IN THE SUPREME COURT OF FLORIDA

MICROTEL, INC., Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION and GTE SPRINT COMMUNICATIONS CORPORATION, Appellees.	CASE NOS. ~~65,307~~ 64,801 65,351 65,449 (Consolidated)

ANSWER BRIEF OF GTE SPRINT COMMUNICATIONS CORPORATION

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DESIGNATION OF PARTIES AND ABBREVIATIONS

In this Brief, the following designations and abbreviations are used:

Appellant Microtel, Inc., is referred to as "Microtel."

Appellee The Florida Public Service Commission is referred to by full name or as the "Commission."

Appellee GTE Sprint Communications Systems is referred to by full name, or as "GTE Sprint," or simply "Sprint."

Appellee MCI Telecommunications Corporation is referred to as "MCI."

Appellee Satellite Business Systems is referred to as "SBS."

Appellee United States Transmission Systems is referred to as "USTS."

Appellees Sprint, MCI, SBS, and USTS are collectively referred to as "Appellees."

The grant of a certificate under Section 364.335, Fla. Stat. to a telephone company which will be in competition with, or which will duplicate the services of another long distance telephone company will be referred to as the "grant of competitive authority." Similarly, the authority received under such a grant will be referred to as "competitive authority," and the recipient of a grant of competitive authority will be referred to as a "competitive carrier."

The record below is referenced by "R. _____," and the transcript of Sprint's hearing below is referenced as "Tr. _____".

INTRODUCTION TO BRIEF

In 1982, the Legislature changed Chapter 364, Florida Statutes, to allow competition in intrastate long distance telephone service. After becoming the first telephone company in Florida to receive a grant of competitive authority under this revision, Microtel has fought the grant of competitive authority to each of the four subsequent long distance companies that have sought it. Microtel's one true purpose in this fight has been to delay, for its own financial self interest, head to head competition in the market place. Every argument advanced by Microtel to the Commission in each of these proceedings was to this end. Microtel was desperate to ensure itself an unchallengable piece of the intrastate long distance market before it had to compete with Appellees or any other competitive carrier.

This is not to say that Microtel has been disingenious as to its true purpose. On the contrary, with refreshing candor Microtel identifies its purpose in Point III of its Initial Brief. In so doing, Microtel advances the theory that the Legislature intended in the 1982 revision of Chapter 364 to protect the first recipient of competitive authority from successive grants of such authority until the first recipient is comfortably ensconced in the markets of its choice.

As a result of Microtel's theory, what appears to be four successive appeals from four successive grants of competitive authority is actually a single-minded attack on the Commission's interpretation and implementation of the revised statute. Thus,

the Court's review of the instant grants of competitive authority must be undertaken in light of the legislative history of Chapter 364, and the Commission's implementation of the 1982 legislative changes to introduce competition into intrastate long distance telephone service. This implementation follows the classic agency paradigm of developing incipient policy through adjudication, while moving towards the statement of generally applicable policy through rules.

A review of the 1982 changes and of the Commission's implementation of those changes will establish that Microtel advances an aberrant view of the law, and that the Commission's approach is sound. Further, a review of the respective records in each appellee's case will show that the Commission's application of its approach was based on competent substantial evidence and comported with the essential requirements of law. This review will also establish that Microtel's fight for protection from competition was not for the public interest, but for private interest, and that these appeals are due not to the Commission's misapprehension of the law, but to Microtel's fear of competition. Finally, this review will establish that at stake in this consolidated appeal are not the rights of Microtel, but the orderly and reasoned introduction of competitive long distance telephone service within Florida.

STATEMENT OF THE CASE

Appellee GTE Sprint does not accept Appellant Microtel's statement of the case as it omits needed procedural history, and mischaracterizes Commission Order No. 12913, (Appendix A) which reflects the grant of competitive authority to GTE Sprint, and Commission Order No. 13237, which denies Microtel's Petition for Reconsideration.

On March 14, 1983, Sprint, formerly known as Southern Pacific Communications Company, filed with the Commission an application for a Certificate of Public Convenience and Necessity to provide interexchange communications common carrier services by use of microwave, fiber optics and other means, which include resale of WATS and MTS, within the State of Florida. (R.333) Sprint later requested that the WATS and MTS resale portion of its application be treated separately. In response, the Commission granted authority to Sprint to resell WATS and MTS services within the State of Florida by Order No. 12391, issued August 19, 1983. Sprint's application to operate as an interexchange common carrier or competitive carrier was set for hearing to be held on December 16, 1983.

During the pendency of Sprint's application certain parties intervened: General Telephone Company of Florida ("General"), Microtel, AT&T Communications of the Southern States ("AT&T"), and Southern Bell Telephone and Telegraph Company ("Southern Bell"). General withdrew from the proceeding because its concerns

about compensation from competitive carriers for access to its local facilities had been addressed in a generic docket.[1] Microtel and AT&T participated in the hearing; Southern Bell did not.

In the nine months between Sprint's initial application and the hearing, Sprint responded to numerous information requests of the Commission staff as the Commission evaluated Sprint's application for competitive authority. The prehearing conference for this application was held on December 9, 1983, before Commissioner Joseph P. Cresse as Prehearing officer. The prehearing order was issued on December 9, 1983. (R.742)

The only material issue of fact in dispute according to Microtel was whether Sprint's proposed system constituted wasteful duplication.[2] Raising a policy issue, Microtel argued that a grant of authority to Sprint would not be in the public interest. As a legal issue, Microtel stated that the proper interpretation of Chapter 364 Florida Statutes required a quantum of proof in support of Sprint's application not found in Sprint's prefiled testimony, and that could not be provided by Sprint absent public witnesses. As another legal issue, Microtel argued that the criteria in section 364.337(2) Fla. Stat. must be addressed in the decision to grant authority to Sprint under section 364.335, Fla. Stat. and that the Commisison must make particular findings with respect to each. Notwithstanding this position (and despite requests from Sprint), Microtel failed to identify any facts

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[1]Docket No. 820537-TP (Access Charges).
[2]Sprint never acquiesced in that issue of fact being material.

underlying these criteria as being in dispute. Indeed, by their very nature, the facts necessary to consider these criteria are either readily identifiable or not susceptible to proof. As a result, going into the hearing, there was alleged only one basic issue of material fact in dispute: Microtel's issue of wasteful duplication. The remaining issues were issues of law and policy.

The hearing was held on December 16, 1983. Witnesses on behalf of Sprint provided testimonial evidence in support of its application. This evidence related, inter alia, to the following:

(1) Sprints' financial and technical capability to operate as a competitive company;

(2) Sprint's interstate and intrastate network;

(3) The nature of Sprint's service offerings and the rates charged for those offerings;

(4) Whether a grant of authority to Sprint would be in the public interest;

(5) The benefits of competitive long distance service which Sprint will bring to the public;

(6) The number of firms providing telephone service in Florida;

(7) The geographic availability of the service from other firms;

(8) The quality of service available from other alternative suppliers;

(9) The effect on telephone service rates charged to customers of other companies; and

(10) The notion of "wasteful duplication" as it relates to a competitive, deregulated system as opposed to a monopolistic, regulated system.

In short, the hearing was a full evidentiary hearing on Sprint's application. At the end of the hearing, after closing argument by counsel, the Commission voted first, under section 364.335, to grant Sprint authority to operate as a competitive carrier, and next under section 364.337, to exempt Sprint from certain rules and regulations pertaining to fully regulated, local exchange companies.

The Commission issued Order No. 12913 on January 20, 1984, consummating its decision. Order No. 12913 fully explains the Commission's decision to grant Sprint competitive authority, and addresses Microtel's objection to that grant.

On February 3, 1984, Microtel filed a Petition for Reconsideration and Request for Oral Argument. (R.783) On April 26, 1984 the Commission issued Order No. 13237, denying Microtel's Petition for Reconsideration. (R.819)

Microtel filed its notice of appeal in this proceeding on May 23, 1984. (R.821) As the Court is aware, the Commission moved on June 11, 1984 to consolidate this proceeding with Microtel's appeal of the grant of competitive authority to the other Appellees in this case. This motion was granted by the Court.

STATEMENT OF THE FACTS

In neither its Initial Brief nor it Supplemental Brief, does Microtel provide a statement of facts particular to the grant of competitive authority to GTE Sprint. For such a statement, the Court is respectfully referred to Order No. 12913, which fully sets out Sprint's qualifications to operate as a competitive carrier and other factors justifying the grant of competitive authority to it. Also missing from Microtel's briefs is an adequate statement of the legislative and regulatory history behind Florida's move toward competition in the provision of long distance telephone service. This information is necessary to the Court's review of the statutory provisions and the Commission's implementing decisions in these proceedings, and is provided below.

A. Legislative History: In 1982 the Legislature made the Fundamental Decision to Establish Competition in the Provision of Intrastate Long Distance Telephone Service.

Profound changes have been made to the Public Service Commission's regulatory authority during the last five years. Some of the changes come from an economic reconsideration of the basis for regulating certain industries, such as trucking, while other changes have been spawned by technology. We are expericiencing a watershed in this state's regulatory history.

For the most part, the American economy is based on competition in the market place. Thus, businesses compete to provide goods and services demanded by the consuming public. In most situations, this leads to lower prices for higher quality goods and services,

and efficient allocation of resources throughout the economy.

Since the 19th Century, however, certain types of businesses have been viewed as natural monopolies, and thus not appropriate for competition. Typically, businesses viewed as natural monopolies were capital intensive and experienced economies of scale as they expanded. As a result, once such a business was established, it was effectively insulated from competition. Moreover, if the business offered services necessary to society, such as electrical power or telephone service, it could charge monopoloy prices without suffering self-defeating decreases in demand. As a result, such natural monopolies were viewed as affected with the public interest and subject to tight economic regulation as a surrogate for competition.

Economic regulation of these industries at the state level has typically been vested in public utility commissions ("PUC's"). Moreover, state PUC's have typically administered what is called "rate base regulation," or less favorably, "cost plus" regulation. In rate base regulation, a utility is allowed to charge for its services rates designed to allow the utility to recover operation and maintenance expenses and to give the utility the opportunity to achieve an authorized rate of return on rate base, i.e., the plant used and useful in utility service. An integral part of rate base regulation is the utility's status as a monopoly provides in its service area. Thus, there are erected barriers to the entry of competitive, alternative suppliers of the service. In exchange for this protected status, the

utility accepts the obligation to provide service to everyone within its territory on a reasonable and nondiscriminatory basis, and subjects itself to rate base regulation by the PUC.

In Florida, the State PUC is called the Florida Public Service Commission, and it, of course, has been charged with the responsibility of economically regulating natural monopoly businesses in the State. These businesses, at various times, have included electric and gas utilities, telephone companies, water and sewer companies, railroads, the motor carrier industry, radio common carriers, and even intrastate air carriers. In 1980 the Commission's regulatory authority over these industries was subjected to its first full sunset review.[3] After the smoke had cleared, several of the above industries were completely deregulated through sunset: the motor carrier radio common carrier, and intrastate airline industies. This deregulation reflected, in varying degrees, the legislative view that the old natural monopoly, full economic regulation of these industries was no longer appropriate.

The intrastate telephone industry was not deregulated, of course. In fact, under the 1980 revisions to Chapter 364 entry requirements were tightened rather than loosened. The

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[3]Section 11.61(4), Fla. Stat. (1979) (Originally enacted in 1976, 1976 Fla. Laws ch. 76-167, and amended by 1977 Fla. Laws ch. 77-45). "Sunset" is a term of art identifying the process through which existing legislation is terminated by its own specified term of operation unless it is reenacted.

1979 "pre-sunset" version of Chapter 364 provided in Section 364.35 as follows:

> (2) The Commission shall not grant a certificate for a proposed plant, line, or system, or extension thereof, which will be in competition with or duplication of any other plant, line, or system, unless it shall first determine that the existing facilities are inadequte to meet the reasonable needs of the public, or that the person operating the same is unable to or refuses or neglects to provide reasonably adequate service.

During the course of the Sunset review, Chapter 364 was revised with respect to the granting of authority.[4] Specifically, Section 364.335, Fla. Stat. (1981), was created, replacing Section 364.35, Fla. Stat. (1979). Subsection (4) of that section provided as follows:

> (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, which will be in competition with, or which will duplicate the 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.

The revised language in the above provision apparently raised

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[4]This change was part of an overall effort to bring consistency to the language in the several chapters that grant the Commission certification authority in the several industry areas.

the threshold for certifying a new entrant to operate as a telephone company in Florida by requiring that existing certificates be amended "to remove the basis for the competition or duplication."

In contrast, during the 1982 legislative session the Commission supported legislation that would permit the granting of competitive authority. On March 18, 1982, the Governor signed into law Senate Bill 868, which limited the applicability of the restrictive entry provisions contained in Section 364.335 to "local exchange service." In addition, that bill created a new Section 364.337, which provides as follows:

> (1) When the Commisison 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 commisison, 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 requirements 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) 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.

B. Regulatory History: The Commission Has Consistently and Appropriately Applied the 1982 Changes to Chapter 364 Allowing Competition in Long Distance Service.

Microtel was the first long distance telephone company to receive competitive authority under these new provisions. As noted in Order No. 11095,[5] issued August 23, 1982, granting Microtel competitive authority, Microtel applied for authority under the 1979 Chapter, while the hearing was held after the 1980 revisions to Chapter 364. During this period the Commission became convinced that it needed the flexibility to depart from the traditional strict entry and rate base regulation of telephone companies. The Commission did not know exactly how it should respond to applications such as Microtel's, but it did know that because of technological advances in telephony it would be presented with similar requests for the provision of both long distance and local service. The Commission brought this problem to the attention of the Legislature by sponsoring a bill in the 1982 Legislative Session that would revise its authority under Chapter 364. The Legislature responded by enacting the previously identified 1982 revisions to Chapter 364. Thus Microtel was not only the first company to receive authority under these changes, but also in some sense the reason the chapter was changed.

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[5]A copy of Order No. 11095 may be found in the appendix to Microtel's Initial Brief, beginning on page 29 of the brief.

There are two important aspects of Microtel's grant that the Court should note. First, although Microtel received its grant under the 1982 version of chapter 364, the hearing was held under the old versions where Microtel had to prove inadequacy of service. Such hearings were novel in the telephone industry, but were commonplace in the trucking industry. There had developed a body of law in granting trucking certificates that the applicant had to prove that existing service was inadequate and that existing carriers were unable to provide the new service.
In addition, under this body of law, the Commission could not grant certificates unless "public witnesses" testified in support of the application. Microtel approached the hearing on its application as though it were in a trucking case.

The next important aspect of Microtel's hearing is that it was a case of first impression for the Commission. Dealing in understatement, the application generated interest within the Commission and among existing telephone companies. Thus, the Commission conducted an exhaustive hearing not only on Microtel's application, but also on policy issues involved in letting competition into long distance telephone service.

The final order awarding Microtel competitive authority reflects both of the above aspects of its case. First, it reflects that Microtel did put on a case to prove inadequacy of service and its fitness to remedy that inadequacy. Next, it reflects an agency attempting to formulate incipient ground rules for moving toward the competitive provision of long distance telephone

service within Florida. These incipient ground rules would be tested and refined in the hearing on the applications of the Appellees.

The first company to file an application after the Microtel order was MCI. MCI's hearing was held in March of 1983. A review of the record in that proceeding will demonstrate that MCI successfully proved its fitness to operate as a competitive intrastate carrier, that competition in long distance would be good for the public, and that it should be exempted from regulations pertaining to local service, as had Microtel. Missing from the hearing were "public witnesses" because, the "trucking approach," i.e. the restrictive approach to entry, was not applicable. The MCI order[6] reflects a careful consideration of the issues involved in new entry, of MCI's fitness to serve as a competitive carrier, and the need for equality of treatment among competitors in the long distance market. Also reflected is a careful balancing between the private entrepreneurial interests of the applicant and the public, social interests of telephone subscribers. Significantly, in format and in basic approach, MCI's order reflects the refinement and reapplication of the approach forged in the Microtel proceeding and order.

The next applicant for intrastate long distance authority was GTE Sprint. As already noted in this Brief's Statement

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[6]Order No. 12292, which may be found at page 45 of Microtel's Initial Brief, as an appendix.

of the Case, the December 1983 hearing on Sprint's application was held after 9 months of intensive staff review. This was also some 16 months after the Microtel order, during which time the Commission not only handled the MCI case, but processed more than two dozen applications for intrastate resale authority.

After having conducted the Microtel, MCI and Sprint case, the Commission apparently began to feel comfortable with its administrative implementation of the legislative and regulatory framework for competition in long distance telephone service. Thus, when SBS and USTS subsequently applied for authority to be competitive long distance carriers, the Commission used its more streamlined Proposed Agency Action proceedure to process requests. The Proposed Agency Action in both applications became final agency action, and accorded these two companies the same treatment provided Microtel.

Recently, the Commission staff has set out to place this refined incipient policy in rules. In August of 1984, the staff presented to the Commission, at a noticed public conference, a recommendation to propose rules governing competitive carriers. The Commission has set the staff's recommendation for a workshop to receive the comments of local and long distance telephone companies, the Public Counsel, and others before formally proposing the adoption of rules.

Thus, a review of the statutory and regulatory history of Chapter 364 shows that the Legislature repudiated the old "trucking" approach in favor of allowing competition into long

distance telephone service. At the same time, the Legislature gave the Commission authority to treat competitive services and providers under a more flexible regulatory approach. This review further shows that in applying the new legislative approach, the Commission proceeded deliberatively to establish a fair, consistent, and rational regulatory treatment that appropriately balances public and private interests.

ISSUES PRESENTED

I. IS THE COMMISSION'S INTERPRETATION OF SECTION 364.335 AND 364.337 CORRECT, OR DOES IT RESULT IN AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER TO THE COMMISSION?

II. DOES CHAPTER 364 OFFER MICROTEL A HAVEN FROM COMPETITION?

III. IS THE COMMISSION'S GRANT OF COMPETITIVE AUTHORITY TO SPRINT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD?

ARGUMENT

Introduction

In its briefs, Microtel makes essentially three arguments. First, it claims that, in granting the appellees authority under section 364.335, the Commission erred in not applying certain criteria found in section 364.337(2). According to Microtel, without the help of these criteria section 364.335 is unconstitutional. Next, Microtel argues that the Commission erred in not recognizing that Chapter 364 guaranteed it a headstart against its competitors in the provision of long distance telephone service. And third, Microtel claims that the Commission erred by not imposing certain burdens of proof on the applicants, as formerly done in trucking hearings.

As noted earlier in the Introduction to Argument, each of these arguments serve Microtel's true purpose of insulating itself from competition and as further explained below they are without merit because they fail to recognize that the 1982 changes to Chapter 364 were made to promote competition, not stifle it.

POINT I. THE COMMISSION'S INTERPRETATION OF SECTIONS 364.335 AND 364.337 IS CORRECT AND THAT INTERPRETATION DOES NOT RESULT IN AN UNCONSTITUTIONAL DELEGATION OF LEGLSIATIVE POWER TO THE COMMISSION.

A. The criteria contained in Section 364.337(2) do not apply to the grant of authority under Section 364.335.

The gravamen of Microtel's legal challenge to the Commission's decision to grant the Appellees competitive authority is that

the Commission misapplied Section 364.335 and Section 364.337(2). Specifically, Microtel argues that in granting competitive authority under Section 364.335 the Commission must apply the criteria found in Section 364.337(2), which relate to relaxing regulation of competitive carriers. Microtel's view, however, conflicts with the plain meaning of those sections, as reflected both in the wording and structure of the statutes. The legal basis of Microtel's appeal thus joins it social basis in being without merit.

In Sections 364.335 and 364.337, the Legislature has created a two step process under which the Commission may first grant competitive authority, and then relax the degree of regulation of the new competitive entrant. The first step, the grant of competitive authority, is authorized under Section 364.335. The second step, the relaxation of the regulation of the competitive company, is authorized in a physically separate section of the chapter. If in fact the legislature had not contemplated separate steps, it would have placed the criteria of section 364.337(2) within section 364.335, or at least have placed an unambiguous signal in either section that they were to be read in para materia. But they were not placed under the same section, and there was no such signal. To repeat some legislative history, in 1982 Section 364.335(4) was amended and section 364.337 was created in the same bill. Thus, the Legislature had ample opportunity to use Microtel's suggested approach. Given the Legislature's failure to do so, one can only infer that the legislative intent

is that they be read as written, i.e., as two self contained sections.

Microtel appears to be alone in its misreading of the statue. For example, when the 1982 revisions to Chapter 364 were in bill form, the Senate Staff analysis reflected the clear separation. According to the Senate Staff, among other things the bill would:

> * * *
>
> Permit the PSC to grant certificates to companies which will allow them to be in competition with other companies, except for local exchange services;
>
> Provide that the requirements set out in Chapter 364, F.S., 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 B)

Nor has the Commission in memoralizing the grants of competitive authority and the relaxation of their regulation blurred these two steps. Specifically, each of the orders in this proceeding reflect first the decision to grant competitive authority, and then next the decision to exempt these competitive carriers from certain regulations pertaining to local, natural monopoly telephone companies. Moreover, the grant of competitive authority is finally encapsulated in the issuance of a certificate of authority. That certificate does not on its face reflect any special treatment of the competitive carrier, only the grant of authority. The certificate does give notice, however, that the exercise of that grant is subject to certain conditions

and terms as reflected in Commission orders, which orders are identified by number on the face of the certificate. Thus, if some restriction or relaxation of the operations of the company is later effected, it can be handled through normal procedures under Section 120.57, Fla. Stat., without having to go through a recertification proceeding, as used to be done in trucking regulation.

In sum, the Commission's application of the two separate sections perfectly reflects the legislative intent, while Microtel's forced interpretation ignores the plain meaning of the statute. Microtel attempts to bridge this gulf between its interpretation and the plain meaning of the statute by arguing that without the Section 364.337(2) criteria, Section 364.355 is unconstitutional. As discussed below, this argument is also without merit.

B. STANDING ON ITS OWN, SECTION 364.335 CONTAINS ADEQUATE STANDARDS TO GUIDE THE COMMISSION IN GRANTING COMPETITIVE LONG DISTANCE AUTHORITY, AND THUS IS NOT AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

As noted above, Microtel argues that Section 364.337(2) criteria must be applied in the grant of competitive authority under Section 364.335. According to Microtel, unless these sections are read in para materia, Section 364.335 is an unconstitutional delegation of legislative power to the Commission because it is "overly vague" and because it gives to the Commission "unbridled" discretion. Microtel's argument is based on a misapprehension of the Florida Constitution, and is unsupported in the case law. Standing on its own, section 364.335 contains adequate standards to guide the Commission in granting competitive

authority.

The doctrine of nondelegation of legislative power stems from Article II, Section 3 of the Florida Constitution, which prohibits members of one branch of government from exercising powers appertaining to another branch. Thus, the doctrine of nondelegation of legislative power is "firmly embedded in our law." Askew v. Cross Key Waterways, 372 So.2d 913, 924 (Fla. 1978). Moreover, there is a wealth of case law explaining its proper application.

The doctrine of nondelegation of legislative power is, in effect, a prohibition against the Legislature delegating to agencies the power to say what the law shall be. See, e.g., State v. Atlantic Coast Line. R. Co., 47 So. 969 (Fla. 1908). The test is whether the Legislature has laid down adequate standards which guide the Commission in the execution of the law. Lewis v. Bank of Pasco County, 346 So.2d 53 (Fla. 1976); Delta Truck Brokers, Inc. v. King, 142 So.2d 273 (Fla. 1962). Or, as more recently stated by this Court:

> (T)he crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature's intent.

Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815, 819 (Fla. 1983).

This Court has applied this test to a number of statutory provisions analagous to Section 364.335, and has found these

provisions to be perfectly constitutional. In these cases the Court recognizes that, particularly in the areas of licensure and regulatory legislation, "sufficient" and "adequate" standards or guidelines may not mean "detailed" or "specific." Practicality often demands the use of general standards. See e.g., Dickinson v. State, 227 So.2d 36 (Fla. 1969). As this Court has explained:

> [O]ur Constitution does not deny to the Legislature necessary resources of flexibility and practicality, and when a general approach is required, judicial scrutiny ought to be accompanied by recognition and appreciation of the need for flexibility." State, Department of Citrus v. Griffin, 239 So.2d 577, 581 (Fla. 1970).

Thus, in Bigler v. Department of Banking and Finance, 394 So.2d 989 (Fla. 1981), this Court approved a statute which did not detail the guidelines for its application, but which did request the Department to make specific inquiries before it granted or refused a bank application. These inquiries "delineated the scope and subject matter of the Department's investigation," and thus insured that the Department "implements the law rather than makes it." id. at 991.

Similarly, in Gainesville - Alachua County Regional Electric, Water and Sewer Utilities Board v. Clay Electric Cooperative, Inc., 340 So.2d 1159 (Fla. 1977), the Court upheld Section 366.04, Fla. Stat., which delegates to the Commission the authority to resolve territorial disputes. That provision set as the legislative purpose the "avoidance of uneconomic duplication" in natural monoply electric power, and the statute suggested certain criteria the Commission might consider in resolving

these disputes. This Court upheld the statute's combination of intent and guidelines as a lawful delegation of power. See also, Coca-Cola Co., Food Dis. v. State, Department of Citrus, 406 So.2d 1079 (Fla. 1982).

The District Courts of Appeal have also applied this Court's test to statutes analogous to Section 364.335 and found them valid. For example, in Albrecht v. Department of Environmental Regulation, 353 So.2d 883 (Fla. 1st DCA 1977), cert denied, 359 So.2d 1210 (Fla. 1978), the DER was authorized to grant land fill permits based on whether the proposed project would interfere with the conservation of wildlife or natural resources "to such an extent as to be contrary to the public interest." The First District Court held that this was an adequate standard and that no unlawful delegation had occured. In part, the Court based its decision on the inclusion in the statute of procedural guidelines. The Court's treatment of these guidelines is instructive:

> By requiring the preparation of studies and surveys the legislature recognized that determination of each application for a fill permit involves complicated decisions which cannot intelligently be guided by specific or quantitative statutory standards. The legislature chose therefore to direct DER's attention to several areas of inquiry in the exercise of its sound and reviewable discretion to grant or deny permits. Id. at 886.

See also, Solimena v. State, Dept. of Business Regulation, 402 So.2d 1240 (Fla. 3d DCA 1981).

Although these and other such cases address different statutes and each statute must be reviewed in light of its own

characteristics, a common thread runs through them all. First, this Court recognizes that in certain areas of police power legislation the Legislature must be accorded the flexibility to be practical. The Court will not overturn a statute unless it finds no meaningful standard by which to review the agency's exercise of the delegated authority to ensure that the legislative purpose is being fulfilled. Next, the standard the Court needs to perform its review may be supplied by (1) a legislatively determined definition of the statute's purpose, and (2) legislatively determined criteria which the agency and the Court may use to determine whether the statutory purpose is being fulfilled.

In the instant case, as in Bigler and Albrecht, for example, the legislative purpose is expressed in terms of making licensing decisions in the "public interest." Thus, in this case, as in Bigler and Albrecht, there must be first some legislatively determined definition of the "public interest", and second, some legislatively determined criteria to reference in determining whether the Commission's actions are serving that definition of the public interest.

To understand what the lawmakers meant by "public interest" in this case, one must first look to the legislative history of Section 364.335. As noted in the Statement of Facts, before 1982 subsection (4) read in relevant part as follows:

> 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 service 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 company to remove the basis for competition or duplication of service.

Thus, when the subsection was in this form, the Commission could grant a certificate "in the public interest" only if there was a showing of inadequate service. To serve the public interest meant to prohibit competitive local and long distance telephone service. This was the intent of the legislation.

As also noted earlier, in 1982 the above subsection was amended as follows:

> 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...

By this change the Legislature now permits competition and duplication in the intrastate telephone market, except for local exchange services. The legislative intent has shifted, and thus the definition of public interest has changed in favor of long distance competition.

This intent informs and shapes the "public interest" standard. Where this standard formerly guided the Comission to prohibit competition because end to end service was a natural monopoly, consideration of the public interest in light of new technology now points the Commission toward establishing a competitive long distance segment of the industry. Thus the phrase "in the public interest" derives meaning from the intent of the

legislation. For long distance service, "public interest" means bringing to the people of Florida the benefits of competition. The first requirement of an adequate standard is thus satisfied by Section 364.335.

The second requirement of an adequate standard, i.e. legislatively determined criteria, is satisfied as well. Section 364.335 spells out specific criteria to help the Commission in making a public interest determination. Subsection (1) reads in relevant part:

> (1) Each applicant for a certificate shall: (a) Provide all information required by rule or order of the Commission, which may include a detailed inquiry into the ability of the applicant to provide service, a detailed inquiry into the territory and facilities involved, and a detailed inquiry into the existence of service from other sources within geographical proximity to the territory applied for.

Here as in Bigler, the Leigslature has focused the Commission's attention on specific lines of inquiry. Moreover, in Sprint's application as well as in the applicaitons of the other Appellees, these criteria were expressly considered as the Commission performed a thorough review of the requests for competitive authority.

The Legislature's approach in section 364.335 is thus consistent with its approach in Bigler, Albrecht, et al., and the Commission's execution of authority under the statute was procedurally and substantively faithful to that approach. Section 364.335 standing alone is not an unconstitutional delegation of legislative power.

In support of its contention that section 364.335 is an unconstitutional delegation of legislative power, Microtel relies

primarily on the following cases: Delta Truck Brokers, supra., Conner v. Joe Hatton, 216 So.2d 209 (Fla. 1968), Dickinson, supra., Lewis, supra., and High Ridge Management Corp. v. State, 354 So.2d 377 (Fla. 1977). None of these cases, however, actually support the proposition for which they are advanced.

The Delta Truck Brokers case dealt with the Commission's[7] authority to cancel, modify, or refuse to transfer the license of a truck broker. The challenged statute provided as follows:

> The Commission may reasonably alter, restrict or modify the terms and provisions of any such license or impose restrictions on such transfer where the public interest may be best served thereby.

The Court declared this statute void as being overly broad. There are, however, three aspects of this case that Microtel overlooks. First the Delta statute contained absolutely no standards for its implementation unlike Section 364.335 in the instant case. Next, the Delta statute involved the Commission's authority to modify or impose restrictions on the transfer of an existing licenses not the authority to grant licenses. In this important respect, it also differs from Section 364.335, which deals with the grant of competitive authority. If Delta statute is similar to any statutory provision in the instant case, it is Section 364.337, which authorizes the Commission to modify the parameters of operating authority previously granted to a competitive carrier. But Section 364.337(2) contains the

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[7]At the time the Commission was named the "Florida Railroad and Utilities Commission."

very criteria the Delta statute lacked. The thirdaspect of the case overlooked by Microtel is that the Court, in a per curiam opinion on rehearing, took great pains to stress that the unconstitutionality of the Delta statute did not suggest that the section governing grants of authority within the same chapter were also unconstitutional. Instead, each section must be considered in the context of its application. 142 So.2d at 276. Given the true nature of the case and the Court's limitations on the holding, it is difficult to view Delta Truck Brokers as requiring this Commission to read section 364.337(2) in pari materia with section 364.335.

In Conner, this Court addressed a statute that, inter alia, authorized the Commissioner of Agriculture to establish programs "for the prevention, modification, or removal of trade barriers which obstruct the free flow of celery of sweet corn to market," and also programs to prohibit "unfair trading practices" in the same field. Since these standards were completely undefined, and had no set meaning in law or common usage, the Court struck down the statute authorizing these programs as unconstitutional.

In Dickinson, the Court invalidated a statute authorizing the Comptroller to determine the need for further cemetery facilities, on the grounds that these terms lacked any definition in the statutory language. And in Lewis, the Court held that authorization for publishing otherwise confidential bank records "with the consent of the department" was an invalid delegation of legislative power. In each of these cases, the standards

in question were without any of the definition and substantiation provided by the Legislature in Section 364.335.

Finally, the Court in High Ridge struck down a statute devoid of standards or guidelines. At issue in that case was the power to rate nursing homes according to a scale of "AA," "A," "B," "C," and "F." The statutory language did not stipulate whether the average home would be "A," "B," or "C," nor whether an "AA" rating was a mark of any particular distinction, nor whether there would be a Bell curve distribution of ratings or a flat percentage in each group. In other words, the statute gave the agency unbridled discretion to distribute ratings in any way it wished. Again, the statute in High Ridge lacked the restrictions on agency conduct found in the instant case.

In conclusion, the cases cited by Microtel as supporting its attack on section 364.335 are inapposite to the instant case. Further, under the tests provided by this Court in the several cases addressing the doctrine of nondelegation of legislative power, Section 364.335 is a perfectly valid delegation of authority. Standing on its own, Section 364.335 contains adequate standards to guide the Commission in granting competitive authority to carriers such as Microtel, MCI, Sprint, SBS and USTS. The Commission's interpretation and implementation of Section 364.335 must be upheld.

POINT II. CHAPTER 364 ENTITLES MICROTEL TO NO HAVEN FROM COMPETITION.

As already noted, Microtel's true purpose in these appeals is to protect itself from competition. Microtel argues that under Chapter 364 it is implicitly guaranteed this protection for the following reasons:

(1) as an economic reality, it is not possible to realize the benefits of competition overnight;

(2) the Commission acknowledged in the Microtel order that in moving from a mostly regulated industry to a mostly unregulated one, it is necessary to protect against economic dislocation;

(3) as an economic reality, "... the acknowledged benefits for (sic) competition cannot be realized without viable competitors...";

(4) Section 364.345(1), which creates an obligation in telephone companies to provide service, also implicitly entitles the telephone company to a "reasonable time within which to commence service.";

(5) the Legislature and the Commission wish to protect local telephone subscribers from rate increases, which explains the section 364.337(2) mandate that the Commission consider the effect on ratepayers "... when ... competing certificates are sought by specialized carriers."[8]; and

(6) the Commission in granting Microtel competitive authority "recognized that it would take two years to construct the system."

In an attempt to summarize Microtel's position, it appears Microtel believes that under Chapter 364 the benefits to the public from competition can only be gained by moving slowly to ensure that each recipient of competitive authority is a fully operational and that local telephone companies do not

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[8]This argument, assumes that Section 364.337(2) must be read in para materia with section 364.335. As shown in the preceeding pages, this assumption is wrong.

unjustifiably raise rates. Thus according to Microtel, Chapter 364 must be interpreted to allow it time to become viable by not granting to others competitive authority. Thus, reduced to its essence, Microtel believes that under the statute it is entitled to a headstart in its competition with Sprint, MCI, SBS, and USTS. What's good for Microtel is allegedly good for the State. In response, it is apparent that Microtel offers no reason for this Court to second guess the Commission's application of the statute in favor of Microtel's self serving interpretation. It is well established, of course, that Commission's interpretation of its statutes is entitled great weight and should not be overturned unless clearly erroneous. E.g., Pan Am. World Airways v. Fla. Public Service Commission, 427 So.2d 716 (Fla. 1983). For this reason alone, the Commission's interpretation should be upheld.

But this is not just a case of differing interpretations of a statute where the Court should give deference to the Commission's interpretation. Microtel's view is so fundamentally flawed that it subverts the legislative intent. The true legislative intent is this: to open entry into the provision of long distance service, so that the provision of such service will more open and less regulated. As entry becomes opened, there is little reason for the Commission to serve as a surrogate for competition. The Legislature thus created Section 364.337 to allow relaxation in the economic regulation of the competitive long distance carriers. Section 364.337 directs the Commission to look at

the number of carriers providing service, etc., in determining the appropriate levels of regulation for new competitive services. Thus, the question under Section 364.337 is not whether there are too many entrants to allow another grant of competitive authority. Instead, it is whether the Commission can streamline regulation of competitively provided long distance telephone service based on the number and nature of carriers providing the service, as well as other factors.

Microtel is correct that there cannot be effective competition without viable competitors. Any neutral review of the Commission's actions, however, will conclude that it has appropriately laid the ground work for competition in granting authority to competitors who were shown to be viable. Of course, just because all of the competitive carriers are viable does not mean that all will prosper. Even fully regulated local telephone companies are not guaranteed a fair rate of return, only the opportunity to achieve that return. E.g., United Tel. Co. of Florida v. Mann, 403 So.2d 1209 (Fla. 1981) There is no guarantee of success in the marketplace. Competition without the opportunity to fail as well as to succeed is not competition at all. Whatever alternative system Microtel advocates for the provision of long distance service, it is not a competitive one, and is not contemplated under Chapter 364.

Microtel in its brief also raises concerns about economic dislocation and increased local rates to support its plea for a haven from competition. Of course, GTE Sprint and the other

Appellees are concerned about economic dislocation during this period of transition in telecommunications. The concern, however, is about local telephone company rate hikes and not about overpriced competitive long distance service. The Commission does not even regulate the rates of the competitive carriers, except for AT&T. Microtel has offered no evidence that additional long distance competition will raise local telephone rates any more than the grant of authority to Microtel would have. Moreover, the Commission has spent a great deal of time in setting access charges to ensure that long distance competition promotes the availability of local telephone service. Microtel as well as the Appellees have participated in these proceedings, and Microtel has not appealed the Commissions decisions on access charges. Thus any "social" concerns that Microtel may express in its briefs about high local rates and universal service are being separately addressed by the Commission, and are, in any event, outside the instant proceeding.

In sum, Microtel advances an anemic concept of competition under Chapter 364 to allow it a haven from competition. This distorted vision subverts the intent of the Legislature, and would serve only the interests of Microtel, not the public. The Commission fully understands the expressed purpose of the Legislature in its 1982 revisions to Chapter 364, and has consistently and faithfully acted to serve that purpose. The certification of Appellees should be affirmed, and Microtel should be denied insulation from competition.

POINT III. THE COMMISSION'S GRANT OF COMPETITIVE AUTHORITY TO SPRINT IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD.

Any neutral review of the record will establish that the Commission's grant of competitive authority is supported by competent substantial evidence in the record. Further, Order No. 12913, which consummates the grant, fully sets out the facts and considerations justifying the Commission's final agency action on Sprint's application. The Commission's decision to grant Sprint competitive authority is unassailable.

Notwithstanding the above, Microtel obliquely suggests that the record in the proceeding below is deficient because no "public witnesses" appeared on behalf of Sprint. As already discussed in this Brief, the notion that "public witnesses" are required to prove need of the proposed service is a throwback to the days of trucking regulation, and has no place under the competitive scheme contemplated in Chapter 364. Microtel's arguments here are out of place, and without merit.

Microtel also suggests that the Commission committed reversible error by not rejecting Sprint's application on the ground that Sprint's proposed enterprise would be a wasteful duplication of Microtel's system. The conceptual deficiencies in this view have been noted in this Brief, and Sprint will not reargue the point. It is important, however, to note that the notion of wasteful duplication was addressed at the hearing, and that in Order No. 12913 the Commission made a finding adverse to Microtel. Specifically, at the hearing, Sprint's witness Dr. Robert

Fishbach testified that any losses due to "stranded investment" or "wasteful duplication" would have to be absorbed by the shareholders of the competitive carrier, not the subscribing public. Next, for Microtel, witness Michael Fincher attempted to support the view that wasteful duplication would be created by successive grants of authority. On cross-examination by the Commission staff, Mr. Fincher struggled to provide a definition of wasteful duplication, finally admitting his inability to explain what it meant:

> ...Wasteful duplication could be--I'm not sure I can competently answer wasteful duplication." (TR. 137)

Further, on questioning by the Commissioners, the most Mr. Fincher could say about the harmful effects of "wasteful duplication" on ratepayers or fully regulated local companies was that he could not exclude the possibility that the public might be hurt:

> COMMISSIONER MARKS: Well, then how is that going to effect -- your service is going to effect the local exchange company, or will it? It will not, as I understand it, is that correct?
>
> WITNESS FINCHER: I can't say for sure that there's no possibility that with the introduction of more competitive entrants in the arena that the regulated exchange companies will not suffer. (TR.138)

But when asked directly by Commissioner Nichols whether he could say that the introduction of new competitors would hurt regulated local companies, and thus rate payers, Mr. Fincher replied as follows: "No, I cannot." (TR.138)

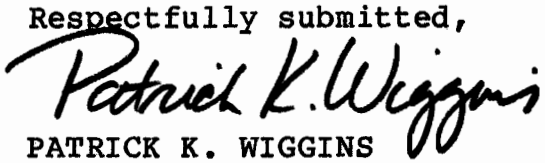
Thus in conclusion, Microtel has resisted the grant of

competitive authority to Sprint on the ground that it would somehow be bad for the public. Yet, at hearing Microtel could offer no persuasive, competent evidence why this would be. Moreover, Microtel failed to rebut the prima facie showing by Sprint that its receipt of competitive authority would be in the public interest. The Commission properly chose to rely on the competent substantial evidence in the record supporting Sprint's application, rather than the unsupported and self serving assertions of Microtel. The Commission's decision to grant Sprint competitive authority comports with the essential requirements of law and is supported by competent substantial evidence in the record. The Court must affirm that decision. E.g., Fla. Dept. of Transportation v. J.W.C. Co. Inc., 396 So.2d 778 (Fla 1st DCA 1981); Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784 (Fla. 1983), and Degroot v. Sheffield, 95 So.2d 912 (Fla. 1957).

CONCLUSION

The Legislative delegation of authority to the Commission in Section 364.335 is consistent with the requirements of the Florida Constitution. Similarly, the Commisison's application of this statute comports with all constitutional mandates and is in full accord with the essential requirements of law. Finally, the Commission's action in this case is based upon competent substantial evidence of record. For these reasons, as elaborated in the body of this brief, the Commission's award of competitive authority to GTE Sprint must be affirmed in all respects.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee GTE Sprint Communications Corporation, has been furnished by mail to the following parties of record this 31st day of August, 1984.

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