IN THE SUPREME COURT OF FLORIDA

MICROTEL, INC., ET AL.,
APPELLANTS,

v.

FLORIDA PUBLIC SERVICE COMMISSION, ET AL.,
APPELLEES.

CASE NO. 66,125

(CONSOLIDATED CASES)

GTE SPRINT COMMUNICATIONS CORP., ET AL.,
APPELLANTS,

v.

FLORIDA PUBLIC SERVICE COMMISSION, ET AL.,
APPELLEES.

CASE NO. 66,403

MCI TELECOMMUNICATIONS CORP., ET AL.,
APPELLANTS,

v.

FLORIDA PUBLIC SERVICE COMMISSION, ET AL.,
APPELLEES.

CASE NO. 66,404

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE, UNITED TELEPHONE COMPANY OF FLORIDA

JERRY M. JOHNS, GENERAL COUNSEL
UNITED TELEPHONE COMPANY OF FLORIDA
POST OFFICE BOX 5000
ALTAMONTE SPRINGS, FL 32715-5000
(305) 889-6016

TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Statutes

Laws of Florida

STATEMENT OF THE CASE

This proceeding involves the review of a final order of the Florida Public Service Commission in Docket No. 820537-TP. The orders sought to be reviewed are Orders No. 13750 and 13912, issued October 5, 1984, and December 12, 1984, respectively.

As discussed in greater detail in the Statement of Facts, the orders which are subject to review dealt with the establishment of standards under which Interexchange Common Carriers, such as the Appellants in this proceeding, would interconnect with local exchange telephone companies such as United Telephone Company of Florida for the purpose of providing long distance services.

Although worded in different ways, the Appellants raise only one fundamental issue: can the Florida Public Service Commission determine the pace at which competition in telecommunications is introduced in Florida.

Appellee, United Telephone Company of Florida, is a telephone company regulated by the Florida Public Service Commission. The Company serves 700,000 customers in Central and Southwest Florida.

For brevity, these abbreviations are used:

United Telephone Company of Florida	United
Florida Public Service Commission	Commission
GTE Sprint Communications Corporation	Sprint
MCI Telecommunications Corp.	MCI
Microtel, Inc.	Microtel
AT&T Communications of the Southern States	AT&T
Southern Bell Telephone & Telegraph Co., Inc.	So.Bell
General Telephone Company of Florida	Gentel

An appendix containing the two orders under review is affixed to this brief, references to which are denoted as (App._____).

References to the transcript of hearings before the Commission are denoted as (TR._____), and to the other parts of the record on appeal as (R._____).

United will utilize the Glossary of terms which appears in MCI's initial brief at pages 2-5. The term LATA which is defined in MCI's Glossary is correctly used to refer only to areas within So.Bell's operating territory. The term Market Area is used to describe areas within the territories of non-Bell telephone companies such as United and Gentel.

STATEMENT OF FACTS

United believes that Appellants' Statements of the Facts are argumentative and fail to describe essential provisions of the orders which are subject to review. Consequently, United offers this Statement of the Facts.

Docket No. 820537-TP, from which emanated the orders under review, was established by the Commission in 1982 as an investigatory docket. With the introduction of competitive long distance services, the Commission undertook an investigation of where and how new telecommunications carriers could be accommodated in Florida.

These new carriers, IXCs, were involved in providing long distance services either over their own facilities or over resold facilities of existing telephone companies. The new IXCs did not provide customer to customer service, but would instead use the existing facilities of local telephone companies to originate or

complete long distance calls. For example, a Crawfordville to Atlanta call might be carried by AT&T, MCI, Sprint or Microtel from the Central Telephone Company long distance switch in Tallahassee to Atlanta, but only Central would have lines between Crawfordville and Tallahassee. One of the objectives of Docket No. 820537-TP was to determine how local exchange carriers (LECs) such as Central were to be compensated for originating and terminating long distance calls carried by the IXCs. The method of compensation among carriers is referred to as access charges. Earlier orders in Docket No. 820537-TP established an initial set of access charges. Those orders are not subject to review herein, but collectively constitute the first phase of this docket.

The second phase of Docket No. 820537-TP deals with the provision of "equal access" to the IXCs. In the context of this docket, equal generally means equal to the access enjoyed by the original IXC, AT&T. The most obvious existing inequality is in the number of digits a customer must dial to reach an IXC. AT&T's network can be reached by dialing Ø or 1, but a minimum of seven digits is needed to reach any of the other IXCs because the telephone network was never designed for more than one long distance carrier. Other "equal access" factors are identified in Order No. 13750 at page 3 (App. 3). The Commission's objective in this phase of Docket No. 820537-TP was to investigate all issues related to the type of access IXCs should have if the full benefits of competition in the form of lower prices and improved services were to be made available to the public.

After hearing 17 witnesses over four days of hearings, the

Commission issued Order No. 13750 on October 5, 1984. At the outset the Commission noted that if all Florida residents and businesses were to be provided equal access to multiple IXCs, the concept of equal access would have to be construed from the customer's vantage rather than the IXC's vantage. The Commission's concern was that if the focus were upon the IXCs only there would be "... competitive services in high volume and urban markets, but not in the low volume and rural markets." (App. 3) With a goal of statewide competitive services, the Commission believed that Equal Access Exchange Areas (EAEA) should be created in such a manner as to ensure that all Florida residents and businesses would have access to more than one IXC.

The EAEA concept advances the Commission's goal by requiring telephone companies, such as United, to deliver all customers' traffic to central points where the traffic could be switched to an IXC of the customer's choice. The points of interconnection for United were determined to be at its four toll switches. Under the EAEA plan, United would be responsible for providing equal access to every customer, even those in the most rural areas, to reach IXCs. It would accomplish this by routing long distance calls through its local exchange switches, or end offices (United has 94 end offices) to the four toll centers. Other telephone companies will provide interconnection at their end offices - the Commission's EAEA plan allows the flexibility to fashion the most economic way to provide equal access. United will spend $4,000,000 to provide equal access at its toll centers. The cost would have been $13,000,000 if those capabilities were provided at

the more numerous end offices. (App. 4) The Commission ordered that equal access be made available when it is economically feasible to do so, or when existing switches are replaced by digital technology switches which have the capability of providing equal access features. (App. 5)

While this aspect of the orders which are under review is virtually ignored in Appellants' initial briefs, the establishment of the EAEA plan is extremely beneficial to the IXCs in that it ensures that they will have access to every telephone customer in Florida. Merely reading those briefs would not lead someone unfamiliar with the proceedings before the Commission to detect that there is any quality of benefit in either order to the IXCs.

In United's argument, infra, this undeniable benefit to the IXCs is cited as the basis of the Commission's effort to balance the interests of the IXCs with the interests of the local telephone companies in order to achieve the Commission's goal of providing equal access to all telephone customers.

This is not to minimize the significance of the temporary preservation of limited toll monopoly areas to the IXCs, but simply to establish a perspective: there is much in the orders under review from which the IXCs benefit.

With respect to toll monopoly areas, the Commission has determined that there shall be <u>temporary</u> prohibitions on competition within the twenty-two EAEAs by toll transmission carriers. There is <u>no</u> prohibition against resellers operating within an EAEA. The Appellant IXCs, except AT&T, are both toll transmission carriers and resellers. The effect of Orders No. 13750 and 13912

on MCI, for example, is that it may not temporarily compete with United between Leesburg and Ocala using its own lines (a toll transmission line), but it may lease lines from United to carry this traffic (as a reseller).

Order No. 13750 provides that the temporary preclusion of intraEAEA toll transmission competition shall last only until September 1, 1986. The Commission has placed United and other local telephone companies on notice that the prohibition will end at that time unless the companies can carry the burden of proof in establishing that the public interest requires an extension of the ban. (App. 11)

Order No. 13750 gives this reasoning to support the temporary measure:

> "We find that toll transmission monopoly areas are appropriate on an interim basis in order to provide a transitional period during which LECs can adjust to competitive circumstances. Continuing toll monopolies will support the LECs' revenue stability in the short term. Further, toll transmission monopoly areas may be desirable to the extent that there are economies of scale in the provision of transmission facilities with the technology likely to be in use over the next several years, we find that, subject to the two previously enumerated exceptions, it is economically desirable to allow only the LECs to provide transmission facilities in an area where such economies can be fully exploited." (App. 11)

One of the two exceptions referred to above permits an IXC to carry intraEAEA traffic if it is not technologically able to screen and block such calls. (App. 10-11, 15) The second exception was subsequently held in abeyance. (App. 16)

SUMMARY OF ARGUMENT

United supports the Commission orders under review in this proceeding.

There is but one basic issue before the Court: can the Commission determine the pace at which competition for long distance telephone service will be introduced.

Appellants assert that the Commission is without authority to restrict toll competition by certificated carriers in Florida. They state that the Legislature has provided no opportunity for the Commission to exercise its discretion with regard to when and where competition may be offered by certificated carriers.

Appellants' arguments are baseless and their reasoning faulty.

Section 364.335(4), Florida Statutes (1983), which has somehow been read to prohibit the Commission's reasoned approach to the introduction of competition, says nothing of the sort. It does, to the contrary, expressly provide that the Commission may grant certificates in whole or in part with modifications in the public interest. In Microtel, Inc. v. Florida Public Service Commission, ___ So.2d ___, No. 64,801 (Fla. filed February 28, 1985), the Court held that this statute requires the Commission to consider the public interest in its determinations as to granting competitive certificates. The orders under review have opened to competition all interEAEA traffic, all resale of intraEAEA traffic, and have fixed the date of September 1, 1986, as the date upon which the remaining limited toll monopoly will end. This accomplishes the gradual introduction of full competition which was envisioned by the Legislature. The Senate Staff report that Appellants rely upon as proof of legislative intent expressly states that the bill "permits" the Commission to allow

competition. This, coupled with the use of the permissive "may" in the statute, clearly indicates that the Commission was expected to exercise the type of discretion the Legislature is accustomed to having it perform.

Appellants also argue that there are no standards or guidelines to limit the exercise of discretion; but this cannot be so because the Court ruled upon this very point in the Microtel case, holding that sufficient controls do exist in the law.

Appellants argue that the Commission acted in an arbitrary and capricious manner, but the record amply supports the Commission's conclusions. While the Court will not delve into the transcripts of record to resolve competing assertions as to what the facts say, the Commission's findings are justified both in its orders and in the underlying documentation.

Finally, Appellants argue that the Commission is estopped from precluding full competition even temporarily because of an allegedly contradictory filing in U.S. v. Western Electric, 569 F.Supp. 990 (D.D.C. 1983). The filing is not inconsistent with the orders under review; to the contrary those orders expressly recognize the Commission's duty to approve competition within the Southeast Florida LATA. They accomplish that end. The simple fact is that the Commission is in effective compliance with its representations to the Court. No recognized theory of estoppel by judgment and/or collateral estoppel acts as a constraint upon the Commission in this regard.

Appellant's assertions are without merit. Orders No. 13750 and 13912 should be affirmed by the Court.

ARGUMENT

POINT I CAN THE FLORIDA PUBLIC SERVICE COMMISSION DETERMINE THE PACE AT WHICH COMPETITION IS INTRODUCED IN FLORIDA?

The Commission has taken the only responsible course of action available to it with respect to the introduction of competitive telecommunications services in Florida. Its actions in Orders No. 13750 and 13912 are consonant with its statutory authority and are essential in protecting the public interest.

Appellants assert five fundamental arguments in support of their respective positions:

a. The 1982 amendment to Section 364.335, Florida Statutes, precludes toll monopolies.

b. The legislative intent and legislative history of the amendment to Section 364.335, Florida Statutes, is to bar all toll monopoly.

c. The Commission action complained of violates this Court's holding in Microtel, Inc. v. Florida Public Service Commission, ____ So.2d ____ No. 64,801 (Fla. Filed February 28, 1985), and is contradictory to positions taken therein by the Commission.

d. There are no standards or guidelines to govern the Commission's actions.

e. The Commission is barred from preserving toll monopoly areas by reason of statements made to U.S. District Court Judge Harold Greene in U.S. v. Western Electric, 569 F.Supp. 990 (D.D.C. 1983).

United believes that none of these arguments has merit and

that Appellants have totally failed to assert any lawful basis for quashing Orders No. 13750 and 13912.

A. Does Section 364.335, Florida Statutes, preclude toll monopolies?

By its express terms, Section 364.335, Florida Statutes (1983), vests the Commission with authority to exercise its discretion with respect to the nature of competitive telecommunications services to be offered in Florida.

Section 364.355(4) provides:

> "The Commission may grant a certificate, in whole or in part or with modifications in the public interest, but in no event granting authority greater than that requested in the application or amendments thereto and noticed under subsection (1); or it may deny a certificate. The commission shall not grant a certificate for a proposed telephone company or for the extension of an existing telephone company, which will be in competition with or 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."
> (Emphasis Added)

There is no implication in this provision that the Commission is powerless to regulate the entry of competition for toll services; nor is there the slightest inference that toll monopolies have been barred instanter.

Had the Legislature intended to preclude the Commission from exercising its discretion in permitting toll competition, it would have provided that the Commission "shall grant a certificate" using mandatory language as it did in the second sentence of the quoted section.

Recently the Court has had cause to review this very language in Microtel, Inc. v. Florida Public Service Commission, supra, and concluded:

> As the Commission urges, we find that sections 364.335 and 364.337, taken together, provide for a two step certification process. The first step, governed by Section 364,335, requires the Commission to make an initial decision whether to issue a certificate, guided by the discretionary provision that certification be in the public interest. (Emphasis added. App. 23)

It is abundantly clear in this decision that the Commission has not been precluded from exercising its discretion and expertise in determining when and how much toll competition shall be permitted. To the contrary, the Court has found that the Commission is required to consider the public interest.

It is those very public interest considerations upon which the Commission has acted in temporarily precluding toll transmission competition on an intraEAEA basis.[1/] In Order No. 13750, the Commission found:

> We find that toll transmission monopoly areas are appropriate on an interim basis in order to provide a transitional period during which LECs can adjust to competitive circumstances. Continuing toll monopolies will support the LECs' revenue stability in the short term. (App. 11)

1/ Appellants' Initial Briefs repeatedly state that the Commission orders under review "created" a monopoly, the inference being that Appellants have been stripped of authority they previously possessed. That is not the case; to the contrary Appellants have never held the right to provide such a service in Florida. The Commission has done no more than temporarily preserve a limited toll monopoly which has existed for many years.

The beneficiaries of the transition period are less the telephone companies than the ratepayers, as Order No. 13912 subsequently made clear in speaking of not making existing investments in telephone company toll equipment stranded (obsolete). (App. 18) Telephone company investments are, of course, supported by its ratepayers. Hence, it is in the public interest to time the entry of competition so as to not uneconomically or inefficiently strand existing investment.

Further evidence of the Commission's reliance upon the appropriate standard in permitting a temporary toll monopoly can be found in Order No. 13750. After concluding that limited toll monopolies should cease to exist on September 1, 1986, the Commission stated:

> Parties advocating that toll monopoly areas be retained have the burden of demonstrating that such areas should continue in the public interest. (App. 11, emphasis added)

Appellants may disagree that the Commission has correctly evaluated public interest concerns, but the Court is not required to resolve such a conflict.

> The Court's responsibility is not to reweigh or reevaluate conflicting evidence, but only to ascertain whether the Commission's order is supported by competent substantial evidence.

Jacksonville Sub. Utilities Corp. v. Hawkins, 380 So.2d 425 (Fla. 1980). See also Gulf Coast Motor Lines, Inc. v. Hawkins, 376 So.2d 391 (Fla. 1979).

The Court has a very narrow scope of review in that Commission orders carry a strong presumption of correctness.

Pan Am World Airways v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983); Florida Telephone Corporation v. Mayo, 350 So.2d 775 (Fla 1977); Surf Coast Tours, Inc. v. Florida Public Service Commission, 385 So.2d 1353 (Fla. 1980); Fargo Van & Storage, Inc. v. Bevis, 314 So.2d 129 (Fla. 1975)

That an agency's conclusions should not be disturbed is a well settled principle of law in Florida:

> [A]dministrative construction of the statute by the agency or body charged with its administration is entitled to great weight and will not be overturned unless clearly erroneous.

State Ex Rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823, 8 (Fla. 1973). See also Ft. Pierce, etc. v. Florida Public Service Commission, 388 So.2d 1031 (Fla 1980); Grady v. Department of Professional Regulation, 402 So.2d 438 (Fla. 3rd DCA 1981); and Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla 1983).

Given the language in Microtel that the Commission must exercise discretion and act in the public interest in granting certificates to provide toll services, and the well settled case law holding that an agency such as the Commission is entitled to great deference in interpreting statutes it is charged to administer, Appellants' arguments that the Commission is without authority to temporarily preserve a limited amount of toll monopoly should be rejected.

B. Does the legislative history or legislative intent dictate a finding that temporary preservation of limited toll monopoly is precluded?

Legislative intent is manifest in the language the

Legislature chose in enacting Section 364.335(4), Florida Statutes (1983), - "... the Commission may grant a certificate ..." The Legislature did not infer that the Commission had been precluded from exercising its discretion in acting in the public interest, although it could easily have done so by providing that the Commission "shall" or "will" grant certificates upon specific preconditions. The Legislature could have precluded the Commission's exercise of discretion by enacting a statute that eliminated the need for the application of the Commission's review and expertise, but it obviously chose not to do so. Appellants are before the Court to secure that which the Legislature has withheld.

Where the language of the statute is clear and unambiguous, there is no need to judicially construe or interpret its meaning. Tropical Coach Line, Inc. v. Carter, 121 So.2d 779 (Fla. 1960). Appellants' gravamen is, in essence, that the Legislature intended to mandate full toll competition, without exception.[2/] In other words, the Commission shall grant certificates rather than the chosen word may. In 1963, the First District Court of Appeal held:

> It must be assumed that the Legislature of this state must know the plain and ordinary meaning of words and that the word "may" when given its ordinary meaning, denotes a permissive term rather than the mandatory connotation of the word "shall". It is

---

2/ AT&T Initial Brief p. 7
MCI Initial Brief p. 15
Sprint Initial Brief p. 24
Microtel Initial Brief p. 9

> interesting to note that in other provisions of the same chapter, which are definitely mandatory, the Legislature used the word "shall". If the Legislature had meant to say "shall", we think it would have so provided.

Brooks v. Anastasia Mosquito Control District, 148 So.2d 64 (Fla. 1st DCA 1963). (Footnote omitted)

Appellant, AT&T, asserts that the Senate Staff Analysis of the bill which ultimately became Section 364.335(4) "... left no room for any suggestion ..." that the Commission could limit competition. AT&T's Initial Brief p.12. Yet the Staff Analysis flatly states:

> This 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;
>
> * *
>
> (Emphasis added) AT&T Appendix A-1 Paragraph I.B. Effect of Proposed Changes.

United agrees that the Legislature "left no room" for doubt: the Legislature's intention was that the Commission should be permitted to introduce competition. The Commission has acted prudently to introduce intrastate competition by facilities carriers and resellers. It has manifested the intent to terminate the remaining limited toll monopoly on September 1, 1986, and has even created an exception to the limited monopoly for IXCs lacking the capability to screen calls. All circumstances considered, the Commission has balanced the interests of the IXCs and the telephone companies and is moving rationally in measured steps toward full toll competition. There is every indication in the language chosen by the Legislature and, as discussed in the Senate

Staff Analysis, that the Legislature intended for the Commission to proceed in just this manner.

C. Does the Commission's temporary preservation of a limited toll monopoly violate the holding in Microtel, Inc. v. Florida Public Service Commission, or contravene statements made therein by the Florida Public Service Commission?

The Court's decision in Microtel, Inc. v. Florida Public Service Commission, ____ So.2d ____, No. 64,801 (Fla. filed February 28, 1985) considered these questions:

1. Must the Commission consider the provisions of Section 364.337(2), Florida Statutes (1983) as part of its initial determination of whether to issue a certificate?

2. Under Section 364.345(1) is Microtel entitled to be free from competition until it has a chance to establish itself?

Neither issue is on point with the questions which are before the Court in this proceeding so there is only limited applicability of the Microtel holding. Sections 364.337(2) and 364.345(2) are not at issue in this proceeding; Section 364.335(4) is at issue.

Nonetheless, the apparent relatedness between the Microtel case and the instant case do seem to require that the parties address it.

United believes that the Microtel decision is not contrary to the Commission's determination that there should be a temporary preservation of a limited toll monopoly area. To the contrary, the Court found that certification of competitive toll carriers was a two part process, the first of which

> ...requires the Commission to make an initial decision whether to issue a certificate, guided by the discretionary proviso that

certification be in the public interest. Id, at p.2 (App. 23)

A vital element of that decisionmaking process and the exercise of discretion by the Commission was its consideration of whether less than full competition should be permitted immediately upon certification. For example, MCI's certificate was granted with the express proviso that it was subject to determinations to be made in Docket No. 820537-TP with respect to geographical scope.[3/] Thus, while the Commission proceeded with the docketing and approval of several IXC certification proceedings, it did so reserving the right to subsequently determine the restrictions to be placed upon the geographical scope of the IXCs' authorities.

With respect to the question of whether the Commission made statements in the Microtel case which contradict its holding in Orders No. 13750 and 13912, there is a singular lack of legal authority in Appellants' initial briefs as to its significance. The Commission in the Microtel case was defending its orders granting certificates to several IXCs. United was not a party to the Microtel proceeding, but counsel has read the Motion to Dismiss which is quoted repeatedly through Appellants' initial briefs. There is nothing in the Motion which should discomfort the Commission and certainly nothing which acts as any legal constraint on the Commission's defense of the orders under review

---

3/ See MCI's Initial Brief, Supplemental Appendix, p. 8.

herein. The Motion to Dismiss speaks in terms of bringing about vigorous competition and that is precisely what the Commission has accomplished: it has authorized interEAEA competition by all IXCs, as well as intraEAEA competition by IXCs who are resellers (including Appellants) and has fixed a date for discontinuing the limited intraEAEA toll monopoly. Moreover, it has ordered the local telephone companies to provide equal access, at an anticipated cost of more than $48 million.

The Court is concerned only with whether the actions complained of comport with the essential requirements of the law [4/], and are supported by competent substantial evidence [5/], an inquiry that is not enhanced by noncontextual comparisons with pleadings de hors the record.

D. Are there sufficient standards in Section 364.335 to support the Commission's action in Orders No. 13750 and 13912?

The Court has already determined that the amendment to Section 364.335 which permits the Commission to authorize toll competition (Chapter 82-51, Laws of Florida) contains sufficient standards and guidelines to pass constitutional muster:

> We are of the opinion that adequate standards and guidelines are provided in this statute in light of the Legislative objective to bring competition into this business area which had not heretofore existed.

Microtel, Inc. v. Florida Public Service Commission, supra, at 3. (App. 24)

4/ Gulf Coast Motor Line, Inc. v. Hawkins, supra

5/ Jacksonville Sub. Utilities, Corp. v. Hawkins, supra

The very orders which the Microtel opinion affirms contain an express reservation by the Commission of the right to determine the geographical scope of the IXCs' operating authorities in Docket No. 820537-TP. See, for example, Order No. 12292 contained in MCI's Initial Brief Supplemental Appendix, at p. 8.

It is a waste of the Court's resources to reargue an issue that has been so recently and unequivocally settled.

Appellants have confused the question of adequate standards with that of competent substantial evidence.[6/] Questions of adequacy of standards are matters of statutory construction. Barrow v. Holland, 125 So.2d 749 (Fla. 1960).

Where the court has specifically construed the statutes in question and found therein "adequate standards and guidelines" the only remaining question can be whether the Commission's specific action was arbitrary and capricious. Sprint has raised the question of whether the temporary preservation of limited toll monopoly areas is arbitrary and capricious, asserting that the Commission's position is inconsistent with earlier statements favoring competition and contradictory to the position of Sprint's witness in the proceedings before the Commission.

6/ MCI asserts that the absence of a standard "... renders the Commission's interpretation of the statute unconstitutional", citing Askew v. Cross Keys Waterways, 372 So.2d 913 (Fla. 1978). Agency interpretations may be arbitrary and capricious, but they cannot, per se, be unconstitutional.

The record taken as whole shows that the Commission has been consistent in its introduction of competition in Florida. Both in IXC certification proceedings and in Docket No. 820537-TP, the Commission has introduced substantial, but not complete competition. In addition, it has established a timetable for going to full competition. The Appellants fail to consider that the Commission has balanced their interests with the interests of local telephone companies which have millions of dollars of rate-payer supported investment already in place. The Commission exercises only minimal rate regulation over IXCs who are free to price services based on market forces while local telephone companies are burdened with statewide uniform toll tariffs which may be changed only through full scale rate proceedings which last a year or more. Moreover, the Commission has authorized Appellants to compete with the local telephone companies as resellers throughout the state, a status they disdain in Briefs before the Court, but in which they extensively, and presumably profitably, compete.

The record in this proceeding supports the Commission's conclusions in Orders No. 13750 and 13912. Mr. Ronald Whisenhunt testified for the Commission that the temporary preservation of a limited toll monopoly is supported by these factors:

- it supports universal service goals (Tr. 22)
- it is inequitable to regulate telephone companies intra-EAEA toll rates and service standards, but not IXCs (Tr. 38)
- that limited monopoly is but a temporary measure to avoid adverse effects to the ratepayers (Tr. 39)

One of the Commissioners stated his concern this way:

> It seems to me what we are about is the introduction of competition, where it is technically feasible, and at the same time trying to protect local ratepayers from the enormous increases in local rates. (Tr. 58)

Other references in the transcript of record may be found which are consistent with these statements.

To be sure, Appellants could cite references to testimony which argues against temporary, limited toll monopolies, but it is the Commission's province to weigh and evaluate conflicting testimony, not the Courts'. Jacksonville Sub. Utilities Corp. v. Hawkins, supra. While the record supports the Commission's findings, even if the Court might have reached a different conclusion, it is bound to affirm the Commission's order when it is supported by competent substantial evidence, as these orders are. Benton Bros. Film Express v. Fla. Railroad and P. U. Com'n, 57 So.2d 435 (Fla. 1952). Moreover, the narrow scope of the Court's review does not permit it to "... delve into the transcript of testimony in order to resolve opposing contentions as to what it shows...". Ryder Truck Lines, Inc. v. King, 155 So.2d 540 (Fla. 1963).

The orders in this proceeding are based on sufficient, competent substantial evidence and are in no way arbitrary or capricious, but on the contrary are well-founded, based upon evidence of record and permitted under the governing laws.

E. Is the Commission barred from temporarily preserving a limited toll monopoly because of positions allegedly taken by it in another proceeding?

Two appellants have asserted that the temporary provision

of limited toll monopoly is barred by positions taken by the Commission in the Bell System divestiture proceeding, U.S. v. Western Electric, 569 F.Supp. 990 (D.D.C. 1983).

Sprint argues that U.S. District Court Judge Harold Greene was misled into approving larger LATAs than he otherwise would have because representations had been made to him by the Commission that intraLATA competition would be permitted in Florida. As support for this argument, Sprint refers to only one LATA, the so-called Southeast LATA, and states that absent the Commission's assurances of intraLATA competition it would not have gained the Court's approval as one LATA.

Assuming, arguendo, that the Commission was persuasive in having the Southeast LATA approved on the basis of allowing competition within it, the Commission has fulfilled its commitment by specifically providing in Order No. 13750:

> Judge Harold Greene, prior to affirming the LATA boundaries, expressed concern that there might not be competition within the Southeast LATA. The Southeast LATA has been divided into two EAEAs, thus permitting competition in that LATA.
> (App. 11, emphasis added.)

Judge Greene surely did not believe that intrastate competition was going to appear in full bloom upon the issuance of his decision. He recognized that the introduction of intrastate competition was subject to state regulatory action and acknowledged that the Florida Public Service Commission is committed to intrastate competition in telecommunications. U.S. v. Western Electric, supra, at 1004-6, and 1032. The Commission has justified this belief by providing for full interEAEA

competition, resale of intraEAEA services and a termination date of September 1, 1986, for intraEAEA toll transmission monopoly. By its own terms, Sprint's argument is restricted to the Southeast LATA and is not said to extend to other LATAs, let alone any of United's territory, none of which is encompassed within a LATA. United was not a party to U.S. v. Western Electric, supra, and is not subject to representations made therein or to the Court's holding insofar as intrastate competition in telecommunications services are concerned.

If the Commission submitted representations to the federal court, the inconsonance, if any, of its later actions with those comments and the legal effect of same should be argued before Judge Greene. The Florida Supreme Court has no basis, save gross speculation, to presume that Judge Greene would redesign the Florida LATAs because intraEAEA competition will occur in 1986 rather than 1985. There is no basis upon which the Court can rule.

MCI asserts that the Commission is estopped from precluding full toll competition on the basis of a footnote in Guerra v. State Department of Labor and Employment, 427 So.2d 1098 (Fla. 3rd DCA 1983). The footnote is, first, dicta, and second, inapposite. It is dicta because the decision invalidates a rule and the proceeding held pursuant thereto and does not turn on any theory of estoppel. It is inapposite because the reference is to collateral estoppel which prevents the relitigation of issues actually adjudicated between the same parties in a former action. Dixie Farms, Inc. v. Hertz Corp., 343 So.2d 633 (Fla. 3rd DCA

1977) and Smith v. United Services Automobile Association, 259 So.2d 501 (Fla. 1st DCA 1972). The temporary preservation of limited toll monopoly areas in Florida was not adjudicated in U.S. v. Western Electric, supra, nor were the parties identical. It is incongruous to assert that comments by the Commission, a nonlitigant third party in the Bell System divestiture proceeding, is an estoppel by judgment over different issues and different parties. Assuming only for the sake of argument that the Commission was a party in that proceeding, it was not a party before itself nor did it attempt to relitigate matters before itself.

CONCLUSION

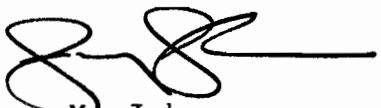
Section 364.335(4), Florida Statutes (1983), empowers the Florida Public Service Commission to exercise its discretion in the public interest to determine when and to what extent competition in intrastate toll telecommunications should be introduced.

The Commission's orders establishing Equal Access Exchange Areas and providing full interEAEA and partial intraEAEA competition are supported by the record and are based on competent substantial evidence.

Appellants' arguments are without merit and should be rejected.

United Telephone Company of Florida prays that the Court affirm Orders No. 13750 and 13912 in all respects.

Respectfully submitted,



Jerry M. Johns
Attorney for United Telephone
Company of Florida
Post Office Box 5000
Altamonte Springs, FL 32715-5000
(305) 889-6016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief and Appendix of Appellee, United Telephone Company of Florida has been served by United States mail on all parties listed below on this 10th day of April, 1985:

Mr. William B. Barfield
Attorney for Southern Bell
Telephone & Telegraph Co.
666 N.W. 79th Avenue, Room 632
Miami, FL 33126

Mr. James V. Carideo, Esquire
General Telephone Company of
Florida
Post Office Box 110 MC:7
Tampa, FL 33601

Mr. John P. Fons
Attorney for AT&T Communications of the Southern States
Post Office Box 7800
Atlanta, GA 30357

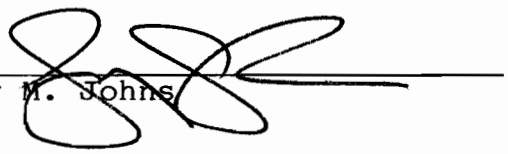
Mr. Robert M. Peak
Attorney for GTE Sprint
Communications Corp.
45 Rockefeller Plaza
New York, NY 10111

Mr. Richard D. Melson
Attorney for MCI Telecommunications Corporation
Post Office Box 6526
Tallahassee, FL 32301

Mr. James E. Wharton
Attorney for Microtel, Inc.
Lucerne Plaza, Suite 300
100 West Lucerne Circle
Orlando, FL 32801

Susan F. Clark
Deputy General Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301-8153

Mr. Robert L. Hinkle, Esquire
Aurell, Fons, Radey & Hinkle
Post Office Box 10154
Tallahassee, FL 32302



Jerry M. Johns