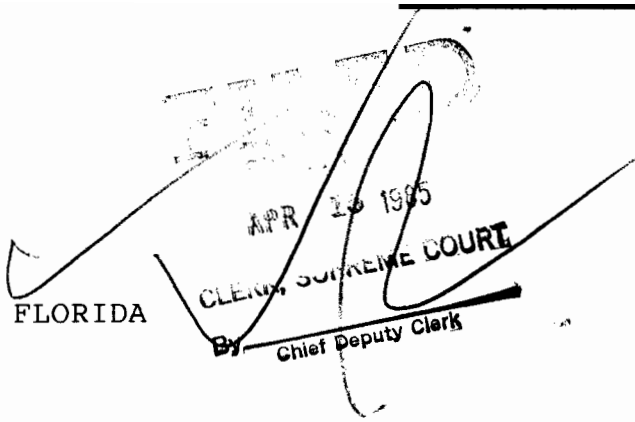

IN THE SUPREME COURT OF FLORIDA

MICROTEL, INC., et al.,
Appellants,

v. CASE NO. 66, 125

FLORIDA PUBLIC SERVICE
COMMISSION, et al.,
Appellees. (CONSOLIDATED CASES)

GTE SPRINT COMMUNICATIONS CORP., et al.,
Appellants,

v. CASE NO. 66, 403

FLORIDA PUBLIC SERVICE
COMMISSION, et al.,
Appellees.

MCI TELECOMMUNICATIONS CORP., et al.,
Appellants,

v. CASE NO. 66, 404

FLORIDA PUBLIC SERVICE
COMMISSION, et al.,
Appellees.

On Appeal From The Florida Public Service Commission

ANSWER BRIEF OF APPELLEE
SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY

William B. Barfield,
666 N.W. 79th Avenue
Miami, Florida 33126

William H. Adams, III
Robert J. Winicki,
Post Office Box 4099
Jacksonville, Fl. 32201

Attorneys for Southern Bell Telephone & Telegraph Company

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STATEMENT OF THE CASE AND FACTS

The statements of the case and facts contained in the briefs filed by appellants omit important facts that are essential to an understanding of the main issue raised on this appeal.

Restatement of the Issue

Appellants have stated the issue as whether the legislature's enactment of Chapter 82-51, Laws of Florida, deprived the Florida Public Service Commission ("Commission") of any power to create "Toll Monopoly Areas" in which competition in long distance services is not permitted and only the local exchange telephone company ("LEC") serving the area is authorized to provide intra-exchange long distance telephone services. Their statement focuses on whether the Commission has power to give LECs a monopoly, as distinguished from its power to put restrictions in the certificates of public convenience and necessity issued to appellants which curtail the areas they are entitled to serve. This approach to the case ignores the Commission's longstanding statutory power to issue certificates of public convenience and necessity defining the geographic areas certificate holders may serve and the services they are authorized to provide.

Under the scheme established by Chapter 364, Florida Statutes, a more accurate statement of the issue would be Whether enactment of Chapter 82-51 deprived the Commission of its power to issue certificates of convenience and necessity that contain territorial and other restrictions which, in the interest of making consumer choice more effective, have the effect of restricting some competition among telephone companies that provide intrastate long distance services.

The Commission Has Long Had Power to Issue Certificates of Public Convenience and Necessity Defining Services a Carrier is Authorized to Provide.

In 1953, the legislature enacted Chapter 28013, Laws of Florida, giving the Commission authority to issue certificates of public convenience and necessity to telephone companies. The substance of the 1953 legislation, with minor amendments, has continued in effect to the present time. Section 364.335(4), the amendment of which must be interpreted by the Court in this case, was a combination of sections 3 and 7 of the 1953 act.

Sections 364.32 through 364.37, Florida Statutes, make it clear that the Commission has always had power in issuing certificates of convenience and necessity to specify the territories in which certificate holders are authorized to provide service. Section 364.33, which prohibits operation of a telephone company without a certificate, is written in terms of the territory to be served by the certificate holder.

Section 364.335(1), which specifies the obligations of applicants, permits the Commission to require extensive information about the territory and facilities involved. Subsection 3 requires that hearings on the application be in or near the territory applied for. Section 364.345 requires every telephone company to provide adequate and efficient service in the territory described in its certificate and empowers the Commission to amend the certificate to delete territory not being properly served. Section 364.37 authorizes the Commission to adjudicate territorial disputes.

The Commission Has Board Power to Grant Certificates "In the Public Interest".

The first sentence of section 364.335(4) gives the Commission broad power to act on applications for certificates in accordance with its determination of the public interest. It 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.[1]

[1] All emphasis added unless otherwise indicated.

The Second Sentence of Section 364.335(4), Florida Statutes, Limits the Commission's Power to Issue Certificates.

Before Chapter 82-51 was enacted in 1982, the Commission's power to grant such certificates as it deemed to be in the public interest was limited by the second sentence of section 364.335(4) which provided:

> 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 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 service.

Section 364.335(4), Fla. Stat. (1981)

This sentence prohibited the Commission from allowing duplicative or competitive intrastate telephone service.

Thus, sections 364.32 through 364.37, as they existed before 1982, gave the Commission broad power to grant or deny to telephone companies certificates of convenience and necessity subject to the proviso that the Commission was not authorized to permit any competition to occur between companies in the telephone industry.

The 1982 Amendment Expanded the Commission's Power by Authorizing it to Permit Competition in Providing Long Distance Telephone Service.

Chapter 82-51, which contains two operative sections relevant to this appeal, did not amend section 364.33 which requires telephone companies to hold certificates of convenience and necessity describing the territories in which they are authorized to do business, nor did it change the first sentence of section 364.335(4) which gives the Commission broad power to grant, deny or modify certificates in the public interest. The first relevant section of Chapter 82-51 is section 3, which amended the second sentence of 364.335(4). The amendment expanded the power of the Commission by narrowing the prohibition against competition. This result was accomplished by amending section 364.335(4) to make it read as follows:

> (4) . . .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, 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.

This amendment left in place the prohibition against the Commission's permitting competition, but, by adding the words "local exchange" to modify "services", narrowed the restraint so that after the effective date of the amendment the Commission was prohibited from allowing competition only in the provision of "local exchange" services.

Section 4, the other relevant section of Chapter 82-51, confirmed that, when the Commission exercises its power to issue certificates under which duplicative or competitive service may be provided, it may regulate the resulting competition. The legislature did this by creating a new section 364.337, Florida Statutes, which provides:

> 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;

(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 Commission's Response to the 1982 Amendments.

Immediately after the legislature amended the prohibition against allowing competition, the Commission embarked on the task of creating a framework within which competition in long distance telephone service could be made effective. Despite the protestations of Microtel, Inc., the Commission issued certificates to a number of intrastate long distance service carriers. In its order, the Commission interpreted the legislature's action as approving competition whenever the public interest would not be harmed, and this Court upheld the Commission's position. See Microtel, Inc. v. Florida Public Service Commission, ___ So.2d ___ (Fla. 1985).

Issues Created By the AT&T Divestiture Decision.

The Commission recognized that the AT&T divestiture proceeding, United States v. AT&T, 552 F.Supp. 131 (D. D.C. 1983), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983), which separated AT&T long distance service from the

local service provided by the Bell Operating Companies, created new issues concerning the relationships between long distance carriers and local operating companies whose facilities had to be used by long distance carriers for originating and terminating long distance telephone traffic. The Commission identified these issues and noted that new regulatory requirements would be needed to facilitate introduction of competition into the intrastate long distance market. Accordingly, it opened docket number 820537-TP to determine what these requirements should be. Proceedings under the docket resulted in Order No. 13750, issued by the Commission on October 5, 1984. In the Order, the Commission created a comprehensive regulatory structure for the introduction of competitive long distance intrastate telephone service.

The Commission's Objectives in Docket No. 820537-TP.

The Commission's fundamental objectives in creating the new docket were to ensure "equal access" by long distance carriers to customers of the LECs, to compensate LECs for the use of their facilities and to encourage competition while maintaining universal service. Order at p.2. Technically, equal access for long distance carriers is the opportunity to serve customers with equal transmission quality and without cumbersome access codes. But the Commission chose to view equal access not only from a technical standpoint but from the

prospective of telephone customers. It found that equal access from the customers' viewpoint is the ability to choose among all long distance carriers that elect to do business anywhere in a given geographical area. Order at p. 3.

Creation of Equal Access Exchange Areas.

The Commission was concerned that, if it did not define geographic areas and require carriers who choose to do business in an area to offer services throughout the entire area, the natural incentives of long distance carriers would produce "competitive services in high volume urban markets but not in low volumes and rural markets." Id. The Commission minimized the cost of providing "equal access" by maximizing use of existing toll centers at which all long distance carriers would be interconnected with the LEC and by providing that intrastate long distance carriers would pay a uniform transport charge to LECs for carrying traffic within areas around toll centers. The areas around toll centers were referred to in the Order as "Equal Access Exchange Areas" ("EAEAs"). EAEAs are geographic regions fixed by the Commission that are generally congruent with the areas served by existing toll centers and additional toll centers to be constructed or consolidated through 1987. EAEAs may include more than one local exchange. EAEAs are engineered to aggregate and switch toll telephone traffic in a

manner that will maximize the efficiency of trunks between local central offices within the areas. The Commission divided Florida into twenty-two EAEAs.

The Creation of Toll Monopolies within EAEAs.

The Commission decided that competition in the use of facilities to carry toll traffic between points within EAEAs was undesirable, at least in the short run. Therefore, until September 1, 1986, it gave the local exchange carrier operating in each EAEA the exclusive right to have its facilities used in providing toll services within its EAEA. However, there are several exceptions to the LECs' monopolies. LECs were given only "transmission" monopolies; that is, monopolies only in the sense that the LECs' facilities must be used for carrying intra-EAEA calls. The Order does not prevent resellers of long distance telephone services from competing with the LECs for intra-EAEA long distance traffic. Also, if a long distance carrier is unable to screen out or block intra-EAEA calls with its existing facilities, it may carry intra-EAEA over its own facilities and pay the LEC its existing message toll rate for the calls. And, finally, if the long distance carrier can demonstrate that the LEC cannot handle intra-EAEA toll traffic at a competitive price or in a timely manner, it may carry the traffic without compensating the LEC. Under the Commission's Order on Reconsideration, this latter exception will be

revisited before September, 1986. Order Disposing of Petitions for Clarification and Reconsideration, Order No. 13912, December 11, 1984 at pp 1-2.

Appellants' Certificates Were Issued Subject to the Orders to be entered by the Commission in the Proceedings Below.

Before the Order appealed from was entered, appellants had no vested rights to provide long distance service within EAEAs. They had certificates as intrastate long distance carriers, but the Commission's orders granting the certificates specifically noted that the scope of service and geographic area permitted under them would be defined by the Commission in docket number 820537-TP, the docket in which the Order appealed from in this case was entered.

For example, in Commission order number 12292, aff'd Microtel, Inc. v. Florida Public Service Commission, ___ So.2d ___ (1985), which granted MCI Telecommunications Corp. a certificate for long distance service, the Commission had expressly reserved ruling on the definition of MCI's territory stating:

> C. Definition of Territory
>
> By virtue of this Order, MCI is authorized to operate as a telephone company providing long-distance telecommunications service within the State of Florida. The certificate granted to MCI contemplates statewide authority and will not define the territory within which it operates. However, because of the changing environment and structure of the telecommunications industry, the

> scope of MCI's service and possibly the requirement to serve within that geographical scope would be subject to the determination made by this Commission in the generic access charge docket (Docket No. 820537-TP) and other related dockets. Accordingly, we find that the scope and nature of MCI's authority is subject to amendment consistent with our decisions in the generic access charge and other related dockets.

Thus, the consolidated appeals have been taken from the Order which, in effect, defines the services appellants are authorized to provide and the territories in which they may offer those services.

ARGUMENT

I. UNDER CHAPTER 364, THE COMMISSION MAY ISSUE CERTIFICATES OF CONVENIENCE AND NECESSITY TO INTRASTATE LONG DISTANCE CARRIERS UNDER WHICH THE CARRIERS ARE NOT AUTHORIZED TO PROVIDE INTRA-EAEA LONG DISTANCE SERVICES.

The Issue is Whether the 1982 Amendment Deprived the Commission of Its Power to Define the Territory and Service a Carrier is Authorized to Provide.

Before 1982, sections 364.32 through 364.37, Florida Statutes, clearly gave the Commission power to determine in the public interest the territory in which a telephone company was allowed to provide service and the nature of the service it was authorized to provide. The issue before the Court is whether the 1982 amendment to section 364.335(4), Florida Statutes (1981), deprived the Commission of the power to exercise this authority in a manner that restricts competition in providing

long distance service within EAEAs. Southern Bell's position is that the amendment did not deprive the Commission of that power.

Application of Rules of Statutory Construction Require Strict Construction of the Exception in the Second Sentence of Section 364.335(4) as Amended.

Familiar rules of statutory construction require that section 364.335(4), as amended, be interpreted to provide that the Commission still has power to define, in the public interest, the territories that certificate holders are entitled to serve and the services they are entitled to provide notwithstanding the 1982 amendment.

The second sentence of section 364.335(4) is essentially a proviso or exception which restricts the general grant of power to the Commission contained in the first sentence of the section. It is settled that a statutory proviso is an exception to the general grant of authority that precedes it.

> The office of a proviso is to restrain the enacting clause; to except something which would otherwise be within it, or in some manner to modify it; and where it follows an enacting clause general in its scope and language, it is to be construed strictly, and limited to objects fairly within its terms.

Southern Bell Telephone & Telegraph Company v. D'Alemberte, 39 Fla. 26, 21 So. 570, 572 (1897).

See Also Futch v. Adams, 47 Fla. 257, 36 So. 575 (1904); Cragin v. Ocean & Lake Realty Co., 101 Fla. 1324, 133 So. 569,

adhered to 101 Fla. 1337, 135 So. 795, app. dism'd 286 U.S. 523 (1931); State ex. rel. Florida Jai Alai Inc., 112 So.2d 825 (1959).

Application of this principle meant that the second sentence of section 364.335(4), as it existed before 1982, had to be strictly construed. This sentence did not mandate anything. It was a prohibition against the Commission's allowing any competition.

Nothing in the 1982 amendment changed either the character of the second sentence as an exception to the general principle set forth in the first sentence or its prohibitory nature. The fact that the second sentence was amended did not alter its relationship to the first sentence in section 364.335(4). It is well settled that when statutes are amended, the old and new provisions must be construed together:

> In accordance with the general rule of construction that a statute should read as a whole, as to future transactions the provisions introduced by the amendatory act should be read together with the provisions of the original section that were reenacted in the amendatory act or left unchanged thereby, as if they had been originally enacted as one section. Effect is to be given to each part, and they are to be interpreted so that they do not conflict.

1A Sands, Sutherland Statutory Construction, Section 22.34.

The Amendment Merely Gave the Commission New Power to Permit Competition.

The second sentence prohibited the Commission from allowing competition. The 1982 amendment to that sentence expressed the legislature's approval of competition, but it did not mandate unrestricted competition. It merely narrowed the restriction on the Commission's authority that prohibited it from issuing certificates that would enable telephone companies to compete. Since the sentence in which the amendment was made is only an exception to the general power of the Commission to determine in the public interest what territories a certificate holder may serve and what service it may provide, the amendment, by narrowing the exception, expanded the Commission's power, giving it authority to permit competition in long distance services upon such terms as it deemed to be in the public interest.

The Legislative History Makes it Clear That The Amendment Was Intended to Confer Additional Power on the Commission.

The foregoing construction of the amendment is entirely consistent with the amendment's legislative history. The Senate Staff Analysis and Economic Impact Statement on the Committee Substitute for Senate Bill 868 (Appendix to AT&T's Brief, p. A-1) described the effect of the proposed change in the following language:

> 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;
>
> Provide that the requirements set out in ch. 364, F.S., could be varied for a company or a company would be exempted from some or all requirements if such actions are consistent with the public interest.

The staff analysis thus clearly recognized that the effect of the amendment was not to require unrestricted competition in long distance service; it was to give the Commission power to permit competition in long distance service when it deemed that competition would benefit the public. The only requirement of section 364.335(4), as amended, is that the Commission exercise this power in the public interest. The issue of whether it has done so in this case has not been seriously raised by appellants. The issue they have focused on is whether the Commission has power to do what it did. It clearly does.

If there were any doubt about whether the Commission was required to allow intrastate long distance carriers to operate without restriction in all markets in which they are technically and financially able to provide service, without regard to competitive factors, that doubt was put to rest by section 4 of Ch. 82-51. That section specifically grants to the Commission authority to consider competitive factors in

determining whether to impose special requirements on a long distance carrier. If the Commission could consider only technical and financial ability in deciding whether to allow long distance carriers to provide service and if unrestricted competition were mandated by the amendment, the legislature would not have included competitive factors in § 364.337(2). This is particularly true since the Commission already had the statutory authority to consider technical and financial proficiency in the rendition of service by long distance carriers. See § 364.03, Fla.Stat. (1983). As both the Court and appellants have recognized, orders of the Commission come to the Court with a presumption of correctness. See Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So.2d 577, 582 (Fla. 1965). The Commission has both the statutory duty and expertise to determine issues relating to the public interest. Its responsibility is to protect consumers, not disgruntled telephone companies. Microtel, Inc., ___ So.2d at ___.

In Microtel This Court Did Not Hold That the Legislature Had Mandated Unrestricted Competition.

In the Microtel case, the Court was faced with an appeal by Microtel from an order of the Commission giving certificates to other long distance carriers which authorized them to compete with it. This Court upheld the Commission's order. The issue

of whether the Commission, acting in the public interest under section 364.335(4) or under the slightly different standards of section 364.337, has power to place restrictions on carriers' certificates that limit or restrict competition, was not before the Court, and the Court's opinion does not address it.

The Commission Acted in Accordance With Adequate Statutory Standards.

Section 364.335(4) requires the Commission to act "in the public interest" in granting certificates. In addition, section 364.337, Florida Statutes, sets forth five factors the Commission is required to consider in determining whether specific requirements should be imposed on competitive long distance carriers. Appellants contend that these are insufficient standards.

Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1978), on which appellants rely in contending that the legislature has not laid down adequate standards to govern the Commission in deciding whether to permit competition, is not merely distinguishable. It supports the position that "the public interest" is an adequate standard to govern the Commission in making decisions with respect to certificates of public convenience and necessity. In the Askew case, the Court struck down a statute which gave the Department of Administration unbridled discretion in selecting areas of critical state concern. The statute set out no guidelines to guide the

department in establishing priorities among many areas that might potentially qualify for designation. The District Court of Appeal for the First District held that the statute was an unlawful delegation of legislative power. Cross Key Waterways v. Askew, 351 So. 2d 1062 (Fla. App. 1st, 1977). This Court affirmed. The Court began its discussion of the delegation issue by observing that:

> . . .the specificity [required] of standards and guidelines may depend upon the subject matter dealt with and the degree of difficulty involved in articulating finite standards.

The Court did not criticize the legislature's use of general terms such as "the public interest", a standard that legislatures have traditionally used in delegating authority to public utility commissions. Its concern was with the lack of any standards governing the department in its selection process. The Court wrote:

> We emphasize that it is not the legislature's use of the phrases "containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional impact" nor "significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment" which faults the legislation. Although the Court in Sarasota County v. Barg, supra, invalidated an act which utilized the terms "undue or unreasonable" dredging or filling and "unreasonable" destruction of natural vegetation in a manner which would be

> "harmful or significantly contribute" to air and water pollution, such quantitative assessments by an administrative agency are not necessarily prohibited. As suggested by the district court of appeal such "approximations of the threshold of legislative concern" are not only a practical necessity in legislation, but they are now amenable to articulation and refinement by policy statements adopted as rules under the 1974 Administrative Procedure Act, Chapter 120, Florida Statutes.

372 So. 2d at 919

The court made clear that in determining whether a delegation is unlawful, the issue is whether the statute contains sufficient standards to enable a reviewing court to determine whether the agency has properly done its job. It said:

> A corollary of the doctrine of unlawful delegation is the availability of judicial review. In the final analysis it is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature. When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.

372 So. 2d at 918.

Courts have traditionally upheld statutes authorizing public utility commissions to issue certificates "in the public interest" or in accordance with public convenience and necessity". The requirement that an agency act "in the public interest" or that it issue certificates in accordance with the "public convenience and necessity" requires an agency to balance the benefits to the public from a proposed action against the detriments of the action and act only when it finds a net benefit. Statutory standards of this kind are more than adequate to fulfill the legislature's constitutional delegation obligations. The general rule is stated by American Jurisprudence Second in the following language:

> A requirement that an act shall be "in the public interest" is a sufficient criterion and standard where the subject matter of the statute renders this an intelligible and not a limitless criterion. Similarly, "public interest, convenience, or necessity" and "public convenience and advantage" have been held sufficient standards.

1 Am. Jur. 2d, Administrative Law, § 120.

Moreover, courts have traditionally had no difficulty in reviewing agency decisions based on the public interest or the public convenience and necessity. See Florida Motor Lines, Inc. v. Railroad Commissioners, 100 Fla. 538, 129 So. 2d 876 (1930) and Burlington Truck Lines v. United States, 371 U.S. 156 (1962). See also Microtel, Inc., ___ So.2d at ___.

The Order contains the following explicit findings:

F. Monopoly Areas

Subject to two exceptions, the Commission finds that there shall be toll transmission monopoly areas in which the LECs shall be the sole supplier of transmission facilities. Generally, resellers and IXCs may compete with LECs for the provision of toll service to customers within the EAEA only through the use of LEC provided WATS and MTS. However, an exception will be granted if an IXC does not have facilities with technology in place for screening and blocking unauthorized calls. In such a case the IXC may carry traffic over its own facilities and pay the existing MTS rates to the LEC. A second exception is that if, upon application, an IXC can demonstrate that they can handle the traffic in a more economical and timely manner, then the IXC may use its facilities to carry such traffic without compensating the LECs. Toll transmission monopoly areas shall coincide with EAEA boundaries.

Based on the above, the Commission decides that toll transmission monopoly areas are hereby established on a transitional basis until September 1, 1986. Prior to that date hearings will be held to determine whether toll monopoly areas should be continued as structured herein. Parties advocating that toll monopoly areas be retained have the burden of demonstrating that such areas should continue in the public interest. We find that the boundaries for toll monopoly areas shall be the same as those for EAEAs.

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 economics 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 economics can be fully exploited.

> If an applicant for an IXC certificate does not have the necessary technology to comply with EAEA requirements as set forth in this order, the Commission shall consider the reasons and justifications for non-compliance and determine whether or not to grant a certificate.
>
> Finally, the Commission, in establishing toll monopoly areas, is acting within the scope of its authority and such action is harmonious with state and federal law. Judge Harold Greene, prior to affirming with LATA boundaries, expressed concern that there might not be competition within the Southeast LATA. The Southeast LATA have been divided into two EAEAs, thus permitting competition in that LATA. Also, no LATA boundaries have been crossed in drawing EAEA boundaries.

These findings are clearly sufficient to justify the Commission's decision.

The Commission Had Statutory Authority To Limit Appellants' Certificates and Thus, Foreclose Intra-EAEA Competition.

Appellants have not seriously argued that the Commission did not properly exercise its discretion. Instead, they argue that the Commission acted without authority. We submit that the Commission had ample authority under section 364.32 through 364.37 to amend appellants' certificates of convenience and necessity in a manner that restricted long distance competition within EAEAs.

II. REPRESENTATIONS MADE BY THE COMMISSION TO JUDGE GREENE ARE NOT JUSTICIABLE IN THIS CASE

Several of the appellants argue that the Commission represented to Judge Harold H. Greene in the AT&T divestiture proceedings "that full competition would exist for

'non-exchange' telephone services within the Southeast Florida LATA -- and by implication in other LATA's throughout Florida." MCI Brief at 22 n.8 (emphasis added). This allegation is incorrect. As the appendix to MCI's brief makes clear, the Commission advised the court that it was committed to promoting intra-LATA competition. As the order reveals, it has carried out its commitment to promote effective competition by creating EAEAs.

The divestiture proceedings which split up the Bell System separated the function of providing long distance toll service from that of providing local telephone service (which includes intra-LATA long distance service). Judge Greene assigned to the Bell Operating Companies, including Southern Bell, the function of providing local telephone service. He assigned to AT&T the function of providing long distance service. See United States v. Western Electric Co., 569 F. Supp. 990, 993-94 (D.D.C. 1983). In order to achieve this division of functions, it was necessary for the court to establish some means of determining whether a toll call would be deemed a local or long distance call. In order to provide a mechanism for drawing the line between these different kinds of service, the district court created the LATA concept. The term "LATA" was defined by Judge Greene as establishing "the boundaries beyond which a Bell Operating Company may not carry telephone calls." Id. at 994. Judge Greene's order did not preempt the state's power

to regulate intra-LATA exchange service. It left to the states the determination of the extent to which interexchange competition would be permitted. Id. at 1005 & n. 70.

With regard to the Southeast Florida LATA, comprising Miami, Ft. Lauderdale and West Palm Beach, the Department of Justice opposed consolidation of the two metropolitan areas into one LATA. Southern Bell supported the single LATA concept. Judge Greene found in favor of Southern Bell. Id. at 1030-33. He noted that the Commission had already licensed Microtel, Inc. to compete with Southern Bell for intra-LATA calls and that the Commission was committed to promoting competition. Id. at 1032. However, Judge Greene specifically rejected Microtel, Inc's. contention that the district court, not the Commission, should define local exchange service for the purpose of determining the scope of the interexchange long distance service Microtel would be allowed to provide. Judge Greene wrote: "Microtel's desire that the local, regulatory definition of 'exchange' be applied to its operations [intra-LATA] for purposes of Florida law is a matter for the state regulators." Id. at 1032 n. 219 (emphasis added).

The Commission did not represent to Judge Greene that it favored unrestricted competition in intrastate long distance service nor did it represent that it would allow all certified long distance carriers to provide services anywhere within the Florida LATAs. Mindful of its commitment to promote

competition, the Commission split the Southeast LATA in half, thereby, for example, allowing long distance carriers to serve points between Miami and Palm Beach. The Commission made specific note of this in its Order. We submit that the Commission has been faithful to its obligations under the statute and to its commitment to promote effective competition. If Appellants believe the Commission has violated Judge Greene's order, they should make that argument before him. It has no place in this appeal.

CONCLUSION

The Commission acted within its authority in determining that intrastate long distance carriers may not provide long distance service between points within EAEAs. We respectfully submit that its Order should be affirmed.

Respectfully submitted,

William B. Barfield
666 N.W. 79th Avenue
Miami, Florida 33126
(305) 263-2622

MAHONEY ADAMS MILAM SURFACE
& GRIMSLEY, P.A.

By _____
William H. Adams, III
Robert J. Winicki
Post Office Box 4099
Jacksonville, Florida 32201
(904) 354-1100

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE & TELEGRAPH COMPANY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Answer Brief of Appellee Southern Bell Telephone & Telegraph Company have been served by U.S. mail this 12th day of April, 1985, on the following:

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

William B. Barfield
Joaqui R. Carbonell
Southern Bell Telephone and
Telegraph Company
Room 632
666 N.W. 79th Avenue
Miami, Florida 33126

Jerry M. Johns
Alan N. Berg
Post Office Box 5000
Altamonte Springs, FL. 32701

Kevin H. Cassidy
J. Manning Lee
Savery Gradoville
Satellite Business Systems
8283 Greensboro Drive
McLean, VA. 22101

Thomas F. Woods
Woods & Carlson
Suite 112
1030 E. Lafayette Street
Tallahassee, FL. 32301

Mark J. Bryn
Reisman and Bryn
Suite 400D
2699 South Bayshore Drive
Miami, FL. 33131

Jeffrey Pardo
21st Floor, Flagler Center
Building
44 West Flagler Street
Miami, FL. 33130

Lee Willis, Jr.
Ausley, McMullen, McGehee,
Carothers & Proctor
Post Office Box 391
Tallahassee, FL 32302

R. Douglas Lackey
Southern Bell Telephone
and Telegraph Company
4300 Southern Bell Center
675 West Peachtree St., N.E.
Atlanta, Georgia 30375

Jack Shreve
Michael Wilson
Office of Public Counsel
624 Crown Building
202 Blount Street
Tallahassee, FL. 32301

John P. Fons
Michael Andre Donella
Post Office Box 7800
1200 Peachtree St., N.E.
Atlanta, GA. 30357

Norman Horton, Esq.
Mason, Erwin & Horton, P.A.
Suite 202
1020 East Lafayette Street
Tallahassee, Fl. 32301

James V. Carideo
Thomas Parker
General Telephone Company
of Florida
Post Office Box 110, MC 717
Tampa, Fl. 33601

Ethan Minsky, Esquire
Holywell Corporation
300 Miami Center
100 Chopin Plaza
Miami, Fl. 33131

Kenneth B. Gatlin, Esquire
Madigan & Parker
Post Office Box 669
Tallahassee, FL. 32302

Patrick K. Wiggins
Messer Rhodes & Vickers
701 Lewis State Bank Bldg.
Tallahassee, Fl. 32301

Dellon E. Coker
Chief Regulatory Law Office
U.S. Army Legal Services Agency
Attn: JALS-RL 3208
5611 Columbia Pike
Falls Church, VA 22041

John K. Aurell
Holland & Knight
Post Office Drawer 810
Tallahassee, FL. 32302

James E. Wharton
Lucerne Plaza, Suite 300
100 W. Lucerne Circle
Orlando, Fl. 32801

Stephen H. Watts, II
McGuire, Woods & Battle
1400 Ross Building
Richmond, VA. 23219

Robert M. Peek
Susan Coleman
Reboul MacMurray Hewitt
Maynard & Kristol
45 Rockefeller Plaza
New York, N.Y. 10111

W. D. Lines
Lines, Hinson & Lines
Post Office Box 550
Quincy, FL. 32351

J. Lloyd Nault
Southern Bell Telephone
and Telegraph Company
4300 Southern Bell Center
675 West Peachtree St., N.E.
Atlanta, GA. 30375

Irwin M. Frost
Suite 123 Dadeland Towers
9400 South Dadeland Blvd.
Miami, Florida 33156

Randall B. Lowe
67 Broad Street
New York, N.Y. 10004

Barrett G. Johnson
Suite 346, Barnett Bank
Building
Post Office Box 1308
Tallahassee, FL. 32302

Daniel R. Loftus
Watkins, McGuin, McNeilly &
Rowan
18th Fl., First American Ctr
Nashville, TN. 37238

Noreen Davis
Public Service Commission
101 East Gaines Street
Tallahassee, Fl. 32301

Winston Pierce
Division of Communications
651 Larson Building
Tallahassee, Fl. 32301

Sam Wahlen
Central Telephone Company
of Florida
Post Office Box 2214
Tallahassee, Fl. 32304

Marie Cox Lyons
Gulf Telephone Company
Post Office Box 1120
Perry, FL. 32347

Brian R. Giloman
100 S. Wacker Drive
7th Floor
Chicago, IL. 60606

Wallace S. Townsend
ALLTEL Florida, Inc.
Post Office Box 550
Live Oak, FL. 32060

James W. Tyler
Vista-United
Telecommunications
Post Office Box 1161
Lake Buena Vista, FL. 32830

Dick Fletcher
344 Barnett Bank Building
315 S. Calhoun Street
Tallahassee, FL. 32301

Attorney

0083A