IN THE SUPREME COURT OF FLORIDA

MICROTEL, INC., Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	CASE NO. 66,125
GTE SPRINT COMMUNICATIONS CORPORATION, Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	CASE NO. 66,403
MCI TELECOMMUNICATIONS CORPORATION, Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	CASE NO. 66,404

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

In 1982, the Florida Legislature amended section 364.335(4), Florida Statutes, to allow competition in the provision of telephone service. The Commission was authorized to issue certificates for competitive service with "modifications in the public interest." Previously, the Commission was prohibited from issuing a certificate to a proposed company that would be providing services in competition with the services of an existing telephone company. However, in 1982 this provision was narrowed to only prohibit the issuance of certificates for service that would be in competition with local exchange service.

In response to this legislative change, six interexchange carriers (IXCs) requested and were granted authority to provide interexchange service over their own facilities: Microtel, Inc.; MCI Telecommunications Corporation (MCI); AT&T Communications of the Southern States, Inc. (AT&T); GTE Sprint Communications Corporation (Sprint); Satellite Business Systems (SBS); and United States Transmissions Systems (USTS). In addition, other certificates were issued to "resellers." Resellers are companies that purchase service from facilities-based carriers and resell the service to its customers.

The certificates issued to the six facilities-based IXCs contained a provision for the future modification of

the scope and nature of authority granted.[1] Specifically each order granting a certificate stated that the scope and nature of authority granted was subject to amendment in the access charge docket, Docket No. 820537-TP. The orders which are the subject of this appeal were issued in Docket No. 820537-TP.

By Order No. 12765, issued December 9, 1983, in Docket No. 820537-TP, the Commission expressed its intent to establish Equal Access Exchange Areas (EAEAs). An EAEA defines the geographic area for which a local exchange company (LEC) is to provide equal access to all IXCs wishing to serve that area. On February 20, 1985, a workshop was held to define EAEAs and to determine how to implement a plan to provide access to competition for customers within an EAEA. A task force was also assembled and its report was submitted on March 26, 1984.

A three-day hearing on the propriety and specifics of establishing EAEAs and toll transmission monopoly areas

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[1] See Page 3, Order No. 12292 in Docket No. 820450-TP granting authority to MCI Telecommunications Corporation; Page 2, Order No. 12788 in Docket No. 830489-TI granting authority to AT&T Communications of the Southern States, Inc.; Order No. 12791 in Docket No. 800333-TP clarifying Microtel, Inc.'s grant of authority; Page 3, Order No. 12912 in Docket No. 830457-TP granting authority to Satellite Business Systems; Page 2, Order No. 12913 in Docket No. 830118-TP granting authority to GTE Sprint Communications Corporation; and Page 3, Order No. 13015 in Docket No. 830434-TP granting authority to United States Transmission Systems. Copies of these orders are attached as Appendix A.

was held on June 4, 6 and 7, 1984. As a result of the hearing the Commission decided that at least for an interim period (until September 1, 1986) it was in the public interest to modify each IXC's certificate to require that intraEAEA long distance service be provided solely through resale of WATS and MTS provided by LECs.

On October 5, 1984, the Commission issued Order No. 13750 establishing twenty-two EAEAs. Also in that Order the Commission limited the provision of competitive long distance toll service within an EAEA to the resale of WATS and MTS service provided by the LEC in that EAEA. Competitive carriers were not permitted to provide long distance service over their own facilities except under two circumstances. First, if an IXC did not have screening capability, it was permitted to carry intraEAEA toll traffic over its own facilities, but it would have to pay MTS rates to the LEC to compensate for diverting this traffic from the LEC's network. Second, if an IXC could demonstrate that the LEC could not offer the facilities at a competitive price and in a timely manner, then the IXC was permitted to carry the traffic over its own facilities without compensating the LEC. The order further provided the entire issue of toll transmission monopoly areas would be revisited in September of 1986.

Several parties filed Petitions for Reconsideration of Order No. 13750. In Order No. 13912, the Commission disposed of the petitions and held in abeyance the second exception to the LEC's toll transmission monopoly for intraEAEA traffic. The issue of allowing IXCs to carry traffic over its own facilities within an EAEA where an LEC could not provide the facilities at a competitive price and in a timely manner, was postponed until September 1986.

These appeals ensued after the issuance of Order No. 13912.

I.

THE FLORIDA PUBLIC SERVICE COMMISSION ACTED PURSUANT TO VALID STATUTORY AUTHORITY WHEN IT LIMITED THE PROVISION OF COMPETITIVE LONG DISTANCE SERVICE WITHIN AN EQUAL ACCESS EXCHANGE AREA TO THE RESALE OF WATS AND MTS UNTIL SEPTEMBER 1, 1986.

The Florida Public Service Commission (Commission) acting pursuant to section 364.335, Florida Statutes, clearly has the authority to limit the means by which interexchange carriers (IXCs) compete in the provision of long distance service within an equal access exchange area (EAEA). Section 364.335, Florida Statutes, prohibits the Commission from allowing competition in the provision of local exchange services and permits the Commission to allow for competition in other services, so long as it is in the public interest. The Appellants are mistaken in their assertion that the prohibition of competition in local exchange service requires the Commission to allow competition in all other services.

Background

In 1982, in response to the changes taking place in the telephone industry, the Commission sought legislation which would authorize the certification of telephone companies which were in competition with or duplicated the services of existing telephone companies. It was apparent

to the Commission and industry that it may not be in the public interest to preserve the monopoly of existing telephone companies in all areas of telephone service. Rather, the public interest would be better served by allowing competition in the provision of some services. Competition, rather than regulation, would be a better method of keeping rates for such services just and reasonable. At the time the Florida Legislature passed SB 868 which amended section 364.335 , Florida Statutes, authorizing competition, the Federal Communications Commission (FCC) had already authorized various entities to provide interstate telecommunications service in competition with American Telephone and Telegraph Company (AT&T).

In August of 1982, Judge Harold H. Greene approved the break-up of AT&T. Judge Greene approved a consent decree (MFJ) ordering AT&T to divest itself of its local operating companies (Bell Operating Companies or BOCs) thus separating long distance service from exchange service. This separation was in response to the federal government's allegation that AT&T used its control over its local monopoly to preclude competition in the intercity market. BOCs could provide exchange service but were prohibited from providing interexchange services. Under the MFJ, "exchange area" or "exchange" was defined

to encompass one or more contiguous local exchange areas serving common social, economic and other purposes, even where such configuration transcends municipal or other local government boundaries. United States v. American Telephone and Telegraph Co., 552 F.Supp. 131, 229 (D.D.C., 1982) aff'd sub nom.; Maryland v. United States, _____ U.S. _____, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1982).

Subsequent to August 24, 1982, the Court issued an opinion on the division of all Bell territory in the United States into geographically based exchange areas. The term exchange area was changed to LATA, Local Access and Transport Area. LATA was substituted for exchange area to avoid confusion, since exchange area was traditionally used by regulatory bodies as a local exchange area. United States v. American Telephone and Telegraph Co., 569 F.Supp. 990, 993, note 9 (D.D.C., 1983). In the words of the Court, "a LATA marks the boundaries beyond which a Bell Operating Company was prohibited from carrying telephone calls," supra at 993. It was recognized that the size of the LATAs would affect the BOCs financial viability and the pressure for rate increases.

The Court did not preempt state regulation of intrastate as well as intraLATA competition. Judge Greene specifically recognized that states may continue to

require that a regulated monopoly provide intrastate toll service. supra at 569.

A similar limitation on service territory was imposed by Judge Greene on General Telephone Company of Florida (GTF). When GTE Corporation's (GTF's parent corporation) purchase of Sprint from Southern Pacific Communications Corporation was approved in a consent decree, the court established market areas beyond which the companies providing local exchange service could not provide long distance service.

It is against this background the Commission set about determining the scope of competition to be in the public interest. The MFJ and GTE consent decree prohibited Southern Bell Telephone and Telegraph Company (Southern Bell) and GTF from providing service outside a LATA or market territory. Under section 364.335, Florida Statutes, the Commission was prohibited from allowing competition in the provision of local exchange service.

Section 364.335, Florida Statutes, specifically empowers the Commission to grant certificates of authority with modifications that are in the public interest.

Subsection (4) of section 364.335, Florida Statutes, provides as follows:

> (4) The commission may grant a certificate, in whole or in part or with modifications in the public interest, but in no event granting

> authority greater than that requested in the application or amendments thereto and noticed under subsection (1); or it may deny a certificate. The commission shall not grant a certificate for a proposed telephone company, 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 supplied)

Clearly, pursuant to this language, the Commission may modify the scope of authority requested by a telephone company, as long as it is not greater than that requested and as long as it is in the public interest. That is exactly what the Commission did. In each of the orders granting authority to the six facilities-based IXCs, the Commission modified the grant of authority requested. The Commission made the grant of authority subject to limitations that could be imposed as a result of determinations made in the generic docket dealing with access charges (Docket No. 820537-TP). In language typical of that used for the other five facilities-based IXCs, the Commission limited GTE Sprint's request for authority as follows:

> Because of the changing environment and structure of the telecommunications

> industry, we further find that the scope of authority granted to Sprint is subject to limitation and amendment by our decisions in the generic docket on access charges (Docket No. 820537-TP), in which Sprint is a party, and other related dockets.

Order No. 12913, Docket No. 830118-TP, Page 2.

The public interest standard set forth in section 364.335, Florida Statutes, constitutes a valid grant of legislative authority.

This Court has already considered the validity of the legislative delegation of authority to "grant a certificate, in whole or in part or with modifications in the public interest." In its opinion in Microtel v. Florida Public Service Commission, Cases Nos. 64,801, 65,307, 65,351, and 65,449 (Fla. Feb. 28, 1985), the Court found standard guidelines in subsection 364.335(1), were sufficient to delimit the public interest considerations and subsection 364.335(4), did not delegate "unbridled discretion" to the Commission in making the initial certification decision:

> In the instant situation, the legislature provided standards and guidelines in section 364.335(1). It is fairly obvious from the language of this section that the legislature wanted the Commission to make certain that competition on long distance service would be conducted by one who has the technical and financial ability to provide such service, and to know what territory the applicant proposed to operate in and the facilities that

> would be provided, and to ascertain what service, if any, was currently being provided by others in geographical proximity to the territory applied for. The clear legislative intent to foster competition also illuminates the public interest standard of section 364.335(4). We are of the opinion that adequate standards and guidelines are provided in the statute in light of the legislative objective to bring competition to this business area which had not heretofore existed.

supra, at 3.

The same areas of inquiry apply to the Commission's inquiry into whether the public interest will be served by modifying the scope of the authority requested. In modifying the grant of authority to these facilities-based IXCs, the Commission considered the facilities involved and the existence of service from other sources within the geographic areas. It considered whether it was in the public interest to have duplicative facilities and to provide service over those facilities rather than utilizing existing facilities, and the effect it would have on existing service of the LECs.

The Commission properly considered factors affecting the public interest when it limited, on an interim basis, the provision of competitive services within an EAEA to resale of WATS and MTS.

At the outset it should be stressed that the Commission has not prohibited competition within an EAEA.

Rather, the Commission has decided, for the time being, it is not in the public interest to have a proliferation of transmission facilities providing intraEAEA service. All certificated IXCs are permitted to provide long distance service within an EAEA through the resale of WATS and MTS. Moreover, this limitation on the method of providing competitive service within an EAEA is an interim measure, lasting only until September 1, 1986. Importantly, in 1986, those parties advocating the retention of toll transmission monopoly areas will have the burden of proving it is in the public interest to continue the toll transmission monopoly areas:

> 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.

Order No. 13750, Page 11.

In its decision to establish toll transmission monopoly areas, the Commission specifically found that there are economies of scale in the provision of transmission facilities and these economies of scale could

be realized by establishing toll transmission monopoly areas. Additionally, the existing service provided by LECs in an EAEA and in local exchanges could be adversely affected, if some revenue stability for service within an EAEA were not maintained while the LECs adjusted to other changes to the industry:

> We find that toll transmission monopoly areas are appropriate on an interim bases in order to provide a transitional period during which LECs can adjust to competitive circumstances. Continuing toll monopolies will support the LEC's 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.

supra, at 11.

Evidence presented at the June hearing supports the Commission's decision. In his testimony, Dr. Ben Johnson stated that the transmission segment of the toll market has natural monopoly characteristics when traffic volumes are low. (T-807-808). The facilities require large amounts of capital and the more they are used the less cost per unit. It was reasonable for the Commission to

use EAEAs based on 1987 planned toll centers/access tandem areas because the toll centers are currently the initial point of aggregating toll traffic from the various end offices throughout Florida.

To allow competition in the transmission segment of the toll market which is a natural monopoly would have increased the cost of service to Florida ratepayers. Recognizing that ultimately the natural monopoly area be somewhat different than an EAEA the Commission will readdress the geographic boundaries of the toll transmission monopoly areas in 1986.

There has been and continues to be a tremendous transformation taking place in the telephone industry. We are moving from an environment where all aspects of the service were provided on a monopoly basis to an environment where many services (excepting local exchange) will likely be provided on a competitive basis. The divestiture of AT&T and the introduction of competition required developing access charges to replace separation and settlements for toll calling. Additionally, network reconfiguration is required to provide access to all interexchange carriers on the same basis as AT&T (referred to as equal access). Also, the provision of customer premise equipment (CPE) is being phased out from the provision of local exchange service. All these changes are affecting the revenue stability of LECs.

Facilities-based toll competition within EAEAs would likely require LECs to incur further network reconfiguration costs, and the revenue effect to LECs for charging access charges instead of LEC toll charges to customers isn't known. Both of these circumstances lead to revenue instability. To allow LECs time to adjust to changes already required and to prepare for competition in intraEAEA toll led the Commission to maintain the toll transmission monopoly within EAEAs at least temporarily.

The introduction of competition is not an end in and of itself. The purpose of allowing competition is to benefit Florida telephone users through lower rates and more variety in available services. The introduction of competition is not for the sole benefit of those companies wishing to enter the market. The purpose of issuing certificates is not for the advantage and benefit of the applicant requesting them, but is primarily for the benefit of the public.

The Commission's decision to create toll transmission monopoly areas is consistent with its Comments regarding LATA boundaries.

The Commission's decision in this case is the natural evolution of its policy regarding competition in intraLATA toll calling and is not a repudiation of its position taken in Comments to Judge Greene regarding the approval

of LATAs. The Commission was concerned about intercity competition where cites were located within one LATA. This was of particular concern within a LATA as large as the Southeast LATA.

By the terms of the order being appealed, there is competition within LATAs. As stated by MCI in their definition of EAEA at page 4 of their brief, an EAEA is a subset of a LATA. Contrary to GTE Sprint's assertions, EAEA boundaries are not coextensive with LATA boundaries. Appendix B contains two maps of Florida. One showing the LATA boundaries and the other showing EAEA boundaries. There are twenty-two EAEAs and seven LATAs. There is no restriction on intraLATA, interEAEA competition. That service can be provided by a certificated IXC over its own facilities or through the resale of services (such as WATS and MTS) of another IXC. Also there is competition within EAEAs. The only restriction on intraLATA, intraEAEA competition is that it can only be provided through resale of LEC service. Additionally, that restriction is in place until September 1986 when the Commission has committed to revisiting the modification placed on intraEAEA competition.

The thrust of the Commission's Comments to Judge Greene on the establishment of LATAs and intraLATA competition was to preserve to the Commission the

authority to permit intraLATA competition, if it was in the public interest. Florida was concerned that the term LATA would be synonymous with local exchange and section 364.335, Florida Statutes, would prohibit the Commission from authorizing competition within a LATA. Florida is one of the few states which allow any type of intraLATA competition. As pointed out by GTF in its brief, there are 41 states that either prohibit or are still considering whether to allow intraLATA competition.

Finally, the circumstances regarding the Commission's Comments on LATA boundaries and its decision in this case do not meet the requirements for estoppel. Assuming, for arguments sake, the Comments are contrary, which they are not, estoppel does not lie. In Greenhut Construction Co. v. Henry A. Knott, Inc., 247 So.2d 517 (Fla. 1st DCA 1971), the circumstances under which the state may be estopped are set out:

> The law of this state generally recognizes the proposition that although the sovereign may under certain circumstances be estopped, such circumstances must be exceptional and must include some positive act on the part of some officer of the state upon which the aggrieved party had a right to rely and did rely to its detriment. Under no circumstances may the state be estopped by the unauthorized acts or representations of its officers. In addition, the essential elements of estoppel are as declared by this court in Quality Shell Homes & Supply v. Roley to be as follows:

> '* * * (1) a representation by the party estopped to the party claiming the estoppel as to some material fact, which representation is contrary to the condition of affairs later asserted by the estopped party; (2) a reliance upon this representation by the party claiming the estoppel; and (3) a change in the position of the party claiming the estoppel to his detriment, caused by the representation and his reliance thereon.'

The representations MCI complains of do not meet these tests for estoppel. The Comments were made to the Federal District Court, not MCI. Additionally, MCI has not demonstrated that it had a right to rely on the Comments, and it did, in fact, rely on them. At the time the Comments were made to Judge Greene, MCI had only just applied for a certificate to provide intrastate service one day prior to the Commission filing its Comments. More importantly, in granting a certificate, the Commission made it very clear that the scope of its authority may be limited by this proceeding on EAEAs.

II.

GTE SPRINT HAS CITED NO SPECIFIC FEDERAL LAW WHICH GIVES IT THE RIGHT TO PRESUBSCRIBE MORE CUSTOMERS THAN IT CAN SERVE.

GTE Sprint is the only appellant questioning the Commission's decision that an IXC should not receive any additional presubscribed traffic where demand for that particular IXC's services exceeds its capacity. Although Sprint alleges that this part of the Commission's order is in conflict with federal law, it does not cite the federal law or decision it is in conflict with. The Commission is unaware of any federal law or case which gives Sprint the right to presubscribe more customers than it has capacity to serve.

The specific language in Order No. 13750 alleged to be in conflict with federal law is:

> However, if the demand for a particular IXC's services increases to a point that it exceeds existing capacity, the Commission feels that the IXC should not receive any additional presubscribed traffic until it has increased its capacity to permit it to handle additional traffic without violating its presubscribed blockage rate.

Order No. 13750, Page 8.

Presubscription allows customers to designate in advance which IXC will receive and handle that customer's

long distance calls. Blockage rate refers to the number of calls that will not be completed because there is no circuit available to complete the call. It is a quality of service matter. The greater the number of calls attempted but not completed the less the quality of service.

The blockage rate, or the quality of service standard, for Sprint in Florida is designated in a tariff by Sprint. The Commission believes competition will determine what is an acceptable blockage rate. If a customer frequently finds his calls are not being completed because no circuits are available he will switch to another IXC.

An IXC must order enough capacity to handle its customers and meet the blockage rate (quality of service standard) it has committed to maintain. When the blockage rate is exceeded it should order new capacity.

The Commission's order simply facilitates the enforcement of an IXC's designated blockage rate. When the blockage rate is exceeded the IXC will not be permitted to receive additional presubscribed traffic.

Federal preemption of a state action occurs "where compliance with both federal and state regulation is a physical impossibility for one engaged in interstate commerce." Florida Lime and Avocado Growers, Inc. v.

Paul, 373 U.S. 132, 142-143 (1963). There is no physical impossibility of compliance with both in this situation. The IXC need only order sufficient capacity to serve its customers. Moreover, if Sprint were allowed to exceed its chosen blockage rate, it would be violating its standard of quality for both interstate and intrastate service since the tariffed blockage rate for its interstate service is the same as for intrastate service. The Commission's order compliments and furthers federal policy rather than frustrating federal policy or making it impossible to comply with both federal and state regulation.

CONCLUSION

The Commission's Order in this case should be affirmed. Pursuant to section 364.335, Florida Statutes, the Commission determined that it was in the public interest to limit the means by which IXC's provide competitive intraEAEA toll service. Further, the requirement that an IXC have sufficient capacity to serve its customers is consistent with federal law and policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION has been furnished by U.S. Mail this 15th day of April, 1985 to the following:

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