IN THE SUPREME COURT OF FLORIDA

MICROTEL, INC.,

Appellant,

V.

FLORIDA PUBLIC SERVICE COMMISSION, et al.,

Appellees.

CASE NOS. 64,801
65,307
65,351
65,449
(Consolidated)

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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STATEMENT OF THE CASE AND FACTS

In March of 1980, Microtel filed an application seeking authority to construct and operate an intrastate, interexchange telecommunications system in Florida. Under the then existing statutory authority, the Commission could have granted competitive authority only if it had found that "existing facilities are inadequate... or that the person... is unable to provide reasonably adequate service," Section 364.35, Fla. Stat. (1979). During the review of the Commission's authority under "Sunset" by the Legislature in 1980, Chapter 364 was substantially rewritten. Section 364.335, Fla. Stat., was created in 1980, replacing former Section 364.35, Fla. Stat. (1979). It changed the certificating authority of the Commission allowing for the granting of certificates to companies seeking to provide service in whole or in part or with modifications. However, under this new authority, the Commission still could not grant the right to serve when that service was in competition with the service of an existing company providing adequate service.

In 1982, the Commission, with the backing of the regulated industry, offered a bill that would amend the existing law and allow for the granting of certificates to companies seeking competitive authority for all but the local exchange service. The bill passed the legislature during the 1982 session. As part of that bill, a new section was added that gave the Commission the authority to exempt companies from any or all regulatory requirements if the company was seeking authority to provide services that were competitive. It was the legislature's belief

that the free market could control activities that previously had been regulated. The Commission was authorized by the legislation to limit regulation where certain enumerated public interest standards were met.

In Order No. 11095, dated August 23, 1982, the Commission granted Microtel's petition for authority to construct and operate a microwave communication system. In ordering paragraph 1., the Commission concluded:

> ORDERED that pursuant to Section 364.335, Fla. Stat. (1982), Microtel, Inc., is hereby granted a Certificate of Public Convenience and Necessity....

Subsequently, in Order No. 11095-A, titled "Amendatory Order", the Commission added to that authority, the authority to resell WATS (Wide Area Telephone Services) and MTS (Message Toll Service) pursuant to Section 364.335, Fla. Stat.

Thereafter, on November 3, 1982, MCI Telecommunications Corporation filed an application to construct and operate an interexchange telecommunications network in Florida. The Appellant filed for and was granted intervention. After an expedited hearing, the Commission granted authority to MCI to provide resale of WATS and MTS within Florida. On July 25, 1983, the Commission, in Order No. 12292, granted a certificate to MCI to provide interexchange telecommunications on facilities constructed or to be constructed by MCI. In doing so, the Commission exercised its authority under Section 364.335, Fla. Stat. (1982). In addition, the Commission prescribed differing regulatory requirements than for other telephone companies

pursuant to its authority under Section 364.337, Fla. Stat. In the MCI proceeding, Microtel asserted that it should be protected from competition until it could commence operation of its intrastate network. The Commission found that to do so "would serve to deprive the people in this State of a competitive service." Order No. 12292 at 4.

On March 4, 1983, GTE-Sprint filed for authority to provide service comparable with that proposed to be offered and being offered by Microtel and MCI. Microtel again intervened and participated fully at the hearing held December 16, 1983. In Order No. 12913, dated January 20, 1984, the Commission granted GTE-Sprint's requested Certificate for Public Convenience and Necessity.

On September 7, 1983, United States Transmission Systems (USTS) filed for competitive authority. Microtel filed for leave to intervene and requested a hearing. The Commission granted intervention but denied the request for a hearing because the request had been filed thirty-nine days late. On February 2, 1984, the Commission approved the request for a certificate and issued Order No. 13015.

On September 28, 1983, Satellite Business Systems (SBS) filed for competitive authority. Microtel filed for leave to intervene and requested a hearing on the certificate. The Commission granted leave to intervene but denied the request for a hearing for lack of timeliness. On January 20, 1984, in Order No. 12912 the Commission granted the requested authority.

POINT I

THE COMMISSION COMPLIED WITH THE REQUIREMENTS OF SECTION 364.335, FLORIDA STATUTES, IN GRANTING CERTIFICATES TO MCI, GTE-SPRINT, SATELLITE BUSINESS SYSTEMS (SBS), AND UNITED STATES TRANSMISSION SYSTEMS (USTS).

A. Legislative History.

Prior to 1980, the Commission's certificating authority was found in Section 364.32, et seq., Fla. Stat. (1979). Section 364.35, Fla. Stat., stated that the Commission may not grant a certificate in competition with an existing plant, line or system unless the Commission found that the existing service was inadequate to meet the reasonable needs of the public or that the person operating the system was unable, refused or neglected to provide reasonably adequate service.

In 1980, the Commission, as part of its Sunset review, wanted to standardize its certificating process and submitted to the legislature a plan for the consolidation of all regulatory authority into one chapter. At the urging of the legislators, the plan was modified to introduce the same or similar language in all the chapters dealing with each industry area. See: § 367.051(3) and § 364.33(4), Fla. Stat. (1980).

It was for that reason the standards in Chapter 364 for the granting of certificates to operate telephone companies changed in 1980. Under the section as written in 1980, the procedure was expanded and the authority was changed to enable the Commission to grant the certificate in whole or in part or with modifications in the public interest. The public interest requirement was added in

1980. As part of the application process, certain information was required to support a "public interest" determination. Under 364.335(1)(a) & (b), the applicant was to provide information concerning the ability of the applicant to provide the service, the territory and the facilities involved, the existence of service in the area or within close proximity and the rates, rules and contracts to be observed by the applicant in providing the service. These were not "new" requirements but instead were the requirements used for the consideration of an application for a water and sewer application found in Section 367.041(1) & (2), Fla. Stat. (1979), and later as Section 367.051(3), Fla. Stat. (1980).

After 1980, the telecommunications industry went through incredible changes necessitating a review and revision of the State's telecommunication regulatory statutes and philosophy. Competition was growing fast in the provision of telecommunications equipment and services on a national level. Under the existing state statutes no competition was permitted. (Section 364.335(4), Fla. Stat. (1980)). In 1982 a bill was introduced and passed (SB 868-- Chapter 82-51, Laws of Florida) which amended the certificating section (364.335, Fla. Stat.) to permit competition in all but the provision of "local exchange service". In addition to changing the certificating procedure, the Commission suggested to the legislature that some lessening of regulation was appropriate since the market would better control the practices of competing entities. A new section of Chapter 364 was added in the bill that permitted the reduction of regulation,

if it was found to be in the public interest. Criteria to be considered in determining if reduced regulation was in the public interest were provided in the new section. The Senate Staff analysis of the bill clearly evidences this legislative intent.

> [This bill would] ... provide that the requirements set out in Chapter 364, Fla. Stat., could be varied for a company or a company could be exempted from some or all requirements if such actions are consistent with the public interest. Factors are set out which the PSC must consider in determining the public interest;... (See Bill Analysis, Appendix A)

Section 364.337, Fla. Stat. (1982), states that when the Commission grants a certificate to a telephone company for any service that is in competition with existing services, the Commission may provide different requirements for that company or may "exempt the company from some or all the requirements of this chapter". Realizing that such a grant of authority was broad and extensive, the legislature enumerated mandatory criteria for consideration in the granting of this exemption. Under 364.337(2), Fla. Stat., the Commission must consider the number of firms providing the service, the availability of the service from other firms in the area, the effect on rates to the customer, the quality of service from other suppliers and other factors which the Commission considers relevant to the public interest.

There are, therefore, two public interest tests. Under the certificating statute, Section 364.335, the applicant must demonstrate that it is able financially and technologically to provide the service, define precisely the service offered and the

cost of the service it intends to provide. Once that test is met, factors found in Section 364.337 become relevant in determining the level of regulatory involvement. Those factors are oriented more toward the effects that the competition will have on rates and service to the consumer. (This would best be gauged by the amount of competition. Therefore, those standards are designed to show "market conditions" and not the fitness of the applicant.) The greater the level of competition, the less the need for regulation. Competition will assure adequate service at reasonable cost. The criteria are to test the fitness of the competitive market not the fitness of the applicant.

The Appellant, in his brief, states that the Commission did not consider the factors in Section 364.337, Fla. Stat., in granting competitive authority to MCI, GTE-Sprint, SBS and USTS. The Commission did not consider those factors in granting authority to Microtel either. The authority for granting certificates of public convenience and necessity for the provision of intrastate toll service is found in Section 364.335, Fla. Stat., and not Section 364.337, Fla. Stat.

B. The Commission followed the criteria in Section 364.335, Fla. Stat., in granting certificates to Microtel, MCI, GTE-Sprint, SBS and USTS.

The statutes, by their very language, enumerate the criteria the Commission must consider in first granting a certificate under Section 364.335, Fla. Stat., and then those factors to be considered in determining the amount of regulation necessary under Section 364.337, Fla. Stat.

The orders of the Commission granting certificates to the various companies involved in this appeal, discuss and delineate the considerations which the Commission weighed in determining whether to grant the certificates.

Even a cursory review of those orders shows that the Commission methodically reviewed the statutory requirements in every case and made specific findings.

To reduce the burden on the Court of reviewing all five orders in this brief, a review of a typical order, GTE-Sprint, evidences the Commission's considerations of the statutory factors.

Section 364.335 Public Interest Considerations:

1. Authority to serve. The Commission reviewed its authority in Section 364.335 and found that "Microtel could not substantiate its claim that the entry of more competitors would harm the ratepayers in Florida."

2. Financial and Technical Ability. The Commission reviewed the company's consolidated balance sheet and income statements and determined that they "demonstrate a strong financial position." The Commission reviewed the company's actual operations around the country, its physical plant and network capacity, and determined that the company had adequate technical ability to provide the sought after authority.

3. Grant of Authority and Modifications to the Authority Requested. The Commission granted authority to the company to provide the service requested but made that grant subject to limitations that could be imposed as a result of the determination in the generic docket dealing with access charges and

determinations in other related dockets. Further, the Commission restricted the company from providing service that would allow a customer of the company to "bypass" the local network. One of the major concerns facing both the Commission, the public and the industry, is the availability of adequate service at reasonable prices. This necessitates the protection of the local service areas from uneconomic "bypass". As technology advances, large users of service have an economic incentive to install systems which allow them to bypass the local network. The local network is composed of embedded investment for which the local telephone company must charge rates to support. If the large commercial users of the local exchange services bypass the local network, those costs would have to be reallocated over the remaining customers. This economic dislocation could cause great increases in the cost to the consumer for local service. Therefore, pursuant to public interest considerations, the Commission has restricted the companies from providing "bypass" services until the Commission can better determine the effects of this dislocation.

In determining what special requirements and exemptions were allowable, the Commission considered other factors in Section 364.337, Fla. Stat.

1. The Commission found that complete rate regulation was not necessary because GTE-Sprint was a "non-dominant interexchange carrier".

2. It found that there were fourteen local exchange companies in Florida providing interexchange service.

3. The Commission considered that Microtel, MCI and AT&T had

been authorized to provide intrastate interexchange service as limited by the Commission's decision in the access charge docket.

4. It considered the streamline regulation authorized for MCI and Microtel and granted rule waivers consistent with those granted the other companies.

5. The Commission ordered that the company be held to the quality of service standards set forth in their approved tariffs, just as it had done for the other carriers.

6. The Commission considered the effect GTE-Sprint's entry would have on the rates paid by long distance customers in Florida. The Commission found that increased competition, under economic theories, would increase efficiency and thus reduce rates.

7. Tariffs and Charges. Finally, the Commission granted waivers and conditions on tariff filings made by the company. The Commission:

a. Treated the company's tariff filings as presumptively valid.

b. Amended the effective date for tariff filings to a 30-day effective date.

c. Required the filing of quarterly construction reports.

d. Exempted the company from the provision of rules relating to the provision of local service.

e. Allowed the company to keep its books and records in a more streamlined method than normally required for regulatory purposes.

f. Exempted the company from the requirement of the

rule dealing with reports to the extent that the company could file the same report with the Commission that it does with the FCC.

g. Ordered that the company not unjustly discriminate among customers.

The Commission made these and other findings after careful review of the record and filings made by both the petitioners and intervenors.

C. Standard of Review.

Appellant seeks to have this Court review the record de novo and substitute its judgment for that of the original trier of fact. This Court has refused to reweigh the evidence and substitute its judgment for that of the agency charged with special expertise to sit as trier of fact. United Telephone Co. v. Mayo, 345 So.2d 648 (Fla. 1977).

This Court's role is not to reweigh the evidence, Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308, 311 (Fla. 1976), but to determine whether the Commission's decision is supported by competent substantial evidence. Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784, 787 (Fla. 1983). The Commission's decision was clearly supported by competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957). Microtel has the burden of proving that the decision was an abuse of discretion. Citizens of the State of Florida v. Public Service Commission, supra. Microtel has not met this burden.

The Commission's decision to grant the certificates must be affirmed.

POINT II

THE APPELLANT'S INTERPRETATION OF THE LAW WOULD RESULT IN A DENIAL OF EQUAL PROTECTION UNDER THE LAW AND WOULD BE CONTRARY TO LEGISLATIVE INTENT.

The Appellant was granted authority to build and operate an intrastate telecommunications network in Florida under the authority found in Section 364.335, Fla. Stat. The regulatory requirements were reduced for the Appellant as permitted in Section 364.337, Fla. Stat., after consideration of competitive factors. The Appellant would now advocate a different interpretation of those sections to preclude the introduction of any competition with the view that any competition would be fatidic internecine competition. Increasing competition was behind the amendment of Section 364.335, Fla. Stat. Section 364.337, Fla. Stat., was created in recognition of the fact that competition should replace regulation. Microtel has its authority and now wants protectionism. Such a selective and inconsistent interpretation of the statutes would deprive potential competitors of entry and, as such, equal protection of the law.

From a review of the legislative history, it is clear that Sections 364.335, and 364.337 were drafted at different times and for different purposes.

Section 364.335, Fla. Stat., was intended to give the Commission authority to grant certificates of public convenience and necessity to phone companies desiring to provide telecommunications services to the public. The certificating process was altered to be identical with the provisions for the

certificating of water and sewer utilities under the Commission's authority in Chapter 364, Fla. Stat., and then subsequently amended as the need for authority to allow competition demanded a broadening of that authority. It was amended to allow the Commission the latitude to grant certificates to companies for the provision of competitive services in areas that had traditionally been monopolistic. Even with this broadening, the basic requirements of "fitness" of the applicant did not change.

Section 364.337, Fla. Stat., was created in the 1982 Session to allow the Commission to reduce the amount of regulation imposed on utilities providing competitive services. The two statutes are complimentary, each with a public interest test and each with standards to guide the agency in the regulation of telephone companies.

In granting authority to Microtel, the Commission observed the separate requirements of Sections 364.335 and 364.337, Fla. Stat. In the ordering paragraph the Commission stated:

> ORDERED that pursuant to Section 364.335, Fla. Stat. (1982), Microtel, Inc., is hereby granted a Certificate of Public Convenience and Necessity...

Order No. 11095 at 12.

In discussing the application and the new requirements for the reduction in regulatory oversight, the Commission articulated the two things it wanted reviewed in light of the two statutes:

> Specifically, the Commission directed the staff to recommend whether to grant the certificate,

> and to address what conditions and exemptions were appropriate.

Order No. 11095 at 4.

In all subsequent proceedings, the Commission made the same distinction as to the applicability of the two sections.[1] In the MCI Order, the Commission stated:

> As stated previously, under Section 364.337, Florida Statutes, we may prescribe different requirements for telephone companies providing competitive or duplicative services than are otherwise prescribed for telephone companies.

Order No. 12292 at 2.

It further stated:

> Sections 364.335 and 364.337, Florida Statutes, apply in our consideration of MCI's application. Under these statutory provisions, the Commission can exercise its discretion and make a detailed inquiry into the applicant's ability to provide service, the facilities and service area involved, the existence and quality of service from other sources, as well as prescribe for competitive carriers different requirements than are otherwise prescribed for other telephone companies.

Order No. 12292 at 1.

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[1]In the MCI order there is language on page one indicating that the Commission was finding certificating authority in § 364.337, Fla. Stat. (1982). The Commission would contend that this is an error in drafting the order. All subsequent orders contain no such statement. In fact, a close reading of Order 12292 clearly indicates that the Commission observed the distinction between the relevant sections. Counsel believes that he would be remiss to not point out to the Court this inconsistency in the order itself.

In Order No. 12912, granting competitive authority to SBS, the Commission reiterated the statutory distinction and found it consistent with its holding for Microtel.

> Section 364.335 sets forth what an applicant for a certificate must comply with, the procedures we must follow in granting a certificate, and our authority to grant a certificate. Section 364.337 sets forth what we must consider when deciding to prescribe different requirements for a certificated company that is in competition with or that duplicates the services of another telephone company. (footnote omitted).

At 2.

In granting authority to GTE-Sprint to provide competitive service, the Commission again consistently applied the statutes stating:

> Under Section 364.335, Florida Statutes, this Commission can certificate a telephone company that is providing duplicative or competitive intrastate long-distance service if doing so is found to be in the public interest.

Order No. 12913 at 1.

and further

> Under Section 364.337, Florida Statutes, when the Commission grants a certificate to a telephone company providing competitive or duplicative service, we may, if we find it is in the public interest, prescribe different requirements for the company than are otherwise prescribed for telephone companies or exempt the company from some or all of the requirements of Chapter 364, Florida Statutes.

At p. 3.

Finally, in granting the same competitive authority to USTS, the Commission, in Order No. 13015, again stated:

> Section 364.335, Florida Statues, sets forth the requirements with which an applicant for a certificate must comply, the procedures the Commission must follow in granting the certificate and the Commission's authority to grant a certificate. Section 364.337, Florida Statutes, sets forth what the Commission must consider when deciding to prescribe different requirements for a certificated company that is in competition with or that duplicates the service of another telephone company.

At 1 & 2.

In granting authority to Microtel and four other providers of intrastate telecommunications services, the Commission consistently applied its authority. To do otherwise would have been to deny applicants equal protection of the law.

The party challenging the Commission's action on the ground that it is arbitrary must establish by a preponderance of the evidence that the agency abused its discretion. Agrico Chemical Co. v. State, 365 So.2d 759 (Fla. 1st DCA 1979). Microtel has clearly not carried its burden. The Commission employed the standards contained in the statute and lucidly explained the use of those standards in its order. Its decision should not be found to be arbitrary.

POINT III

THE APPELLANT HAS MISCONSTRUED THE PLAIN MEANING OF SECTION 364.345, FLORIDA STATUTES.

Section 364.345, Fla. Stat., states that if a telephone company is granted authority to provide service, it has a reasonable time in which to provide that service or risk losing the authority. The section is intended to give the consuming public protection from companies which are dilatory in the provision of service. The Section provides:

> "If a telephone company fails or refuses to (provide service), the Commission...may amend the certificate to delete the territory not served...or it may revoke the certificate."

Appellant characterizes the statute as a protectionistic statute intended to protect it from the introduction of competition until it can get its service in place and thus obtain a competitive advantage. Microtel is advocating a philosophy of "the first to apply is entitled to be the first to serve." Even under the old truck regulatory statutes, which had their philosophy steeped in restrictions to competition, this "first to apply" idea was specifically rejected. Tamiami Trail Tours, Inc. v. Florida Public Service Commission, 308 So.2d 30 (Fla. 1975).

Clearly Chapter 364 is intended to encourage competition in areas of telecommunications which had traditionally been considered monopolistic. The very foundation of competition is ease of entry (from a regulatory and not necessarily an economic standpoint). To permit a company to have a head start in the provision of a service acts as a clear signal to potential

competitors that there are regulatory obstacles and that the opportunity to compete is restricted. This restriction of an opportunity to compete clearly enures to the benefit of the businesses that were first to receive their authority. As such, the construction of the statute advocated by Microtel works to the competitive advantage of Microtel while restricting the public's choice of options in the provision of intrastate long distance service. Competition is underpinned by consumer awareness and the availability of choice in the market-place. To restrict entry restricts choice. To restrict choice denies potential competitors equal protection of the law and denies the public the ability to maximize its service potential.

Microtel's reliance on Section 364.345, Fla. Stat., is misplaced. Section 364.345, Fla. Stat., was enacted for the protection of the public, not a company providing service such as Microtel.

CONCLUSION

The Commission complied with the requirements of Section 364.335, Fla. Stat., in granting a certificate to MCI, GTE-Sprint, SBS, USTS and Microtel. In addition, the Commission afforded all these interexchange carriers equal protection under the law. It applied the same criteria in determining whether a certificate should be granted and it imposed, pursuant to Section 364.337, the same limited degree of regulation. Therefore, the Commission's orders granting certificates to MCI, GTE-Sprint, SBS, and USTS should be affirmed and Microtel's appeals of these orders should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Brief of Appellee, Florida Public Service Commission, has been furnished by U.S. Mail this 31st day of August, 1984 to the following:

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