IN THE SUPREME COURT OF FLORIDA

MICROTEL, INC.,

Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION and SATELLITE BUSINESS SYSTEMS,

Appellees.

CASE NO. 65,307

APPEAL FROM ACTION OF FLORIDA PUBLIC SERVICE COMMISSION RELATING TO SERVICE OF TELEPHONE COMPANIES

ANSWER BRIEF OF SATELLITE BUSINESS SYSTEMS

HUGH J. TURNER, JR.
SMATHERS & THOMPSON
1301 Alfred I. duPont Building
Miami, Florida 33131
Telephone: (305) 379-6523

and

KEVIN H. CASSIDY
SATELLITE BUSINESS SYSTEMS
8283 Greensboro Drive
McLean, Virginia 22102

Attorneys for Satellite Business Systems

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

INTRODUCTION

In its answering brief, Satellite Business Systems will be referred to as "SBS" and Microtel, Inc. will be referred to as "Microtel." Throughout the brief, SBS's Appendix will be referred to as (A. ____), Microtel's Appendix to its Brief of Appellant, Microtel, Inc., will be referred to as (AB. ____), Microtel's Appendix to its Supplemental Brief will be referred to as (SB. ____), and Record will be referred to as (R. ____).

STATEMENT OF THE CASE

SBS is unable to adopt the Statement of the Case set forth by Microtel, finding same to be incomplete, argumentative, and devoid of any description of the historical background leading up to the appeal in this case necessary for the Court to consider the issues here presented for resolution.

(1) The Microtel Application.

No statement of this case would be complete without a brief review of Microtel's own Application for authority to construct and operate an intrastate interexchange telecommunication system in Florida. Microtel filed its Application in March, 1980, pursuant to a predecessor of Section 364.335, Fla. Stat. (1982 Supp.), Section 364.35 (1979), which provided:

> (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 inadequate 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.

In 1980, the Legislature revised Chapter 364 regarding the granting of authority, creating Section 364.335, Fla. Stat. (1981), replacing Section 364.35 (1979). Subsection (4) of Section 364.335 (1981) provided:

> (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 amendment 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.

During the 1982 legislative session, the Commission supported legislation permitting the granting of certificates for intrastate interexchange services to telephone companies in direct competition with existing service. (AB. 30).

On March 18, 1982, Senate Bill 868 was signed into law which amended Section 364.335 to provide:

> (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 amendment 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 duplicate the local exchange services provided by any other telephone company, unless it first determines that the existing facilities are inadequate to meet the reasonable needs of the public and it first amends the certificate of such other telephone company to remove the basis for competition or duplication of services. 1/

The legislation, designed to permit the Commission to certificate telephone companies to allow them to be in competition with other companies (except local exchange services), 2/ also created a new section reading:

> Section 364.337 Duplicative or competitive services
>
> (1) When the commission grants a certificate to a telephone company for any type of service that is in competition with or that duplicates the services provided by another telephone company, the commission, if it finds that such action is consistent with the public interest, may:
>
> (a) Prescribe different requirements for the company than are otherwise prescribed for telephone companies; or
>
> (b) Exempt the company from some or all of the 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) The geographic availability of the service from other firms;
>
> (c) The quality of service available from alternative suppliers;

1/ Underscored language added by 1982 amendment to Section 364.335.

2/ Senate Staff Analysis of SB 868. (A. 1).

> (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.

The 1982 legislation governed the final disposition of all of the Applications for certificates on review by this Court, [3/] as well as the Application of Microtel. [4/]

Prior to the 1982 legislative revision to Chapter 364, the Commission had processed Microtel's Application pursuant to the then existing statutes. In the course of those proceedings, a hearing was conducted from November 4 to November 6, 1981, during which the Commission received varied testimony including evidence of a generic nature concerning the value of additional competition in connection with interexchange telecommunication services. (AB. 35).

Although the Commission initially recommended that the Microtel Application be denied based upon its analysis of the pre-1982 revision to Chapter 364, the Application was resubmitted for consideration after the 1982 revision and a certificate granted to Microtel on August 23, 1982.

As stated by the Commission in the Order Granting Microtel's certificate:

> The most recent revision of Chapter 364 embraces a different view of telephone service. Specifically,

---

3/ MCI Telecommunications Corporation (Case No. 64,801); GTE Sprint Communications Corporation (Case No. 65,351); Satellite Business Systems (Case No. 65,307); United States Transmission Systems, Inc. (Case No. 65,449).

4/ Order No. 11095.

> the legislative history of the new law demonstrates a recognition that technological progress in the transmission of long distance (interexchange) telecommunications has rendered the natural monopoly concept obsolete for this segment of the telephone business. As a result, the Legislature removed the presumption against allowing the competitive provision of intrastate interexchange service and allowed the Commission broad discretion in regulating companies that provide this segment of service. (AB. 33).

In the Order granting Microtel's Application (AB. 29), after addressing the issue of whether Microtel should be granted a certificate authorizing it to operate as a telephone company within the State, the Commission determined whether special conditions, requirements and exemption should apply to Microtel's authority pursuant to Section 364.337 (1982 Supp.). Although the Order does not articulate that the Subsection 364.337(2) criteria were considered by the Commission, it does reflect that different requirements were prescribed for Microtel than were otherwise prescribed for telephone companies, and Microtel was exempted from some of the requirements of Chapter 364. (AB. 36).

(2) The MCI Telecommunications Corporation Application.

On November 3, 1982, MCI Telecommunications Corporation ("MCI") filed its Application for a certificate of public convenience and necessity to construct and provide interexchange telecommunications services within the State of Florida. The Commission determined that "sections 364.335 and 364.337, Fla. Stat., apply in our consideration of MCI's application." [Order No. 12292] (AB. 45). The Commission, still wanting "to move cautiously into the competitive environment for inter-

exchange carriers", [5/] conducted a hearing on MCI's application on March 21, 1983. Again, the Commission acquired generic economic information regarding the benefits of competition in connection with the providing of interexchange telecommunications services. (AB. 46). Microtel intervened in these proceedings.

On July 25, 1983, an Order was entered by the Commission granting a certificate to MCI. Thereafter, Microtel filed a Motion for Reconsideration of Order No. 12912 seeking to have MCI's certification as an interexchange carrier withheld pending further hearings on the basis that the Order was illegal in light of its failure to contain specific mandatory findings allegedly required by Section 364.337. (AB. 54). The request for reconsideration was denied, the Commission determining that Subsection 364.337(2) need not be considered by the Commission in its initial grant of a certificate to a competitive telephone company. [Order No. 12824] (AB. 54). A Notice of Administrative Appeal was filed by Microtel on January 26, 1984.

(3) The GTE Sprint Communications Corporation Application.

On March 14, 1983, GTE Sprint Communications Corporation ("GTE"), applied for a certificate of public convenience and necessity pursuant to Chapter 364. Again, the Commission elected to conduct a hearing on December 16, 1983, at which time the Commission received further generic evidence as to the advantages of competition in the area

---

5/ Order No. 12912 (SA. 11).

of interexchange telecommunications service in the State. The Commission agreed that the entry of additional competition would likely have a favorable impact on rates paid by long distance customers in the State. (SA. 18). Microtel also intervened in these proceedings. Following the Commission's Order granting authority to GTE to provide intrastate interexchange telecommunication services in Florida (subject to certain limitations based on Subsection 364.337(2), as outlined on sheet 3 of Order No. 12913 (SA. 20)), Microtel petitioned for reconsideration of the determination, arguing that the Commission's original grant of a certificate to GTE was required to be based on mandatory findings required by Subsection 364.337(2). The request for reconsideration was denied on April 26, 1984. [Order No. 13237] (SA. 24). Notice of Administrative Appeal was filed by Microtel on May 23, 1984.

(4) The Satellite Business Systems Application.

On September 28, 1983, SBS filed its Application for a certificate to offer to the general public intrastate common carrier communications services within the State of Florida through the use of satellites and earth stations, fiber optics, microwave systems and other means. The Application submitted by SBS complied with the form requirements set by the Commission and set forth detailed information regarding, inter alia, the benefits to the public in the form of services SBS would provide to its customers in the State and the physical facilities it would use to provide those services [Item 10], SBS's experience and technical ability to provide the services to be offered [Item 11], and SBS's financial ability to operate as an ongoing business [Item 12].

On October 27, 1983, Microtel filed a Petition to Intervene and Request for Public Hearing on the basis that the services to be provided by SBS duplicated the certificate and authority granted to Microtel. On December 6, 1983 Microtel was granted intervention.

On January 20, 1984, the Commission entered its Order Granting Certificate and denied the request for a hearing by Microtel. [Order No. 12912] (SA. 7). The Order took the form of a Notice of Proposed Agency Action, pursuant to Florida Administrative Code Rule 25-22.29. The Order recites that, after consideration of the Application of SBS, it appears:

> That SBS is financially stable and technically capable of providing service. Therefore, we find that SBS is qualified to receive, and it is in the public interest to grant SBS, a certificate of public convenience and necessity to provide interexchange services both as a facilities-based carrier and as a reseller of WATS and MTS.

Specifically, the Order recites that SBS "has complied with the requirements of Subsection 364.335(1)." (SA. 8).

The Commission then determined, based on the criteria set forth in Subsection 364.337(2), whether to prescribe different requirements for SBS given the fact that it was in competition with or duplicated the services of other telephone companies. The Commission prescribed different requirements for SBS observing:

> We recognize that SBS's certificate will duplicate, in many instances, the certificates granted to other interexchange companies. As we have done for those companies, we will prescribe different requirements for SBS than are otherwise prescribed for telephone companies under Chapter 364.

When prescribing different requirements for a company providing competitive and duplicative services we must consider certain factors in determining whether our actions (the prescribing of different requirements and exemption from the requirements of Chapter 364) are consistent with the public interest. Subsection 364.337(2). Order No. 12912 (SA. 8).

The Commission proceeded to consider each of the four (4) Subsection 364.337(2) items:

a. The number of firms providing the service.

To date, we have granted certificates to four companies which wil be providing services which will duplicate and compete with SBS's service. These are MCI Telecommunications Corporation, Microtel, Inc., GTE Sprint Communications Corporation and AT&T Communications of the Southern States, Inc. (While AT&T's services will be duplicated, its authority is different than that granted to the other companies).

b. The geographic availability of the service from other firms.

As we have done for other interexchange carriers, the grant of authority to SBS is statewide, with certain restrictions to be discussed later. At present, however, only AT&T is providing statewide services through its own facilities. Initially, the other facilities-based carriers will provide services to limited areas of the state through their own facilities and to the rest of the state through resale.

c. The quality of service availabe from alternative suppliers.

The quality of service provided by interexchange carriers is unknown at this time, except for AT&T. We will expect the interexchange carriers to provide adequate service and to provide the quality of service set forth in their tariff.

d. The effect on telephone service rates charged to customers of other companies.

Consistent with our belief that Subsection 364.337(2) only requires us to look at the providers of the similar service, we believe the entry of another competitor in the interexchange market will

> help lower long distance rates, or at a minimum, keep rates at the present level.
>
> Having considered these four items, we that SBS's certificate should contain certain special conditions and exemptions. Order No. 12912 (SA. 8-9).

The Commission denied Microtel's request for a hearing pursuant to Subsection 364.335(3), pointing out that Microtel's request was untimely under the Section, having not been submitted within twenty (20) days after the SBS Application was filed. The Commission noted that, while in the past it had conducted hearings on its own motion because it wished to "move cautiously into the competitive environment for interexchange carriers" (SA. 11), it saw no further benefit to be derived by conducting a hearing with respect to the SBS Application. 6/

Microtel filed a Petition on Proposed Agency Action Seeking Reconsideration of Order No. 12912 and a Section 120.57 hearing pursuant to Rule 25-22.29(4), Florida Administrative Code. (R. 285). Rule 25-22.36(7) sets out the contents of such a petition, which must include a statement as to the disputed issues of material fact, if any, said to require a hearing and the petitioner's substantial interests said to be affected by the proposed agency action.

Microtel identified the disputed issues of material fact to be addressed by the Commission as: (1) whether Microtel's request for a hearing pursuant to Subsection 364.335(3) had been timely made; and

---

6/ Microtel's hearing was conducted from November 4 through November 6, 1981; the MCI hearing was conducted on March 21, 1983; and the GTE hearing was conducted on December 16, 1983. Each had been participated in by Microtel.

(2) the need for the Commission, in determining the initial grant of a certificate to SBS under Chapter 364, to make mandatory findings allegedly required by Subsection 364.337(2). 7/ The substantial interests said to be affected by the Commission's action were identified as the authority previously granted to Microtel which would be duplicated by SBS.

On April 25, 1984, the Commission entered its Order Denying the Petition for Reconsideration and Microtel's request for a hearing. SA. 15. The following determinations were made by the Commission.

In light of the fact that Microtel admitted receiving actual notice of SBS's application twelve (12) days before the end of the twenty (20) day statutory deadline for requesting a hearing under Subsection 364.335(3), the Commission rejected Microtel's claim that any issue existed as to the timeliness of Microtel's request for a hearing. Nor was the Commission of the view that its failure to make mandatory findings pursuant to Subsection 364.337(2), as a condition to the initial grant of authority to SBS, constituted a disputed issue of material fact requiring a Section 120.57 hearing. The Commission was also of the opinion that a Section 120.57 hearing was not appropriate because the only interest Microtel claimed was affected by the proposed action of the Commission was that of a competitor. 8/ A Notice of Administrative Appeal was filed by Microtel on May 15, 1984. (R. 313).

7/ The same "disputed issue of material fact" had previously been unsuccessfully advanced by Microtel in both the MCI and GTE proceedings.

8/ The correctness of the Commission's decision not to conduct a hearing is not raised by Microtel as an issue on this appeal.

STATEMENT OF THE FACTS

Microtel's Statement of the Facts is limited solely to MCI, making no reference to SBS. Therefore, SBS sets forth the following brief statement of facts which it feels is pertinent to the issues on appeal.

SBS is a partnership formed in 1975 under the laws of Connecticut. The three SBS partners are: 9/

> Aetna Diversified Technologies, Inc. (a wholly-owned subsidiary of Aetna Life & Casualty Company)
>
> Information Satellite Corporation (a wholly-owned subsidiary of IBM Corporation)
>
> COMSAT General Business Communications, Inc. (a wholly-owned subsidiary of Communications Satellite Corporation)

In addition to the foregoing information, the Application submitted by SBS contained information concerning:

1. The Services SBS Would Provide To Its Customers In Florida And The Physical Facilities It Would Use To Provide That Service [Item 10];

2. SBS's Experience And The Technical Ability Which SBS Had To Provide The Services To Be Offered [Item 11];

3. SBS's Financial Ability To Operate As An Ongoing Business [Item 12].

Although the Court is referred to the Application of SBS in its entirety (R. 1), the following extracts illustrate the type of informa-

---

9/ The SBS partners have agreed to restructure the partnership so that COMSAT General Business Communications, Inc.'s interest will be acquired by the remaining two partners.

tion supplied to the Commission under three (3) of the areas of inquiry the Commission considered in determining whether the grant of a certificate to SBS was in the public interest.

(1) Item 10--The Benefits To The Public Criteria.

The Commission was advised in connection with Item 10 that SBS proposed to offer the general public intrastate telecommunication services for hire between points within the State of Florida; Exhibit 2 to the Application depicted the locations of SBS earth stations presently in service in the State providing interstate telecommunication services. The services proposed by SBS were switched voice and, in the future, data services provided between points within the State in conjunction with SBS's National Network.

SBS stated that it currently provided interstate National Network services to and from points in the State by means of a sophisticated digital switching facility and earth station in Miami, together with leased private facilities and resold MTS and WATS services.

SBS proposed to provide the Florida general public with a competitive, cost-efficient alternative for intrastate long distance communications using modern digital switching techniques. Its proposed tariff provisions were attached as an Appendix to the Application.

In connection with the benefits to the public to be received from SBS's presence in the State, the Commission considered SBS's statement that the grant of SBS's Application would substantially enhance competition in the areas SBS proposed to serve, SBS being able to offer intrastate service to its Florida intercity customers by use

of its sophisticated satellite-based, technologically advanced, fully integrated digital National Network transmission system already in use in Florida to provide interstate service; additional facilities would not need to be constructed by SBS to provide intrastate service. The Application also advised the Commission that SBS proposed a unitary system for providing of intrastate communications in the State. SBS's proven dedication to the continual modernization and expansion of its network, combined with its commitment to the development of new and innovative technologies, services and service features, would assure that SBS's Florida customers would be offered the most up-to-date, state-of-the-art telecommunications services available.

(2) Item 11--The Experience And Technical Ability Criteria.

With respect to the Item 11 inquiry, SBS referred the Commission to Memorandum Opinion, Order, Authorization and Certification of the Federal Communications Commission ("FCC"), released February 8, 1977, 62 F.C.C. 2d 997, 10/ wherein the F.C.C. found SBS was legally, technically and financially qualified as a communications common carrier, and that implementation of the SBS proposal would serve the public interest.

SBS indicated that it operated domestic and international communications systems, primarily using satellite transmission, and pro-

---

10/ On appeal a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit reversed the FCC's Order and remanded the case to the FCC for reasons unrelated to the legal, technical and financial qualifications of SBS. On May 10, 1979 the Court vacated the opinion of the three-judge panel and set the case for rehearing en banc. On rehearing, the Court affirmed the FCC's original order. See Satellite Business Systems, 62 F.C.C. 2d 72 (D.C. Cir. 1980).

vided a range of voice, data and image transmission services for customers with large and small communications requirements. The core of the SBS telecommunication system was referred to as a set of three (3) SBS satellites currently in geosynchronous orbit. The Commission was also informed that SBS had one National Network earth station in the State of Florida.

(3) Item 12--The Financial Capability Criteria.

With respect to Item 12, the Application revealed that, as of June 30, 1983, SBS's partner organizations had provided $638 million in equity funding, with an additional $307 million obtained pursuant to a credit facility provided by a group of 17 banks. Revenues for SBS in 1982 for its interstate services were reflected to be approximately $40 million.

ISSUES PRESENTED

ISSUE I

WHETHER THE PUBLIC SERVICE COMMISSION WAS REQUIRED TO MAKE MANDATORY FINDINGS AS TO THE ITEMS SET FORTH IN SUBSECTION 364.337(2) IN DETERMINING WHETHER THE BASIC GRANT OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO SATELLITE BUSINESS SYSTEMS WAS IN THE PUBLIC INTEREST?

ISSUE II

WHETHER SECTION 364.335, AS INTERPRETED AND APPLIED BY THE COMMISSION, PROVIDES SUFFICIENT STANDARDS TO BE APPLIED BY THE COMMISSION IN DETERMINING WHETHER THE GRANT OF A CERTIFICATE TO SATELLITE BUSINESS SYSTEMS WAS IN THE PUBLIC INTEREST SO THAT THE STATUTE IS CONSTITUTIONAL?

ISSUE III

WHETHER THE COMMISSION'S GRANT OF A CERTIFICATE TO SATELLITE BUSINESS SYSTEMS WAS BASED ON SUBSTANTIAL COMPETENT EVIDENCE THAT THE GRANT WAS IN THE PUBLIC INTEREST?

ISSUE IV

WHETHER MICROTEL IS INSULATED FROM COMPETITION BY SECTION 364.345?

ARGUMENT

I.

THE PUBLIC SERVICE COMMISSION WAS NOT REQUIRED TO MAKE MANDATORY FINDINGS AS TO THE ITEMS SET FORTH IN § 364.337(2) IN DETERMINING WHETHER THE BASIC GRANT OF A CERTIFICATE TO SATELLITE BUSINESS SYSTEMS WAS IN THE PUBLIC INTEREST.

Microtel construes Section 364.337 to require that the Commission look exclusively to Subsection 364.337(2) when it grants any certificate to a telephone company to provide duplicative or competitive services:

> "The PSC can grant a certificate for a type of service that is in competition or that duplicates the services provided by another telephone company if it finds that such action is consistent with the public interest and that it may also prescribe different requirements for a company than are prescribed for other telephone companies or exempt the company from some or all of the requirements of the chapter." Microtel's Supplemental Brief, at 4.

Microtel appears to have misconstrued the clear language of the Section.

A. Microtel's Interpretation Is Inconsistent With The Legislative Intent, Clear Language And Past Construction of Section 364.337

Requiring the Commission to consider the items set forth in Subsection 364.337(2) in determining whether to grant a certificate to provide duplicative or competitive services is inconsistent with the clear legislative intent behind Section 364.337 and the clear language of the Section, as well as the interpretation of the Section applied by the Commission in connection with the grant of Microtel's certificate in 1982.

Subsection 364.337(2) sets forth the items which are to be considered by the Commission in determining whether to prescribe different requirements for an applicant than are otherwise prescribed for telephone companies, or to exempt the carrier from some or all of the requirements of Chapter 364, when the Commission grants a certificate to a telephone company for any duplicative service. The items are to be considered in determining whether the actions which the Commission may take to reduce regulation of the carrier under Subsections 364.337(1)(a) and/or (1)(b) are consistent with the public interest.

(1) Assuming Arguendo That The Commission Was Required To Consider The Items Set Forth In Section 364.337 (2) In Determining The Grant Of A Certificate, No Findings Were Required

Microtel contends that the Commission must make mandatory findings as to the items set forth in Subsection 364.337(2) in connection with the initial grant of the certificate to provide competitive or duplicative services, and suggests that the burden is on the applicant to establish each of these four (4) items to the satisfaction of the Commission. An examination of the items listed in Subsection 364.337(2), however, reveals that the information concerning those items would, for the most part, be within the knowledge of the Commission by reason of its expertise and prior information obtained, rather than within the knowledge of the applicant. In addition, neither the Commission nor the law requires express findings to be made, as long as the record reflects that the items set forth for consideration were in fact considered by the Commission. Tamiami Trail Tours, Inc. v. King, 143 So. 2d 313, 317 (Fla. 1962). This, of course, is consistent with the

statutory language of Subsection 364.337(2), which provides that the Commission "shall consider" the enumerated items in determining whether the actions authorized by Subsection 364.337(1) are consistent with the public interest.

(2) The Legislative Intent Was That Initial Grant Of A Certificate Would Not Be Governed By Section 364.337

"Legislative intent is the pole star by which we must be guided in interpreting the provisions of a law." Parker v. State, 406 So. 2d 1089, 1092 (Fla. 1981). Applying that standard to Section 364.337, the clear intent of the Legislature was that the items set forth in Subsection 364.337(2) would only apply in determining whether it was in the public interest for the Commission to either prescribe different requirements than were otherwise prescribed for telephone companies or exempt the company from some or all of the requirements of Chapter 364. The Senate Staff Analysis for Senate Bill 868, with respect to Section 364.337, provides, inter alia, that:

> "This bill would:
>
> provide that the requirements set out in ch. 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." (A. 1).

(3) The Clear Language of the Section Is Consistent With The Legislative Intent

Subsection 364.337(2) reads:

> "In determining whether the actions authorized by subsection (1) are consistent with the public interest, the commission shall consider:

(a) The number of firms providing the service;

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

(c) The quality of service available from alternative suppliers;

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

(e) Any other factors that the commission considers relevant to the public interest."

"Actions", as referred to above, clearly refers to the actions described in subsections (1)(a) and (1)(b) of Section 364.337. The interpretation advanced by Microtel - that the Commission must consider the items set forth in Section 364.337 in determining whether to grant a certificate to the applicant to provide competitive or duplicative services - would call for the Court to make the assumption that the singular act of granting a certificate is what the Legislature meant when it referred to "actions" in subsection (2) of Section 364.337.

(4) The Interpretation Of Section 364.337 Now Advanced By Microtel Is Inconsistent With The Interpretation Applied By The Commission In Connection With Microtel's Application

The interpretation of Section 364.337 advanced by Microtel is also inconsistent with the construction given to the Section by the Commission with respect to Microtel's own Application for a certificate. Order No. 11095 reflects that Microtel's certificate was granted by application of Section 364.335, not Section 364.337. 11/

11/ The Commission, in Order No. 11095 granting a certificate to Microtel, failed to make the express findings with respect to the Section 364.337(2) criteria that Microtel now contends are mandatory; in fact, the Order lacks any express statement that the items were even considered by the Commission.

B. Microtel's Interpretation Is Inconsistent With Pro-Entry 1982 Legislation

Microtel's interpretation of Section 364.337 is also inconsistent with the fact that, following the 1982 legislation which created (and amended) Chapter 364, intrastate interexchange carriers were no longer required to shoulder the burden of establishing by substantial competent evidence that existing service was inadequate.

Historically, the government in Florida limited those entitled to engage in the transportation, public utility, and communications fields, such monopolization being sanctioned by the State "upon the theory that duplication and cutthroat competition among these industries [would] inevitably result in depriving the public of reliable services . . ." Carbo, Inc. v. Meiklejohn, 217 So. 2d 159, 160 (Fla. 1st DCA 1968). This philosophy is manifest in the authority relied upon by Microtel, Wetmore v. Bevis, 312 So. 2d 722 (Fla. 1974), which dealt with pre-1982 legislation which required the Commission to establish the inadequacy of existing service before authorizing duplicative service. The existing carrier, such as Microtel, under that legislation had the right to establish the adequacy of the service it was providing.

That statutory scheme, however, drastically changed in 1982 when, during the 1982 legislative session, Senate Bill 868, amending Section 364.335 and creating Section 364.337, became law. The 1982 legislation was designed to promote competition in the provision of intrastate interexchange telephone services in Florida, in contrast to the pre-1982 statutory scheme under which the Commission took the position that certificates for competitive intrastate telephone service would not

be granted unless a determination was made that the existing facilities and services were inadequate.

By construing Chapter 364 to require the Commission to consider the Subsection 364.337(2) items in determining the initial grant of a certificate, Microtel seeks to have the same test applied to a telephone carrier seeking to provide duplicative or competitive services in 1983 as the law required prior to the 1982 changes.

C. The Commission Did Not Ignore The Subsection 364.337(2) Criteria

Assuming arguendo that the Court were to conclude that the Commission was required to consider the criteria set forth in Subsection 364.337(2) in its treatment of SBS's application, Order No. 12912 reflects, supra, at 8-10, that the Commission did expressly consider each item under Subsection 364.337(2). (SA. 8). Hence, should the Court conclude that the Commission was required to consider the subsection (2) items before granting a certificate to SBS for intrastate interexchange telephone service, such test was met with respect to SBS.

II.

SECTION 364.335, AS INTERPRETED AND APPLIED BY THE COMMISSION, IS CONSTITUTIONAL IN THAT THE STATUTE PROVIDES SUFFICIENT STANDARDS TO BE APPLIED BY THE COMMISSION IN DETERMINING WHETHER THE GRANT OF A CERTIFICATE IS IN THE PUBLIC INTEREST.

Microtel takes the position that Section 364.335 is constitutional only if Chapter 364 is interpreted to require that the Com-

mission also look to Subsection 364.337(2) to determine whether the grant of a certificate is in the public interest. The corollary to this contention, of course, is that a Section 364.335, standing alone, fails to provide sufficient standards to guide the Commission in determining whether the grant of a certificate is in the public interest.

A statute is presumed constitutional, Hamilton v. State, 366 So. 2d 8 (Fla. 1978), and the party challenging its constitutionality carries the burden of establishing its invalidity. Milliken v. State, 131 So. 2d 889 (Fla. 1961). Generally, legislation must provide sufficient standards or guidelines for an agency to use in exercising its administrative authority to determine the public interest in order to constitute a valid delegation. With respect to agencies which are granted broad policy-making authority, such as the Public Service Commission, wide discretion is normally afforded in determining if the legislative criteria to be used in determining the public interest has been satisfied. Peoples Bank of Indian River v. State, 395 So. 2d 521 (Fla. 1981).

The 1982 revisions to Chapter 364 removed intrastate interexchange telecommunications carriers, such as SBS, from that class of monopolistic businesses subject to anti-entry regulation in the interest of the public welfare, and placed them into those areas in which the State's interest is to protect the public welfare by ensuring that those who provide the service evidence the capability to do so. Thus, in determining whether a certificate of public convenience and necessity, in keeping with Section 364.33, should be granted, the Commission after 1982 is generally required to determine that the applicant has complied with Subsection 364.335(1) and to consider the items set forth in Section 364.335.

Section 364.335 provides for an applicant for a certificate of public convenience and necessity to submit an Application to the Commission. Subsection 364.335(1) reflects that the Application may include detailed inquiry (by the Commission) into the ability of the applicant to provide the service, detailed inquiry into the territory and facilities involved, as well as detailed inquiry into the existence of service from other sources within geographic proximity to the territory applied for. The Subsection thus provides guidelines for the Commission to determine the public interest.

Unlike the situation presented in Delta Truck Brokers, Inc. v. King, 142 So. 2d 273 (Fla. 1962), (relied on by Microtel), Section 364.335 does not afford the Commission "unbridled discretion" in determining the public interest. The legislative delegation of power to the Commission in Delta Truck Brokers was "totally devoid of any standards whatsoever." Id., at 275. Here, the Legislature has specified standards to guide the Commission in the exercise of its power. Those standards or guidelines are set forth in Subsection 364.335(1).

The situation presented here more closely parallels that presented in Bigler v. Dept. of Banking & Finance, 394 So. 2d 989 (Fla. 1981), where this Court, in considering the constitutionality of Section 659.03, determined that the Legislature had adequately delineated the scope and subject matter of the Department's investigation into each application presented for its consideration and had set forth criteria for determining if the "public convenience and necessity" require or will require the construction, operation or acquisition applied for. See also Albrecht v. Dept. of Environmental Regulation, 353 So. 2d 883 (Fla. 1st

DCA 1977), in which Section 253.124 was upheld because its criteria provided sufficient restrictions on the agency's power.

III.

THE COMMISSION'S GRANT OF A CERTIFICATE TO SATELLITE BUSINESS SYSTEMS WAS BASED ON SUBSTANTIAL COMPETENT EVIDENCE THAT THE GRANT WAS IN THE PUBLIC INTEREST.

The Application provided to the Commission by SBS was in the form requested by the Commission. Subsection 364.335(1) provides sufficient criteria directing the Commission's attention to specific areas of inquiry relevant to the public interest determination. See Albrecht, supra, and Bigler, supra.

A. The Information On Which The Public Interest Determination Was Based

SBS's Application provided substantial competent evidence regarding the areas of inquiry under Subsection 364.335(1) including:

1. Services SBS will provide to its customers and physical facilities it will use to provide service [Item 10];

2. SBS's experience and technical ability to provide the services to be offered [Item 11]; and

3. SBS's financial ability to operate as an ongoing business [Item 12]. 12/

12/ SBS's Application also referred the Commission to the FCC Certification Order, which contained additional explication of SBS's financial and technical abilities, as well as the benefits to the public from the services to be provided by SBS.

SBS's certificate was granted on January 20, 1984. Prior to that date, the Commission had conducted three (3) hearings, [13/] all of which provided the Commission with substantial generic economic information regarding the telecommunications industry and the effects of competition in connection with competitive telecommunications service. In making its determination under Section 364.335, the Commission could rely on both the Application before it and the knowledge and expertise gained by it in connection with prior hearings which it had conducted. Official notice of such generic information received in prior hearings could be considered by the Commission in determining whether the grant of a certificate was in the public interest, particularly where as here Microtel participated in each such prior hearing. Peoples Bank of Indian River v. State, 395 So. 2d 521, 524-25 (Fla. 1981); see also National Labor Relations Board v. Seven-Up Bottling Co., 344 U.S. 344, 348-49, 73 S.Ct. 287, 290 (1953), United States v. Pierce Auto Freight Lines, 327 U.S. 515, 525-30, 66 S.Ct. 687, 693-95 (1946); see generally K. Davis, Administrative Law Treatise, § 15:19 (1980).

B. A Hearing Was Unnecessary To Determine The Public Interest

Subsection 364.335(3) envisions that the Commission will make its public interest determination without the necessity of a hearing pursuant to Section 120.57. Thus, unless a substantially affected telephone company or consumer timely requests a hearing, and disputed issues of material fact exist to be resolved, no such hearing is

---

13/ Microtel hearing - November 4-6, 1981; MCI hearing - March 21, 1983; GTE Sprint hearing - December 16, 1983.

appropriate or required. [14/] On the basis of the information provided by the Application submitted by SBS, and with the expertise and generic information possessed by the Commission by the time it considered the SBS application, the Commission could make its inquiries, as required by Subsection 364.335(1), and determine if a grant of a certificate to SBS would be in the public interest.

IV.

SECTION 364.345 DOES NOT INSULATE MICROTEL FROM COMPETITION.

Microtel's reading of Subsection 364.345(1) is both inaccurate and inconsistent with the legislative scheme represented by the 1982 revision to Chapter 364 to promote competition. Subsection 364.345(1) reads:

> (1) Each telephone company shall provide adequate and efficient service to the territory described in its certificate within a reasonable time as prescribed in the commission order. If the telephone company fails or refuses to do so, for whatever reason, the commission, in addition to other powers provided by law, may amend the certificate to delete the territory not served or not properly served, or it may revoke the certificate. In addition, the commission, upon a finding that any telephone company significantly misrepresented its intention or ability to serve the territory in question, may take such action to impose the penalty upon the telephone company as is authorized by general law.

(Underscored language not quoted in Microtel Brief.)

14/ Microtel did not timely request a hearing. Nor did it raise any disputed issue of material fact, the only issue which it sought to have heard being the legal issue of whether the Commission is required to make mandatory findings under Subsection 364.337(2) before granting a certificate of public convenience and necessity. Nor was Microtel a "substantially affected" party, as its only basis for objecting to the grant of a certificate to SBS was that SBS's authority would duplicate that previously granted to Microtel. The correctness of the Commission's determination denying a hearing is not raised as an issue on appeal.

Read in its entirety, Section 364.345 hardly suggests that any start-up time shall be provided to an applicant, such as Microtel, before other companies are allowed to provide competitive service. To the contrary, the Section (particularly when read together with Sections 364.335 and 364.337) indicates that no telephone company shall be insulated from competition, and that the Commission has the power to amend a company's certificate or revoke the certificate if, within a reasonable time, the company fails to provide adequate and efficient service to the territory described in its certificate. No suggestion or mention is made in the Section that, within the time provided to it by the Commission to provide adequate and efficient service, the company will not face competition.

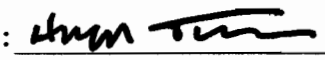
CONCLUSION

The Commission did not deviate from the essential requirements of law in granting a certificate of public convenience and necessity to SBS and the Commission's determination should be affirmed.

HUGH J. TURNER, JR.
SMATHERS & THOMPSON
Attorneys for Satellite Business Systems
1301 Alfred I. duPont Building
Miami, Florida 33131
Telephone: (305) 379-6523

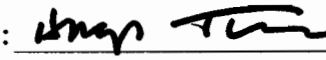
and

KEVIN H. CASSIDY
SATELLITE BUSINESS SYSTEMS
8283 Greensboro Drive
McLean, Virginia 22102

By: 

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 31st day of August, 1984 to those listed on the attached service list.

By: 

SERVICE LIST

James E. Wharton, Esq.
Suite 811, Metcalf Building
100 South Orange Avenue
Orlando, Florida 32801

Patrick K. Wiggins, Esq.
Messer, Rhodes & Vickers
P. O. 1876
Tallahassee, Florida 32302

Richard Melson, Esq.
Hopping, Boyd, Green & Sams
P. O. Box 6526
Tallahassee, Florida 32301

Ben E. Girtman, Esq.
Madigan, Parker, Gatlin,
Swedmark & Skelding
318 N. Monroe Street
P. O. Box 669
Tallahassee, Florida 32302

William S. Bilenky,
General Counsel
Florida Public Service
Commission
101 East Gaines Street
Tallahassee, Florida 32301-8351

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

John K. Aurell, Esq.
Robert L. Hinkle, Esq.
Holland & Knight
P. O. Drawer 810
Tallahassee, Florida 32302

Jim Carideo, Esq.
General Telephone Company
P. O. Box 110, MC 7
Tampa, Florida 33601

Kenneth Cox, Esq.
1133 - 19 Street N.W.
Washington, D.C. 20036

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