BEFORE THE FLORIDA SUPREME COURT

MICROTEL, INC.,

Appellant,

vs. Case No.: 64,801

FILED
SID J. WHITE
MAY 8 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

CHAIRMAN GERALD GUNTER,
COMMISSIONER JOSEPH CRESSE,
COMMISSIONER JOHN MARKS III,
COMMISSION KATIE NICHOLS, and
COMMISSIONER SUSAN LEISNER, as and constituting
the FLORIDA PUBLIC SERVICE COMMISSION,

Appellees.

Reply of Microtel, Inc., Appellant, to Motion to Dismiss Filed by Florida Public Service Commission, Appellee

Microtel, Inc., the Appellant in the above styled proceeding, files this its Reponse to Motion to Dismiss filed herein by the Appellee, Florida Public Service Commission, and would show unto this Court as follows:

1. The Commission predicates its Motion to Dismiss on the grounds that Microtel has no standing to challenge the final orders from which this appeal has been taken. The Commission erroneously under Point No. 1 in its argument seeks to argue the merit of the appeal rather than procedural matters and therefore,

such argument is wholly unproper under the rules of this Court and the decisions of this Court.

2. The second point upon which the motion is predicated is that "Microtel lacks standing to appeal MCI's grant of authority." The appeal in this proceeding is predicated upon an erroneous statutory construction by the Commission towit Section 364.335(4) and Section 364.337(1)(2), Florida Statutes, 1983. Microtel is solely contending on appeal that the statutory construction placed by the Commission under newly enacted statutes in 1982 is erroneous and Microtel, in no way, is contending that the actions of the Commission in some way are solely based on "competition from MCI" as alleged by the Commission in its Motion.

Argument in Support of Response

A review of the cases cited by the Commission for the proposition that Microtel has no standing as an appellant in this proceeding are either based on totally different statutes or not relevant or do not stand for the proposition for which they are cited by the Commission. More specifically in ASI, Inc. vs. FPSC, 334 So2nd 594, FL 1976, this Court was construing the standing of a for-hire permit holder to challenge the issuance of a new for-hire permit by the Commission. This Court properly recognized that the statute then in effect was 323.05(1), Florida Statutes, 1975, which provides that a for hire permit "shall issue as a matter of right and of course when the provisions of this part and that laws of the state touching such motor vehicle operation have been complied with by the applicant." In other words, the statute under which ASI was proceeding clearly mandated that the Commission should issue such permits as a matter of right and accordingly, any existing permit holder would have no standing to challenge that statutory provision. The ASI case clearly has no relevance or reference to the instant proceeding which involves the telephone statutes towit Chapter 364, Florida Statutes 1983.

The next case cited by the Commission for the proposition that Microtel has no standing in this appeal is City of Plant City vs. Mayo, 337 So2nd 966, FL 1976. In that proceeding, the Court was asked to construe whether or not two cities that had

not participated in the proceeding before the Commission had a standing in the Supreme Court to have reviewed the final action of the Commission. This Court held such cities did not have standing to question action of the Commission because the petitions of the two cities were filed with the Commission more than one month after the entry of the final order and six days after the Commission formally denied the reconsideration request of all active intervenors and accordingly, under the Commission's rules such petitions were simply "filed too late to be considered." In the Plant City decision, the Court went on to state as follows:

> "As we view these proceedings, we need not now decide whether the Administrative Procedure Act, due process, neither, or both are abridged when persons not a party to a proceeding in which a major policy change occurs unexpectedly and for purely procedural reasons are denied an opportunity to express their views before the Commission..."

It is clear that the Plant City vs. Mayo decision is not dispositive of the issue of standing now under consideration in the instant appeal.

The third decision cited by the Commission is Daniels vs. Florida Parole & Probation Commission, 401 So2nd 1351, FL App. 1981. The Daniels decision concerned the issue whether or not a prison inmate had the right to an appeal under Chapter 120 from an order of the Parole & Probation Commission establishing a presumptive parole release state which the prisoner claimed was contrary to the statutory parole guidelines. The Court after

discussing the relevant sections of Chapter 120 and the criminal statutes involved held that the prisoner had standing even though the Probation & Parole Commission was not specifically recognized as an agency under Chapter 120 and further pointed out to the Parole Commission that an administrative proceeding can be construed as a legal proceeding as defined in Webster's dictionary, as was the proceeding in the instant case.

The final case cited by the Commission allegedly supporting Microtel's lack of standing to appeal in the instant case is Shared Services vs. State Dept. of Health. 426 So2nd 56, Fl App. 1983. That decision involved an applicant competitor in the field of air ambulance service and whether it lacked standing to obtain a formal hearing on a competing application for licensurer to operate an air ambulance service and certification as an advance life support provider solely on the basis of competition. The Court very carefully pointed out the distinctions made in the statutes involved in the shared services field and specifically called the attention of the parties to the fact not only was Chapter 120 involved, but Chapter 401 that pertains to health and rehabilative services function in granting licenses as being purely ministerial in that particular field of competing medical shared services. Such decision in no way stands for a proposition as to standing under Chapter 364, Florida Statutes, which is involved in the instant appeal.

While Microtel does not desire in any way to argue the merits of this appeal in the Response to a Motion to Dismiss,

suffice is to say that what is clearly involved here is the failure of the Commission to properly follow Section 364.337 and the specific criteria that the statute requires the Commission to follow in granting a telephone certificate under 364.335 in determining whether the grant is in the "public interest." If the Commission is correct in its Motion to Dismiss, there would be no way for a party that has been properly been granted the right to intervene and timely participated in a Chapter 120 proceeding to ever seek judicial review of erroneous Commission action in statutory construction.

It is significant to note that the jurisdiction of the Supreme Court has set forth in Article V, Section 3(b)(2) provides "that the Supreme Court when provided by general law, shall hear appeals and shall review action of 'statewide agencies' relating to rates and services of utilities providing electric, gas, or telephone services." (emphasis added)

Section 364.381, Florida Statutes, 1980 provides as to judicial review as follows:

> "As authorized by Section 3(b)(2), Article V of the State Constitution, the Supreme Court, shall review, upon petition, any action of the Commission relating to rates or service of telephone companies." (emphasis supplied)

Rule 9.030(a)(1)(B)(ii) F.A.R. provides as to the appeal jurisdiction of this Court that it shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

Section 364.38, Florida Statutes, 1982, is entitled "Certificate of Necessity Prerequisite to Construction, Operation, or Control of Telephone Line, Plant, or System." That section of the statute provides as follows:

> "No person shall hereafter begin the construction or operation of any telephone line, plant, or system, or any extension thereof, or acquire ownership or control thereof, in whatever manner, including the acquisition, transfer, or assignment of majority organizational control or controlling stock ownership, without first obtaining from the Commission <u>a certificate that the present or future public convenience necessity require or will require such construction, operation, or acquisition..."</u> (emphasis supplied)

This statute was in effect throughout the proceedings before the Commission concerning the MCI application with the exception that in 1983, the additional phrase was inserted as follows:

> "...in whatever manner including the acquisition, transfer, or assignment of majority organizational control, or controlling stock ownership..."

MCI held no authority from the Public Service Commission prior to the instant proceeding. At the time of the application of MCI, Microtel was the only certificated interexchange telephone company in the state of Florida. Section 364.335 contains the requirements of the application for a certificate and in subparagraph (4) appears the sentence "the Commission may grant a certificate, in whole or in part, or with modifications <u>in the public interest, but in no event granting authority</u>

greater than that requested in the application or amendments thereto and noticed under subsection (1); or it may deny a certificate..."

The next section of the statute is 364.337 which is entitled "Duplicative or Competitive Services." Subparagraph (1) of that section states:

> "When the Commission grants a certificate to a telephone company or 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:" (emphasis added)

The statute goes on to state what the Commission may do if it has found that the granting of the certificate is in the public interest. It is significant to note that the word "such" in Section 364.337 refers back to the granting of the certificate and specifically states that if it finds that "such" action is consistent with the public interest may go and do certain things. Webster's Dictionary defines "such" as meaning of the kind mentioned previously. Microtel is contending on this appeal that the Commission neglected to follow the mandantory requirements in determining whether the actions are consistent with the public interest that are set forth in Subparagraph (2) of Section 364.337. The Commission, on the other hand, is contending that it need not consider any criteria in granting a certificate of public convenience and necessity and can grant such certificates either with or without a hearing and based solely on company

presentation. Microtel contends that such construction by the Florida Commission of Chapter 364 is unconstitutional and denies due process of law to existing certificate holders such as Microtel and to the public of the state of Florida. The very reason that the Legislature put the mandantory considerations in Subparagraph (2) of Section 364.337 was to limit and provide legislative guidelines to the Commission in what it had to consider in granting a certificate in the first instance.

The Commission's own rule 25.404 entitled "Certificates of Public Convenience & Necessity" provides as follows:

> "Except as provided in Chapter 364, Florida Statutes, no person shall begin the construction or operation of any telephone line, plant, or system or an extension thereof or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Florida Public Service Commission a certificate that the present or future convenience and necessity require or will require such construction, operation, or acquisition." (emphasis added)

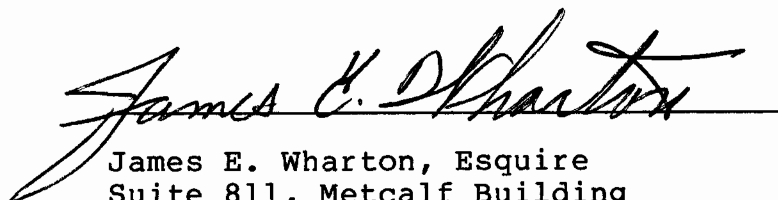
A similar situation was presented in Gadsen State Bank vs. Lewis, 348 So2nd 343, Fl. App. 1977, wherein the First District in observing that the Department of Banking had a similar rule concerning certificate of public convenience and necessity before opening a branch bank, held that agencies must honor their own substantive of rules until they are amended or abrogated and of course, must observe the statutes governing such agency; and that, in fact, in the absence of a statute, the agency's own rule would constitute the effect of refining the

statutory standard of public convenience and necessity before granting additional certificates for branch banking. In the instant situation, the statute prescribes a statutory procedure and standards that must be adhered to and the Florida Commission's rules contain identical language. Accordingly, Microtel clearly had standing as an existing certificate holder before the Commission and clearly has standing to appeal the action of the Commission in failing to follow the statute and its own rules.

The position of Microtel as an existing certificated interexchange carrier is that as a party throughout the proceeding before the Commission below and having submitted briefs on the legal issues must follow the above constitutional rules and statutory provision pertaining to appellate review of an order of the Commission construing statutes pertaining to telephone services. There is no other judicial remedy available to Microtel at this time. Microtel is not contending on this appeal that its standing is simply because there might be some economical detriment to Microtel by the grant to MCI of a certificate. The primary position of Microtel on this appeal is that the Commission has not followed the mandantory statutory requirements of Chapter 364 pertaining to telephone services and this Court offers the only appropriate and proper forum for such a challenge to be made by judicial review to afford full

remedy of due process of law to Microtel under the afore cited authorities.

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished to the following parties of record on this 7th day of May, 1984:

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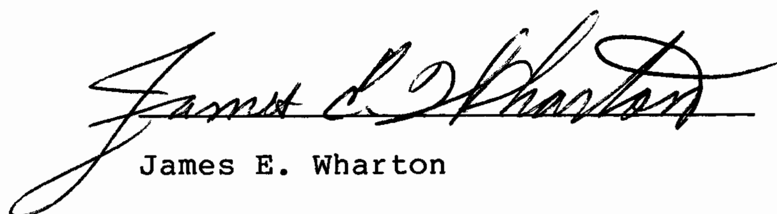

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