BEFORE THE SUPREME COURT OF FLORIDA



| | | |
|---|---|---|
| MICROTEL, INC., | ) | |
| | ) | |
| Appellant, | ) | CASE NOS. 64,307 |
| | ) | 65,351 |
| v. | ) | 65,449 |
| | ) | |
| FLORIDA PUBLIC SERVICE COMMISSION, ET AL., | ) | (Consolidated) |
| | ) | |
| Appellees. | ) | |
| | ) | |

APPEAL FROM ORDERS OF THE
FLORIDA PUBLIC SERVICE COMMISSION
GRANTING CERTIFICATES TO
COMPETITIVE LONG DISTANCE TELEPHONE CARRIERS

# ANSWER BRIEF OF APPELLEE UNITED STATES TRANSMISSION SYSTEMS, INC.

BEN E. GIRTMAN
B. KENNETH GATLIN
Madigan, Parker, Gatlin,
Swedmark & Skelding
P.O. Box 669
Tallahassee, FL 32302

Attorneys for Appellee
UNITED STATES TRANSMISSION
SYSTEMS, INC.

TABLE OF CONTENTS

## TABLE OF CITATIONS

## INTRODUCTION

In this Answer Brief by United States Transmission Systems, Inc., Appellant, Microtel, Inc., may be referred to herein as "Microtel."

The Appelles may be referred to herein as follows: MCI Telecommunications Corporation (MCI), GTE Sprint Communications (GTE Sprint), Satellite Business Systems (SBS) and United States Transmission Systems, Inc. (USTS).

AT&T Communications of the Southern States may be referred to as "AT&T."

The Florida Public Service Commission may be referred to as the "Commission" or as the "PSC." PSC Order No. 13015 is attached hereto and referred to as "Appendix A." PSC Order No. 13284 is attached hereto and referred to as "Appendix B."

Each of these interexchange (long distance) carriers may be referred to as an "IXC."

The record will be referred to as "R. __."

## STATEMENT OF THE CASE

Appellee USTS cannot adopt the Appellant's Statement of the Case or its Statement of the Facts, either in its main Brief or in its Supplemental Brief, in

that they are conclusory, argumentative and incomplete. An alternative statement of the case is set forth below.

Appellant's Supplemental Brief (addressing Microtel's appeals of certificates granted to GTE Sprint, SBS and USTS) adopts the three issues and the legal arguments in its main Brief on its appeal of the certificate granted to MCI. No new issues are raised in Microtel's Supplemental Brief.

Telephone service is regulated in Florida by the Florida Public Service Commission pursuant to Chapter 364, Fla. Stat.

Telephone service consists essentially of local service and long distance service. Historically, the telephone companies in Florida operated in small local exchanges, primarily within cities, and provided services between and among telephones by use of lines strung on telephone poles. So as to avoid duplication of costs and to minimize rates to customers, the Florida Legislature mandated that there should be minimal, if any, duplication of these costs, which meant that each telephone company would be given a monopoly in a particular service area. In return for getting the exclusive right to serve a particular area, the telephone company submitted itself to the regulation by the State of Florida (i.e., by the Florida Public Service Commission and its predecessors). That regulation

applied to both intrastate local and intrastate long distance service. The Bell system was the main provider of nationwide long distance service with the local telephone companies being primarily responsible for providing long distance service between local exchanges in their respective, certificated areas. Although this is a somewhat simplified statement of the previous structure of telephone operations, it serves to distinguish the types of services (local versus long distance) and the types of carriers (local and long distance carriers).

Advances in technology have substantially freed long distance telephone service from the exhorbitant costs of providing competing service and have enabled the regulatory authorities to authorize competition among carriers in providing long distance telephone service. Local telephone service is still strictly regulated in Florida.

Pursuant to the recent statutory amendments to Chapter 364, Fla. Stat. (more fully discussed in the brief of the Florida Public Service Commission and in other briefs of Appellees), the Florida Legislature specifically provided for competition among long distance carriers. (See, e.g., § 364.337, Fla. Stat.)

Because this was a new regulatory field and because of the statutory requirements which prevailed in 1980,

the Public Service Commission held extensive hearings on the first application to compete in the long distance telephone market in Florida. The Commission eventually considered five applications from "facilities-based competitors" (those carriers which would construct and use their own facilities), as opposed to mere resellers (those companies which merely purchase telephone services from existing companies and then resell those services to the general public). The facilities-based competitors are Microtel, Inc. (Microtel), MCI Telecommunications Corporation (MCI), GTE Sprint Communications (GTE Sprint), Satellite Business Systems (SBS) and United States Transmission Systems, Inc. (USTS). AT&T Communications of the Southern States (AT&T) was heir to the long distance certificate held by Southern Bell Telephone and Telegraph Company prior to the breakup of the Bell system. Microtel, Appellant herein, just happened to be the first of the facilities-based competitors to be granted a certificate by the Public Service Commission and now seeks to prevent four of the carriers from receiving certificates. However, Microtel has not sought appellate review of the certificate of public convenience and necessity granted to AT&T.

There are no other similar applications for long distance authority pending before the Florida Public Service Commission.

Microtel was the first carrier granted authority specifically for the purpose of competing with the Bell system and the other the traditional telephone companies in providing long distance telephone services in Florida. It now is trying to use the statute (which it used to acquire its authority to compete) against carriers similar to itself which also want to compete with the traditional telephone companies, with Microtel and with each other.

During the extensive Microtel hearings under the 1980 statute requiring same, the Commission acquired substantial information about the nature of the emerging technology and the regulatory environment which it was required to create among the competitors in this new field. (See legislative history discussed in the briefs of Appellees Public Service Commission). More abbreviated hearings were held in the case of MCI and GTE Sprint because of the change in statutory authorization and because the Commission already had acquired substantial information regarding the industry in its prior Microtel hearing. Subsequent statutory amendments and the availability of the Proposed Agency Action process enabled the Commission to further narrow their proceedings and still give full and complete consideration of the other applications for the same type of competitive, long distance service.

Microtel now seeks to slam the barn door shut on all others who seek to compete with Microtel in providing long distance telephone service in the new, competitive and less-regulated environment.

Telephone companies in Florida are not subject to regulation except by statutory mandate, and what the legislature requires, the legislature may modify or eliminate. It can provide for strict market entry or lenient market entry. It can provide for no regulation of market entry but still require regulation of utility rates and quality of service. It can require varying degrees of regulation of any combination of regulatory factors. Therefore, § 364.337, Fla. Stat., which contemplates competition in the long distance telephone market provides the method whereby carriers similar to Microtel can enter the market and compete.

## STATEMENT OF FACTS

USTS adopts the facts as set forth in the Appellee Public Service Commission's Statement of the Case and Facts.

In addition, the following additional facts are relevant. On September 7, 1983, USTS filed its application for authority to compete in the long distance telephone market in Florida (R. 822). It contained 163 pages, including the application, schedules and exhibits required by the Commission. In addition, it filed a Petition to Establish Special Conditions and Exemptions, seeking to be exempt from numerous rules in the Florida Administrative Code which apply to the more traditional telephone companies. Those rules do not apply to long distance facilities-based competitors like USTS because they relate to local exchange service and rate base regulation.

Fifty days after USTS filed its application on September 7, 1983, Microtel filed on October 27, 1983, its Petition to Intervene and Request for Public Hearing (R. 999).

Microtel's Petition to Intervene and Request for Public Hearing was filed on November 17, 1983. The Commission allowed Microtel to intervene by its order No. 12695 dated November 17, 1983.

On February 20, 1984, the Commission entered its Order No. 13015, a notice of proposed agency action and denial of Microtel's request for a hearing which had not been timely filed.

The proposed agency action was considered by the Commission on May 1, 1984.

On March 6, 1984, Microtel filed a Petition on Proposed Agency Action Seeking Reconsideration, Order No. 13015 and a § 120.57 hearing pursuant to Rule 25-22.29(4), FAC. USTS filed a response on March 19, 1984, and AT&T filed a petition to intervene on March 23, 1984. USTS filed a response to AT&T's petition on March 30, 1984, to which AT&T responded on April 18, 1984.

On May 1, 1984, the Commission provided an opportunity for all interested persons to comment upon its proposed agency action in Order No. 13015.

On May 14, 1984, the Commission entered its Order No. 13284 entitled "Order Denying Petition for Reconsideration and Request for Hearing; Consummating Order." This Order granted final approval to USTS' application and granted its certificate.

There has been no motion for stay filed with the Commission or with this Court, and USTS has, therefore, been [providing interim state long distance service] under its certificate of public convenience and necessity as granted in Order No. 13284.

## POINT I

### THE COMMISSION COMPLIED WITH THE ESSENTIAL REQUIREMENTS OF LAW WHEN GRANTING THE CERTIFICATE TO USTS

Microtel erroneously suggests that the Commission must look only to § 364.337 to determine the criteria for the granting of a certificate to a telephone company to provide interexchange long distance telephone service in competition with other carriers.

Appellant has not challenged on appeal the correctness of the Commission's determination to deny Appellant's request for a hearing in this case. Having failed to timely file a request for hearing and not otherwise being "substantially affected," Microtel now confuses the standards required by the Commission in granting certificates to competing long distance telephone carriers.

Before § 364.337 comes into play, other statutory requirements must be considered by the Commission before it can grant a certificate.

Section 364.33, Fla. Stat., requires that all telephone companies (whether the traditional telephone companies or the new interchange facilities carriers) must acquire a certificate of public convenience and necessity before they can provide service in Florida.

Section 364.335(1), Fla. Stat., requires that the applicant for a certificate must (a) provide certain specific information to the Commission, and the statute lists certain subjects into which the Commission may inquire; (b) the applicant must file rate schedules with the Commission; (c) the applicant must file any application fee required by law; and (d) the applicant must submit an affidavit that the applicant has caused notice to be given to certain govenmental entities and persons of its intention to file an application.

Appellee USTS complied with these requirements in detail, and Appellant Microtel has not contended that USTS failed to comply with these statutory requirements.

Subsections 364.335(2) and (3), Fla. Stat., also apply to all telephone companies and provide that a hearing shall be held by the Commission if, within twenty days following the date of filing of the application, an objection is filed or a request is filed by a substantially affected telephone company or consumer. As recited in the Commission's Order Nos. 13015 and 13284, Microtel failed to make a timely request for hearing and it did not have standing as a substantially affected telephone company merely because it would be required to face competition.

Microtel has not challenged the Commission's decision not to hold a hearing as requested by Microtel.

Contrary to the first three subsections of § 364.335 and the first sentence of subsection (4) which apply to all telephone companies, the last sentence of subsection 364.335(4) (as amended by section 3, Chapter 82-51, Laws of Florida) applies only to local exchange services and not to the interexchange, long distance carriers involved in this case (see asterisks below). The legislative amendment struck the words "which will" and inserted the words "local exchange" as shown below:

364.335 Application for certificate.--

* (4) The commission may grant a certificate, in whole or in part or with modifications in the public interest, but in no event granting authority greater than that requested in the application or amendments thereto and noticed under subsection (1); or it may deny a certificate. The commission shall not grant a certificate for a proposed telephone company or for the extension of an existing telephone company, which will be in competition with, or ~~which will~~ duplicate the local exchange services provided by, any other telephone company, unless it first determines that the existing facilities are inadequate to meet the reasonable needs of the public and it first amends the certificate of such other telephone company to remove the basis for competition or duplication of services.

*

Therefore, the Commission is not required to make a determination ". . . that the existing facilities are inadequate to meet the reasonable needs of the public . . . ." before it can grant a competitive IXC certificate.

Chapter 82-51, Laws of Florida, which amended § 364.335(4), also created § 364.337, which provides that:

> 364.337 Duplicative or competitive services.--
>
> (1) When the commission grants a certificate to a telephone company for any type of service that is in competition with or that duplicates the services provided by another telephone company, the commission, if it finds that such action is consistent with the public interest, may:
>
> (a) Prescribe different requirements for the company than are otherwise prescribed for telephone companies; or
>
> (b) Exempt the company from some or all of the requirments of this chapter.
>
> (2) In determining whether the actions authorized by subsection (1) are consistent with the public interest, the commission shall consider:
>
> (a) The number of firms providing the service;
>
> (b) The geographic availability of the service from other firms;
>
> (c) The quality of service available from alternative suppliers;
>
> (d) The effect on telephone service rates charged to customers of other companies; and
>
> (e) Any other factors that the commission considers relevant to the public interest. [Emphasis added.]

Appellant's main Brief (p. 12) incorrectly asserts that the Commission cannot grant the certificate because

there allegedly was insufficient evidence in the record for the Commission to make the "mandatory findings dictated by § 364.337(2)."

First of all, however, § 364.335(2) and (3), Fla. Stat., contemplate that the Public Service Commission need not hold a hearing on an application if no objection or request for a hearing is filed within 20 days following the date of filing of the application.

Although Microtel has not challenged the Commission's decision to deny its request for hearing, it is important to understand the context of the Commission's action and the evidence which the Commission had before it to understand the correctness of the Commission's actions.

Not only did Microtel not timely request a hearing, it <u>did not contradict any evidence</u> submitted by USTS nor did it raise any disputed issue of fact.

USTS had filed its application on September 7, 1983 (R. 822). In its Order No. 13015 (attached hereto as Appendix A), the Commission found that Microtel was not entitled to a hearing in this case:

> As stated earlier, Microtel filed a petition to intervene and a request for public hearing on October 27, 1983. Subsection 364.335(2), Florida Statutes., allows us to dispose of an application for a certificate without a hearing if we do not receive written objection to the application within <u>20 days</u> following the date the application was filed.

> Alternatively, Subsection 364.335(3), Fla. Stat., provides that we must conduct a hearing if within 20 days of the filing date we receive a written objection requesting a proceeding pursuant to Section 120.57, Florida Statutes, from, among others, any telephone company that would be substantially affected by the requested certification.
>
> USTS' application was filed on September 7, 1983 and Microtel's request for hearing was filed on October 27, 1983, fifty days later. Because Microtel's request for hearing was not timely filed, we are not required to determine if Microtel is a telephone company that would be substantially affected by the certification, nor are we required to conduct a hearing.
>
> In the past we have conducted hearings on our own motion when considering whether to grant an IXC's application. We have done so, in part, because we wanted to move cautiously into the new competitive environment for interexchange carriers. We note that Microtel has been a participant in every one of the hearings held to date.
>
> Because we are not required by Section 364.335, Florida Statutes, to conduct a hearing pursuant to Microtel's request and because we do not believe there is anything further to gain from conducting a hearing to consider USTS' aplication, we deny Microtel's request.
>
> The portion of this order denying Mictotel's request for hearing is issued as a final order and is not proposed agency action. [Emphasis added.]

[PSC Order No. 13015, at 4-5.]

Nor is Microtel "substantially affected" by competition so as to give it standing to request a hearing under § 364.335(3), Fla. Stat. The statutory history of Chapter 364, and especially the more

recent amendments, recognize the new technology and the fact that competition is taking the place of regulation in the telephone industry. This is merely an extension of the move toward deregulation both at the federal and state level. For example, Chapter 323 (trucking) and Chapter 364, Part II (radio common carriers) were repealed pursuant to the Florida Sunset Law, leaving those types of services unregulated. Airlines have been deregulated at both the state and federal levels.

Therefore, the new amendments to Chapter 364, Fla. Stat., specifically contemplate that competition will be generated by the PSC certification process. This statutory expectation is contrary to other, monopolistic regulatory statutes. For example, Microtel's brief cites Wetmore v. Bevis, 312 So.2d 722 (Fla. 1974), in which a new radio common carrier was given a reasonable time to commence operations and provide service before another radio common carrier could be certificated as a competitor. However, the governing statutes (Part II of Chapter 364, Fla. Stat., now repealed) required the Commission to first make a determination that the existing radio common carrier service was inadequate before it could grant a certificate to a competitive or duplicative radio common carrier. The 1982 amendments to the telecommunications statute eliminated a similar

restriction on granting certificates to competing interexchange long distance telephone carriers.

The words "public convenience and necessity" are construed to benefit the public, not a certificated applicant such as Microtel. Greyhound Corp. v. Carter, 124 So.2d 9, at 10-11 (Fla. 1960). Furthermore, the "necessity" that is required is the "reasonable necessity to meet the convenience of the public." Fleet Transport Co. of Florida v. Mason, 188 So.2d 294, at 298 hnn. 5, 6 (Fla. 1966).

The Commission further addressed Microtel's request for hearing and reconsideration of Order No. 13015. In its Order No. 13284 issued May 14, 1984 (R. 1039) consummating its Order No. 13015, the Commission again recited the lateness of Microtel's request for hearing and also stated that "Microtel's only interest affected by this proceeding seems to be the economic interest of a competitor." Order No. 13284, at 2.

Therefore, Microtel has not met the requirements for seeking a hearing pursuant to § 120.57 or §§ 364.335(2) and (3), Fla. Stat.

The limited regulation of competitive long distance carriers shows the legislative intent that the previously stringent limitations to entry, rate regulation, and other matters has been substantially decreased and almost eliminated. As shown by the Commision's consideration in

Order No. 13015 (R. 1003), issued February 20, 1984, the purpose of the regulation is to protect the customers of interexchange carriers:

> As we stated in our orders granting Microtel and MCI IXC authority, we are just beginning our journey into the competitive environment. Accordingly, it is premature for us to totally remove ourselves from the role of protecting USTS' (and other interexchange carriers') customers from possibly inappropriate rate practices. We hold the same belief that we did in the Microtel and the MCI proceeding that some approach to rates is needed that will not unduly hinder a competitive company's flexibility, but at the same time will still offer some protection to customers. To that end, we find that USTS shall file a tariff with this Commission when it initiates or changes rates and services 30 days prior to the tariff's effective date . . . . [Emphasis added.]

[Order No. 13015, at 3.]

In addition to the fact that Microtel did not have a right to the hearing in this case, the Commission based its decision upon competent and substantial evidence in the record which was not contradicted.

The application and other documents submitted by USTS (R. 822, et seq.), and Order No. 13015 of the Commission, show that USTS is a wholly-owned subsidiary of American Cable and Radio Corporation (AC&R). AC&R is wholly-owned by ITT Communications and Information Services, Inc. (ITT Coins), which is in turn wholly-owned by International Telephone and Telegraph Corporation (ITT Corp.). All of these companies are incorporated in the

State of Delaware, and USTS is authorized to transact business within the State of Florida. [See Application, R. 822, p. 2, para. 5.]

In paragraph 10 of the USTS application, USTS specifically identified the type of service which it planned to provide:

> 10. Applicant proposes to offer to the general public for hire communications common carrier intercity services between points within the State of Florida. USTS plans to provide these services using its interstate facilities within the State of Florida that have been, and in the future may be, constructed or otherwise acquired pursuant to authority granted by [federal authorities] . . . . [Further description of the service and facilities is provided in paragraph 10 of the application.]

Paragraph 11 of the application describes USTS' experience and technical capability to provide the service:

> 11. At present, USTS holds Certificates of Public Convenience and Necessity from the FCC to operate a nationwide interstate intercommunications system. These include authorizations for facilities located in the State of Florida that are used or designated to provide interstate communications services. USTS, owns and operates a $141 million microwave system and provides services between 109 metropolitan areas in 34 states and the District of Columbia and spans more than 1700 miles.

Paragraph 11 of the application goes on to further describe the access for customers, additional microwave and terrestrial facilities in addition to satellite

facilities. It notes that the 850 employees of USTS then were involved in preparing to provide the service.

Paragraph 12 of the application further describes the financial capability of the applicant and provides annual reports.

Paragraph 15 of the application further describes the services to be provided by USTS and distinguishes it from the services being offered by other applicants in that:

> . . . it contemplates a single system totally integrated with its interstate system to provide intercity telecommunication services within the State of Florida over a combination of its own facilities and leased lines. As this Commission noted in its Microtel order, "the mere existence of a unitary intrastate long distance communications network offers potentially unique benefits, by definition precluded under the geographically fragmented interexchange network now provided jointly by Southern Bell and the Independent telephone companies." Microtel, at 6. Additionally, the Commission has adopted a policy encouraging the development of competition in the intercity marketplace, see MCI Docket No. 12292, July 25, 1983 at 4 and has determined that MCI's entry would not result in wasteful duplication of facilities, id at 2. The grant of USTS' proposal, far from resulting in wasteful or uneconomic duplication of facilities, will enable USTS to make the most efficient use of its network, because any facilities operating in Florida will also be used in its interstate network. . . .

The application (R. 822) also contains extensive financial data, maps of facilities and network locations, and engineering data.

None of this information was contradicted in the proceedings before the Commission.

USTS' application was filed in accordance with the rules of the Commission and provided all of the data required therein. The Commission specifically made the finding that USTS complied with the requirements of § 364.335(1), in filing its application (Order No. 13015).

The Commission previously had held extensive hearings on three of the first applications during which it acquired substantial data of a generic nature relating to the entire industry. [Microtel -- November 4-6, 1981; MCI -- March 21, 1983; GTE Sprint -- December 16, 1983.] This included the effects of competition in the industry and the economic information relevant thereto. Microtel participated in these hearings and was an intervenor in the proceedings relating to all of the other applicants.

Microtel seeks to have the Commission's order granting the certificate to USTS overturned because the Commission supposedly did not make findings of fact as required by § 364.337(2), Fla. Stat. To the contrary, the Commission did make those findings of fact in its Order No. 13015, as discussed infra, Point II.

Furthermore, the information which Microtel would have the Commission make only after additional hearings is the generic type of information which the Commission acquire again in fact acquired by holding its previous hearings thereon. In Order No. 13015 and Order No. 13284 the Commission makes it clear that it had sufficient information, both from the generic hearings and from the specific evidence presented by USTS, to render its final decision and grant a certificate to USTS:

> In the past we have conducted hearings on our own motion when considering whether to grant an IXC's application. We have done so, in part, because we wanted to move cautiously into the new competitive environment for interexchange carriers. We note that Microtel has been a participant in every one of the hearings held to date.
>
> Because we are not required by section 364.335, Florida Statutes, to conduct a hearing pursuant to Microtel's request and because we do not beleive there is anything further to gain from conducting a hearing to consider USTS' application, we deny Microtel's request.

[Order No. 13015, at 5.]

Therefore, the Commission complied with the essential requirements of law when granting the certificate to USTS.

## POINT II

THE COMMISSION COMPLIED WITH THE REQUIREMENTS OF § 364.337 AS WELL AS THE OTHER APPLICABLE STATUTES IN GRANTING THE CERTIFICATES TO USTS AND TO MICROTEL'S OTHER COMPETITORS

The interaction between §§ 364.33, 364.335 and 364.337, Fla. Stat., are discussed in detail in Point I, supra.

There is substantial duplication of the issues raised in Appellant's Brief (Points I and II thereof), and, therefore, Points I and II of this Brief should be considered together.

Competent substantial evidence had been submitted in the application, affidavit, rate schedules and other documents submitted with the application filed by USTS (See, e.g., R. 822).

The statute requires the Public Service Commission to "consider" the five categories of information set forth above in § 364.337(2), Fla. Stat. Although the statute does not require the Commission to make findings of fact regarding those considerations, the Commission did in fact make findings in its Order No. 13015 at 2: USTS and five other companies would be providing services which would duplicate and compete with each other; the geographic availability of service is statewide (with certain restrictions); the quality of service provided by

the other interexchange carriers (other than AT&T) was unknown at that time; and the entry of another competitor into the market would help to lower long distance rates or, at least, to keep the rates at the present level.

The specific findings made by the Commission relating to USTS were:

> Because USTS' certificate will duplicate the certificates granted to other interexchange companies (IXCs) and because, as with these other companies, we will prescribe different requirements for USTS than are otherwise prescribed for telephone companies under Chapter 364, we must consider certain factors in determining whether our actions are consistent with the public interest. Subsection 364.337(2), Florida Statutes.
>
> a. <u>The number of firms providing the service</u>
>
> To date, we have granted certificates to five companies that will be providing services that will duplicate and compete with USTS' service. These include MCI Telecommunications Corporation, Microtel, Inc., GTE Sprint Communications Corporation, AT&T Communications of the Southern States, Inc. and Satellite Business Systems.
>
> b. <u>The geographical availability of the service from other firms</u>
>
> As we have done for other IXCs, the grant of authority to USTS is statewide with certain restrictions to be discussed later. At present, however, only AT&T is providing statewide service through its own facilities. Initially, the other facilities-based carriers will provide services to limited areas of the state through their own facilities and to the rest of the state through resale.

> c. The quality of service available from alternative suppliers
>
> Because competition in the provision of intrastate toll service is new in Florida, the quality of service provided by interchange carriers other than AT&T is unknown at this time. We expect all certificated IXCs to provide adequate service and to provide the quality of service set forth in their approved tariffs.
>
> d. The effect on telephone service rates charged to customers of other companies
>
> After considering the rates charged to customers by other IXCs, we believe the entry of another competitor in the interchange market will help lower long distance rates or, at a minimum, keep rates at the present level.
>
> Having considered these four items, we find that USTS' certificate should be granted . . . .

Moreover, the statute requires only that the Commission consider those factors it does not require that the consideration produce results favorable to a previously certificated carrier.

Section 364.337(2)(e), Fla. Stat., also authorizes the Commission to consider "any other factors that the commission considers relevant to the public interest."

Order No. 13015 and Order No. 13284, relating to USTS, show that the Commission considered other relevant factors to be: that USTS was financially stable and technically capable of providing the service; that its corporate affiliation provided it strenght to enable it

to provide appropriate service to its customers; that numerous conditions would be placed on USTS and some exemptions would be granted consistent with the conditions and exemptions applied to other similar carriers; that numerous hearings had been held in regard to the earlier applicants and generic information relating to the nature of this emerging, competitive industry had been received by the Commission; and that sufficient general inquiry had been made into the new competitive environment for interexchange carriers to enable the Commission to grant a certificate to USTS upon the specific evidence before it in the USTS docket.

Although there do not appear to be any cases construing the phrase "consistent with the public interest" in § 364.337, similar language was found in the auto transportation broker's statute, § 323.31(2), Fla. Stat. prior to its repeal by the Sunset Law. There are cases construing that and a comparative section, § 323.03(4), Fla. Stat. That judicial interpretation of "consistent with" shows that the public has a lesser need to be protected from competition than previous standards under which an applicant had to show that the public convenience and necessity "required" the grant of the competing certificate. See, e.g., §§ 367.33 and 323.03(4) (both now repealed due to Sunset).

In speaking of the standards of public convenience and necessity, the Florida Supreme Court determined, in Commercial Truck Brokers v. Mann, 379 So.2d 956, at 958 (Fla. 1980), that the two standards of "consistent with" or "required by" are substantially different:

> Petitioners' claim that the standard for granting a transportation brokerage license under section 323.31(2), Florida Statutes (1977), is the same as the standard for granting certificates of public convenience under section 323.03(4), Florida Statutes (1977), is without merit. [Emphasis added.] Section 323.03(4) provides that the proposed service must be "required by the present or future public convenience and necessity," whereas section 323.31(2) provides that the proposed service need only be "consistent with public convenience and necessity." [Emphasis by the Court.] Apparently the latter provision was employed because the public has a lesser need to be protected from excessive competition among brokers than it does among carriers. [Citations omitted.] The divergent purposes of the statutes support the conclusion that an applicant for a broker's license does not have to show as great a need for service as does an applicant for a motor carrier certificate. [Emphasis added.]

Coupled with the statutory purpose of injecting competition into the long distance communications market and the holding of the Commercial Truck Brokers case, supra, the findings of the Commission show that the legislative standards are sufficient and have been met by the Commission.

Even if the stricter standard were applicable in the case at bar, the words "public convenience and necessity" are construed to benefit the public, not a certificated applicant (Microtel). Greyhound Corp. v. Carter, 124 So.2d 9, at 10-11 (Fla. 1960). And even that stricter standard does not contemplate the granting of a monopoly as is sought by Microtel. The "necessity" that is required is the "reasonable necessity to meet the convenience of the public." Fleet Transport Co. of Florida v. Mason, 188 So.2d 294, at 298 hnn.5, 6 (Fla. 1966). Also, compare the case at bar with the standards required in Fargo Van & Storage, Inc. v. Bevis, 314 So.2d 129, at 133-34, hnn.4, 6 (Fla. 1975).

Furthermore, the Commission specifically found that the requirements in § 364.335(1) for the filing of an application by USTS had been met. And, the Commission found that, because the USTS certificate would be limited to interexchange authority, the Commission ". . . need not make the finding required by Subsection 364.335(4), Florida Statutes, that the existing facilities of an existing company providing local exchange service are inadequate to meet the reasonable needs of the public." [Emphasis added.] [Order No. 10305, at 2.]

Appellant's reliance on Delta Truck Brokers, Inc. v. King, 142 So.2d 273 (Fla. 1962), is misplaced. In that case, an applicant for transportation certificate

apparently had provided service prior to receiving a certificate from the Commission. The applicable statute authorized the Commission to deny a certificate if an applicant had been "convicted" of engaging in an auto transportation business without a license. The statute also authorized the Commission to alter or otherwise impose restrictions on the transfer of said certificate "where the public interest may be best served thereby." Id. at 275. In that case, the applicant had never been "convicted," and the Supreme Court properly held that the power to impose restrictions on the transfer of the certificate, "where the public interest may be best served thereby" was devoid of the required standards. Thus, the case is distinguishale from the case at bar.

The other cases cited by Appellant merely cite hornbook law that there must be adequate standards in legislatively delegated authority. In the case at bar, the statutory standards in § 364.33, et seq., and the granting of the certificate of public convenience and necessity, pursuant to § 364.33, et seq., comply with the statutory standards similar to those upheld in other cases. (See, e.g., Tamiami Trail Tours v. Mayo, 234 So.2d 4 (Fla. 1970); Bilger v. Department of Banking and Finance, 394 So.2d 989 (Fla. 1982); and Albrecht v. Department of Environmental Regulation, 353 So.2d 883 (Fla. 1st DCA 1978).

Therefore, the Commission has complied with the standards in both the statutes and in case law.

## POINT III

MICROTEL IS NOT ENTITLED TO "START UP" TIME BEFORE OTHER CARRIERS CAN BE AUTHORIZED TO SERVE THE PUBLIC

Microtel requests that it be authorized a "reasonable period of time to provide the services authorized by its certificate before duplicate authority is granted to other carriers." There is no legal basis for this request for exclusive authority.

Microtel only seeks a monopoly in what was intended to be a competitive long distance communications market.

In support of its position, Microtel cites § 364.345(1) which requires that each telephone company provide adequate and efficient service to the territory described in its certificate, within a reasonable time after the Commission grants that certificate. However, Microtel fails to quote the remaining portion of that statutory section which shows that <u>every</u> telephone company granted a certificate by the Commission is required to provide adequate and efficient service at all times. Microtel's Brief quotes only the first sentence of § 364.345(1), Fla. Stat., upon which it relies:

> 364.345 Certificates; territory served; transfer.--
>
> (1) Each telephone company shall provide adequate and efficient service to the territory described in its certificate within a reasonable time

as prescribed in the commission order.

However, the statute then immediately states that:

> If the telephone company fails or refuses to do so, for whatever reason, the commission, in addition to other powers provided by law, may amend the certificate to delete the territory not served or not properly served, or it may revoke the certificate. In addition, the commission, upon a finding that any telephone company significantly misrepresented its intention or ability to serve the territory in question, may take such action to impose a penalty upon the telephone company as is authorized by general law.

When read together with §§ 364.33, 364.335 and 364.337, Fla. Stat., it is clear that statutory intent is for competition to be encouraged rather than stifled as Microtel seeks to do.

A similar question arose under the former motor carrier statutes (Chapter 323, Fla. Stat.). Tamiami Trail Tours, Inc. v. Mayo, 234 So.2d 4 (Fla. 1970). Tamiami Trail Tours had been granted a certificate to provide transportation over particular routes in Florida. Shortly thereafter, the Commission granted to Greyhound Lines an extension of its certificate to provide service over the same routes. Tamiami protested the granting of Greyhound's extension, asserting that the first applicant for a new route should be given the opportunity to demonstrate its ability to adequately serve the new route before a competing carrier's application is granted.

Both the Commission and the Florida Supreme Court rejected Tamiami's contention, the Court stating that:

> . . . To wait for a performance record by the first applicant in order to establish public convenience and necessity might cause unnecessary hardship to the public. We agree with the following statement of the Commission:
>
> > Although Chapter 323 [Fla. Stat.] does afford considerable protections for existing certificate holders against competition, it does not guarantee or comtemplate a complete monopoly over public convenience and necessity for new service being shown. Where a competing service is justified, it generally results in a better service to the public.

The Court then went on to state that:

> . . . The rapid growth of this State requires that transportation keep in step with the constant development and population increase. We cannot retard progress and inconvenience our people by waiting for urgent need or crisis to be proved before responding the the need for more public transportation.

[Id. at 6.]

And it should be kept in mind that market entry in the case at bar is even more lenient than in the Tamiami Tours transportation case.

Microtel can show no authority which authorizes it to complete its network, acquire all the customers which it can at monopolistic rates and deny entry of any other competitor for a "reasonable time" after it receives its certificate. Microtel's main Brief (pp. 24-25) states

that "It is a necessary implication of this statute that a certificated telephone company is entitled to a 'reasonable time' within which to commence service." To the contrary, there is no such implication of any kind in that statute.

Therefore, Microtel does not have a right to even a temporary monopoly, and it is not necessary that Microtel's quality of service be "known" before other applicants can be certicicated.

## CONCLUSION

The Appellee Florida Public Service Commission, has properly construed Chapter 364, Fla. Stat., and the recent statutory amendments therein so as to authorize the grant of certificates to USTS and to all the other Appellee long distance communications companies involved in this appeal. Detailed standards are set forth in the statutes, all of which were complied with by the Commission. The Commission rendered specific findings of fact on competent substantial evidence so as to support the granting of the certificate to USTS and the other Appellees.

Microtel's request for a hearing in the case of USTS was not timely filed, and Microtel's desire to be free from competition, contrary to the statute, does not make it a "substantially affected" party" so as to grant standing.

Therefore, the order of the Commission granting the certificate to USTS, as well as all the orders granting certificates to the other Appellee communications companies in this case, should be upheld.

RESPECFULLY SUBMITTED this 31st day of August, 1984.

Attorneys for Appellee
UNITED STATES
TRANSMISSION
SYSTEMS, INC.

BEN E. GIRTMAN
B. KENNETH GATLIN
Madigan, Parker, Gatlin,
Swedmark & Skelding
P.O. Box 669
Tallahassee, FL 32302
(904) 222-3730

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following parties of record this 31st day of August, 1984

James E. Wharton, Esq.
Suite 811, Metcalfe Building
100 S. Orange Avenue
Orlando, FL 32801

Mr. Steve Tribble
Commission Clerk
Florida Public Service
Commission
101 E. Gaines Street
Tallahassee, FL 32304

John K. Aurell, Esq.
Robert L. Hinkle, Esq.
P.O. Drawer 810
Suite 600
315 South Calhoun Street
Tallahassee, FL 32302

William B. Barfield, Esq.
Lloyd Nault, Esq.
Southern Bell Telephone
& Telegraph
Room 680, 666 NW 79th Ave.
Miami, FL 33126

William S. Bilenky, Esq.
General Counsel
Florida Public Service
Commission
101 East Gaines Street
Tallahassee, FL 32301

Mitchel Brecher, Esq.
1828 L Street, N.W.
Washington, DC 20036

Jim Carideo, Esq.
General Telephone Company
P.O. Drawer 110, MC 7
Tampa, FL 33601

Gene Coker, Esq.
Southern Bell Telephone &
Telegraph
4300 Southern Bell Center
Atlanta, GA 30375

Kenneth Cox, Esq.
1133 19th Street, N.W.
Washington, DC 22036

Richard Melson, Esq.
Hopping, Boyd, Green
& Sams
Post Office Box 6526
Tallahassee, FL 32301

Kevin Cassidy, Esq.
Satellite Business Systems
8283 Greensboro Drive
McLean, VA 22102

Hugh J. Turner, Jr., Esq.
Smathers & Thompson
1301 Alfred I Dupont Bldg.
Miami, FL 33131

Patrick K. Wiggins, Esq.
Messer & Rhodes
Post Office Box 1876
Tallahassee, FL 32301

Ben E. Girtman

BEN E. GIRTMAN