers in 1997; there can be little question that...here in Florida.....evidence already exists that subscribership levels are being adversely affected by the disconnect authority rule. It is also a fact that the State is mandated to make policy that is not inconsistant with FCC rules, however the State has the authority to go beyond the FCC rules if it deems that their actions are in the public interest. Thus the State has the power and the commensurate responsibility to consider the plight of the working poor, the infirm, the elderly on fixed income, single working mothers with children, and others with special needs that are very much a part of the local service "cut-offs" statistics, and who fall under the Universal Service laws that mandate the Commission to give special attention to those who need conveniently located telephones for purposes essential to education, health care, safety and general welfare.

Thus, the Appellant states herein that it has provided, and that the staff of the PSC has provided "competant substantial evidence" that this "rule" under challenge is a serious barrier to subscribership, and that there are no statuatory prohibitions to its elimination. In fact the FCC encourages

its elimination and has sent a message to the States which in effect says, "if you don't do it, we will"! It is time for the Commission to put aside politics and demonstrate their concern for the public interest with respect to subscribership and in consideration of its mandate to provide Universal Service.

(12) Economic Impact

(a) Ref DOAH Index Attachment I, Appellant's Exhibit No 8 dtd 8/16/96; This is the Economic Impact statement required by FS Ch 120.54 which was prepared for and presented to the Commission by its Division of Research & Regulatory Review in connection with Docket No 951123-TP. The following statement summarizes their conclusion:

"The additional data provided by the respondents (the telcoms) do not change the staff's conclusion about the economic impact of the proposed rule changes. The companies' reported annual billing and collection revenues of $3,952 to $35,682,517 per company. In general the responses indicated that the revenues likely lost range from "unknown" to "all at risk" or "100% vulnerable". The companies reported cost estimates to implement the proposed rule change between $1,600 and $6,276,000 per company."

(b) Posthearing comments of the staff (ref above as "staff's conclusion), are summarized by the excerpts below:

"(I) Circumstances in the telecommunications market place have changed to eliminate the need for a rule that allows Local Exchange Companies to disconnect local service for non-payment of inter-exchange toll charges."

"(II) There is no longer a logical nexus between local and long distance companies that would justify allowing local disconnection of service for non-payment of a long distance company bill."

"(III) The current policy is very effective in limiting uncollectibles, however, the staff believes that it is too effective in today's telecommunications market place. .....In a competitive market, it should be up to the companies to develop new and better ways to protect their revenue streams. Interexchange companies must have created ways to protect their revenue stream in those states which have removed disconnect authority by LECs for non-payment of toll charges, because the IXCs have not declined to provide services in those states. No IXC has filed testimony stating that their rates have gone up in those states where the LECs do not have disconnect authority. At the hearing, neither (none) of the IXC witnesses could give a comparison of what

their uncollectibles were in those states that had policies that prevented LECs from disconnecting for non-payment of IXC toll versus the states that do. Nor could either (any) witness state whether toll rates had increased in those states."

"Finally, this Commission should not make rules based upon whether it is protecting the IXCs from higher uncollectibles. In this new era of competition, IXCs must prosper or falter based upon their own abilities to manage their resources.

(c) Ref Tr pg 157 (Question) "If Mr. Osheyack were to prevail today and the administrative law judge were to say today, okay, Commission, you don't have authority for (1)(f) of this rule, what would be the consequences." (Answer) " I think the consequences could be quite serious, because I think if (1)(f) is determined to be invalid, I believe that it calls into question whether or not the Commission can place restrictions of any kind on disconnection of service."

Thus it is evident that the Commission staff, the telecommunications industry, and by its withdrawal of the staff recommended rule change proposal without comment, the Commissioners themselves, accept the fact that there is neither statuatory support nor hard evidence of negative impact, economic or otherwise associated with the elimination of disconnect authority. As indicated (between the lines) the motivation to retain the rule is "power", and the deterrents are a lack of sensitivity to the realities of the new marketplace, and the inability to respond creatively to its needs.

(13) Notices

(a) Ref FAC Ch 25-4.113 (1) (f) requres that;

" .....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:"

".....provided that termination or suspension of service shall not be made without five (5) working days written notice to the customer, except in extreme cases."

(b) Ref PSC Order No. 12765, pg 26 (K) Accounts Receivable states;

" Regarding those situations where the LEC provides Billing and collection service for the IXC, any partial payments received by the LEC shall first be applied to the customer's local exchange service".

(c) Ref FAC Ch 25-4.110 (9) Customer Billing for LECs states:

"Each local exchange company shall apply partial payments of an end user/customer bill first toward satisfying any unpaid regulated charges." (note) This change is a carryover from PSC Order No. 13429 which was the Order Approving Stipulation which was the accord reached among sixteen LECs and IXCs in 1984).

(d) Ref Tr 130,131, 132 Testimony by witness Sally Simmons indicates as follows:

".....over the years the local exchange companies billing systems have not been able to handle multiple balanaces very effectively."

".....In this Order 13429, there's discussion about the LECs difficulties in maintaining multiple balances."

"Additionally, if a partial payment comes in, it's not really altogether clear what the local exchange companies do with it."

(e) Ref Title VIII of the Consumer Protection Act aka Fair Debt Collection Practices Act (15 USC 1692 (h) § 810 Multiple Debts

"If any consumer owes multiple debts and makes any single payment to any debt collector (sic LEC which bills and collects for IXC) with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's direction."

(f) Ref Tr 130, 131 Testimony by witness Sally Simmons

".....---and this situation (the problems associated with handling multiple balances) may well be changing----"

".....---I doubt that it's completely unsurmountable...."(problem of handling multiple balances)

Now the record indicates that the Local exchange companies can, and in fact are required to provide notice of default to their customers; the original intent of the PSC in 1983 was to require that partial payments by the subscriber would first be applied to the local service account; this requirement was changed to accomodate problems of technical feasibility in 1984; the problems either no longer exist or are soluable today.

Against this background, we have the Fair Debt Collection Practices Acts (federal and state) which order that the consumer who makes a partial payment should have the right to instruct the debt collector as to where and how he wants his payment applied. This is a specific directive which must be measured against the more general requirement of the Florida Administrative Code relied upon by the Commission (FPSC), which requires only that partial payments be first applied toward payment of "unpaid regulated charges".

Now therefore, we have a situation whereby "noticing" the subscriber and the "handling of multiple balances" are today technically feasible (although they might not have been in 1984), but the customer is not advised by notice of his rights under the FDCPA. It is an axiom of law that material information not provided is the legal equivalent of misinformation provided. Thus, the current trade practice of the LECs, with the apparent approval of the Commission, contravenes the Consumer Protection laws of the state and federal governments.

(14) Competition

The Final Order deals with the issue of competition on pg 13. It stipulates that the toll market is "reasonably competitive". In fact as of 1995, the Commission in its Annual Report states that the number of competitors offering toll (long distance) phone service in the Florida market was in excess of 500, and according to more recent reports the number in 1997 exceeds 600 competitors. According to the thesis agreed upon by the Commission and the DOAH (Tr 147; FO pg 13 (21); ".....the benefits of the rule (disconnect authority 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 the cost on the cost causer."

These are the facts:
(a) The Commission, according to the statuatory test (FO pg 15 [24 (f)], has provided no credible evidence, much less competent evidence to support its contention that " the rule keeps uncollectible expenses lower than they would otherwise be and it also puts the costs on the cost causer."

(b) The Commission's perspective is based in speculation and opinion which is influenced by conditions and circumstances as they existed in 1983 and 1984 et seq....but have no relationship with the marketplace as it is today. [see para (15) below]
(c) When a subscriber is "cut-off" from his basic local telephone service, he (or she) is denied access to more than 559 (or more) competitors for non-payment of a debt owed to one of the 600. Moreover, he is denied such access by a company which is a competitor in at least the intrastate long distance market, and possibly the interstate and foreign market also (depending on the status of the LEC). This is an anti-comptitive impact which contravenes the law and its objectives (both state and federal).
(d) The Commission and the DOAH contend that the disconnect authority rule "puts the costs on the cost causer", but it does not present competant evidence except for speculation and unsubstantiated opinion as to who is the cost causer. [see para (15) below]

Now therefore, the Appellant contends that the Commission (FPSC) has not met its burden to prove that its existing rule, which the Appellant contends is obsolete by virtue of changing markets and changing technologies, is supported by competant substantial evidence nor has it provided any current credible evidence to support a contention that there is a viable rationale for retaining the rule under challenge in this cause before the Court.

(15) Alternatives to "local cut-offs"

Assuming the hypothesis that toll charge debts are sufficient to cause valid concern about possible impact on toll rates, there is the technology available today to permit the use of credit cards, debit cards, pre-paid telephone cards (which are sold through mass distribution retail outlets in today's market), and the institution of pre-payment plans for consumers who might have credit problems, or even secured credit as is a common practice in the credit card business today. Thus there is no

longer a valid rationale for "local cut-offs", if there ever was one. All of the aforementioned alternatives are in common useage in the credit markets today, and in fact many have been adjusted and applied to use in the mobile telecommunications industry which is not subject to state regulation. Thus, but for the unwarranted defense of an obsolete status quo by the Commission, progress in the expansion of competition and universal service is being restrained by unnecessary regulations, in order to support what is a fancied need for protection against rate increases beyond their control or review.

Now therefore, the telecommunications industry has sufficient and adequate tools to protect their revenues from leakage due to credit risk. It is the task of the state commissions to encourage their usage. As to the cost of implementation, it appears that the industry does not hesitate to spend large sums on development of technology that will lead to increased profits, nor does it shrink from legal and lobbying expenses associated with the protection of the status quo. Why should they be permitted to avoid the costs necessary to comply with the law and to bring their customer service methodology up to the standards of market needs as they are today?

(16) Contracts with the Consumer

Ref FO pg 16 (28), (29); Tr 151,152 The Final Order, paraphrasing the Commission's Proposed Final Order, states as follows:

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

Now therefore, in consideration of the requirements of statuatory construction previously addressed on pg (9) of this brief, one must give greater weight to the specific provisions of law also provided herein. Moreover, we must examine the matter of "black letter law" as advanced in the Order of the DOAH. In lieu of a citation, let me just proffer a hypothetical.

Let us say that a young man in Texas is paid three thousand dollars ($3,000) to harass or murder a young mother in Tampa, Florida. The exchange of consideration for service, "black letter law", as suggested by the Commission with the written approval of the DOAH, should be a governing element of a binding contract between the parties. Moreover, should the terms of the contract not be met, it is reasonable to presume that the contract has been breached.....according to the Final Order of the DOAH.

In fact it is axiomatic in contract law, that a contract between parties which requires or permits either party to perform unreasonable or unlawful acts, is not enforceable. Accordingly, the test of this alleged contract between the telephone carrier and the consumer is whether or not (1) Rule 24-4.113 (f) FAC is reasonable and lawful; and, (2) FS 364.19 has greater weight than the more specific and applicable constitutional, federal and state statutes that have been cited by the Appellant in this brief.

Accordingly, the matter of an alleged contract between the LECs and the consumer/end-user must be held in abeyance pending resolution by the Court of the facts and law relative to this Administrative Appeal. At this time, the arguments of the Commission, accepted by the DOAH, are legally insufficient.

(17) Cultural Bias

Ref FO pg 12 (16) Tr 158 Several times in both the transcript and also in the Final Order, the Commission and the DOAH agree on what is an expression of cultural bias in the statement ".....the rule puts the costs on the cost causer". This is described by Ms. Simmons in her testimony as "a policy of the Commission". The fact is that there has been no competant evidence produced by the Commission to support the statement that the elimination of the disconnect authority rule would create additional costs. It is possible, of course, that such action might create such an opportunity, if the telecommunications industry did not respond by implementing available alternative means of credit control as identified above (para 15). Thus , it may well be that the true "cost-causer" is the company that does not avail itself of customer friendly alternatives to credit control.

Further to the policy of implementing a rule that purports to "put the cost on the cost causer", in the absence of competant substantial evidence, there is an inherent risk that many who are innocent will be punished along with the few that may be guilty. This, in fact, is a major and unanswered problem in the implementation of the disconnect authority rule. If you can't properly identify the "costs", you cannot identify the "cost causer". It follows then, that if you can't identify the "cost causer", you may well be imposing excessive non-judicial punishment without realization of fault. This is a concept that is antithetical to the very foundations of our society, and is, of course, unlawful.

(18) Prejudicial Statement

One of the most abhorent examples of frivolous and irresponsible misuse of loosely defined but negatively descriptive words is the use of the word "fraud" to imply a nexus between disconnection of telephone service and the criminal act of fraud. I suspect that this attempt at linkage is largely based in a cultural bias , but its impact should be obvious to the Court.[Ref FO pg 11(13); Tr 124, 135; Respondent's Proposed FO pg 15 (9) Tr 124,135.][Note that both the PFO and the FO identify Tr 124,135 as the source of the following statement: "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".]
I am compelled to call attention, as I did at the PSC Agenda Conference where this allegation (or one of a similar nature was made by most all of the telecommunications company representatives and lobbyists at some point in time) to the following references in law: FS Ch 559.552 defers to the Fair Debt Collection Practices Act in matters not specifically identified in Florida law. §807 (7) of the federal Consumer Protection Act in Title VIII (FDCPA) specifically prohibits the "false representation or implication that the consumer has commited any crime or other conduct in order to disgrace the consumer". The Federal Trade Commission has taken the position that "intent to disgrace can be inferred from the nature of the acts that the consumer is being accused of.."(sic fraud). [ref pg 50099 Federal Register (4) False Allegations of Fraud (inferred)]. The Telecommunications industry carries the "intent to disgrace" beyond mere accusation to the non-judicial punitive act of disconnection of local telephone service (aka disablement of personal property), as a means of collecting bills for

services that they do not render. This is done under the authority assumed to be granted under Rule 25-4.113 (1)(f), however there is nothing in the rule that should encourage the Commission or its staff to join the industry in making unsubstantiated allegations of criminal wrongdoing by the people that they are mandated to protect. Absent "due process", and pending a clear definition of what is fraud tested in a court of proper juristiction, such punitive action by an LEC should be construed as an excessive and unfair strategy for collection of the bills for a third party. However, what disturbs me most, is the fact that the author of this allegation was the attorney for the Commission. While the characterization of fraud is attributed to Ms. Simmons' testimony as is indicated by the transcript pages identified, Ms. Simmons did not, in fact, make the allegation. It was inserted by Counsel, and picked up by the DOAH in its Order without any attempt to verify the record. Also disturbing is the fact that the act of switching suppliers in a competitive market is here characterized as a criminal act. If, in fact, switching suppliers is a criminal act, then it follows that the interexchange carriers are equally guilty of aiding and abetting the crime by encouraging such act through their expensive telemarketing campaigns, which include the act known as "slamming" (by definition meaning the switching of consumer's telephone service carrier without proper authorization). It is interesting to note that the Commission has yet to characterize such practice as fraud. [Ref Appellant's Motion to Strike at (DOAH Index pg 382 and 419, to which there was no response)]

This allegation of widespread consumer fraud made in defense of mass punishment for an unproven criminal act, was an obvious attempt to prejudice the administration of justice....and it apparently had the desired impact because it was incorporated into the DOAH Final Order.

(19) The Role of Government

The role of regulatory agencies is often misunderstood by the public and misinterpreted by the agencies of government. The reason lies more with a study of philosophical concepts than law, which is probably why many important but sensitive issues find their way to the courts for resolution. I would be remiss, therefore, if I did not address this issue directly in accordance with my own views.

DUE PROCESS, a constitutional guarantee, is a vague word which is constantly being defined and redefined in its own terms....but JUSTICE is more than a mere word; it is a pattern of behavior which implies ideas, ideologies, values, and attitudes which constantly pursue more humane systems and aspires to focus on human rights. The search for JUSTICE is never executed in a straight line, but there is always a clearly identifiable direction. JUSTICE is never static. It is rather a dynamic creation of our time and place.

RULES OF JUSTICE are, in a sense, expressed as policy rules. All rules have some purpose, some goal, some point, some notion of good and bad, of efficient and inefficient. But rules that reflect JUSTICE should not simply protect an aged and creaking status quo. Rather they should channel and regulate change so that change occurs only in certain predetermined and approved ways, while being denied directions that are not in the public interest.

ECONOMIC LAW AND ECONOMIC REGULATION presuppose a particular society. They reflect rights valued for their economic potential. They must never be acceptable as ancient and fixed markers of status. ECONOMIC REGULATION should always mirror the actual economy; and, ECONOMIC REGULATION must assuage public fears of domination by consentrations of economic power and unprincipled corporate tyranny.

ECONOMIC REGULATION is, in itself a hopelessly nebulous phrase, but it is useful to describe laws that attempt to establish rules for particular kinds of industries. The generally accepted purpose of such regulation is to curb economic power; to prevent it from getting out of control; to keep it from becoming a part of the culture; and, to preclude corruption, predation and other forms of despotic abuse.

The natural flow of authority to the center is egregiously true of regulation whose purpose is the curbing of economic power. However, simple logic leads to the inevitable conclusion that only centralized power is able to effectively

counterbalance the kind of power that accrues to the multi-billion dollar, multi-nationally controlled giant corporations that have been and are being formed to dominate certain essential industries such as telecommunications. Legislative activity, in this regard, is historically responsive rather than anticipatory, and is, therefore slow to impact on the desired result. Accordingly, the task of day-to-day damage control falls to the agencies of government which are mandated to protect the consumer. This is particularly true during periods of transition which is the status of the telecommunications industry today.

There is an inherant danger in this scenario. It is all too easy for two centralized power bases to lose perspective and taking the easy road, to find common ground. Thus the public must be alert and informed; their elected representatives must exercise due diligent and continuous oversight; and, the courts must take an active part in the interpretation of laws which might or might not be written with great clarity and precision, so that all parties understand their rights and responsibilities....and their limitations.

It is interesting to note that a descriptive brochure published by the FPSC under the title INSIDE THE FLORIDA PUBLIC SERVICE COMMISSION-1996, defines the powers and duties of the agency as "quasi-legislative, quasi-judicial as well as executive." Our founding fathers apparently recognized the futility as well as the shortcomings and dangers of such a broad based mandate, and as a remedy they very carefully defined the separation of powers into three distinctly different branches of government. However well meant, the characterization of the Commission of its own powers and duties carries the seeds of arrogance of power, and in fact has led to the promulgation of rules that disregard the primacy of state, federal and constitutional law, as well as the weight of their own prior decisions (orders).

Thus, it is in the sincere belief that there must be a clear understanding that an agency of government has neither the right nor the power to unilaterally repeal , amend, ignore or in any way modify the language, intents or purpose of the laws of this State and this Nation, that I come before this District Court of Appeals.

Moreover, it is extremely important that what may well be a misinterpretation mistakenly conceived many years ago and nurtured by tradition over more than a decade, must be qualified by the need to make rules and judgements that are consistant with current law and current conditions in the marketplace.

(20) Conclusions

(1) Insufficient competant, credible and conclusive evidence was presented by the Commission (FPSC) in written briefs and oral testimony to support the continuation of the current rule of allowing LECs to disconnect local and long distance telephone service for non-payment of and IXC (third party) bill.

(2) The Appellant has presented a preponderance of competant evidence to meet the statuatory tests for invalidity of the rule under challenge.

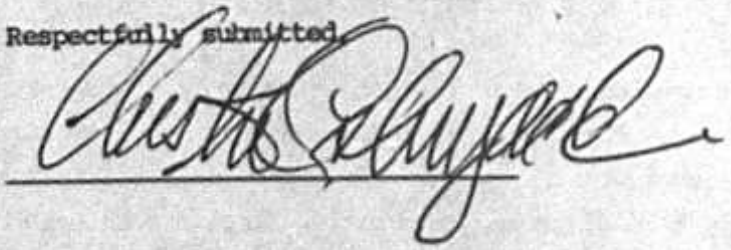
NOW THEREFORE, the Appellant respectfully asks this Honorable Court to rule in accordance with the following options:

OPTION I: Strike FAC Rule 25-4.113 (1)(f) from the Code

OPTION 2: Declare the FPSC action in continuing the current implementation of FAC Rule 25-4.113 (1)(f) improper and require that the agency take immediate administrative action to modify the Rule to bring it into compliance with all applicable law.

Note: If OPTION 2 is chosen, I respectfully request that the Court set a specific time-line for action by the FPSC and retain juristiction over the case until all issues of federal, state and constitutional law are addressed.

Respectfully submitted,



Dated: 12-2-97

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHESTER OSHEYACK, Petitioner/Appellant, vs. Division of Administrative HEARINGS (PUBLIC SERVICE COMMISSION) Respondent/Appellee	)	CASE NO. 97-1628RX 2nd DCA CASE NO. 97-3581

AMENDED INDEX (BY DATE OF FILING)

AMENDED INDEX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing was furnished by U.S. Mail to the following this 5th day of December 1997.

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