BEFORE THE FLORIDA SUPREME COURT

Microtel, Inc.,

Appellant,

vs. Case No. 66,125

Florida Public Service Commission,

Appellee.

GTE/Sprint Communications Corp.,

Appellant,

vs. Case No. 66,403

Florida Public Service Commission,

Appellee.

MCI Telecommunications Corp.,

Appellant,

vs. Case No. 66,404

Florida Public Service Commission,

Appellee.

Brief of Appellant, Microtel, Inc.

Appeal from Orders of Florida Public Service Commission Creating Equal Access Exchange Areas under Chapter 364, Florida Statutes so as to limit an interexchange carrier, such as Microtel, Inc. from competing with local exchange telephone companies in handling interexchange traffic within such areas and more specifically, would prohibit an interexchange carrier such as Microtel, Inc. from handling any interexchange traffic between any territory served by General Telephone Company of Florida such as the entire counties of Hillsborough, Polk, Sarasota, & Pinellas

Due Date: March 21, 1985
Dated: March 20, 1985

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Florida Public Service Commission, Case No. 66,404

Appellee.

References

Reference in this Brief to the record will be "R_____;" to the transcript of record "TR_____;" to exhibits introduced into evidence by "Exhibit _____;" and the page number of which said exhibit was received into evidence and to the Appendix to this Brief by "App."

Glossary

LEC - a local exchange telephone.

IXC - an interexchange telephone company.

Toll Center - an area of local territory or a city served by a toll switch.

EAEA - equal access exchange areas which generally is local exchange area (all IXCs would have equal access to the local network in such areas).

Statement of the Case

This docket was initiated in January 1983 for the purpose of exploring and ultimately implementing an intrastate access charge structure in Florida that would compensate local exchange companies (LECs) for the use of their local facilities to originate and terminate long distance (toll) telephone traffic within Florida for interexchange carriers IXC).

The Commission recognized that the need for such an access charge structure arose from the modification of final judgement (MFJ) entered in the AT&T divestiture proceeding, United States vs. American Telephone & Telegraph Co., 552 Fed. Supp. 131 (DDC 1982), affirmed sub. nom. Maryland vs. United States, 103 S. Ct. 1240 (1983) and concurrent action on interstate access charges by the Federal Communications Commission (FCC) in Docket 78-72, Phase I, MTS and WATS Market Structure.

By Order No. 12765, issued December 9, 1983, the Commission announced a plan for intrastate access charges. Among the concerns addressed by the Commission in that order was the provision of equal access to the largest number of consumers in the state of Florida. The vehicle chosen by the Commission to achieve this goal was the equal access exchange area (EAEA). An associated concern was the size of toll monopoly areas,

if any, to be granted local exchange companies. Hearings were held on this matter on June 4, 6, and 7, 1984. On July 2, 1984, a special agenda was held to make final determinations regarding the establishment and implementations of EAEAs as well as toll monopoly areas. The Commission issued Order No. 13750 on October 5, 1984 making these initial determinations. App A.

Thereafter, various petitions for reconsiderations and modifications were filed by several parties, including Microtel, before the Commission and on December 11, 1984, the Commission entered Order No. 13912 (App B) denying the petitions for reconsideration and clarification and affirmed its determination of the establishment of EAEAs prohibiting competition within such EAEAs by interexchange carriers and among other things, granted to General Telephone of Florida a complete monopoly within the counties of Hillsborough, Polk, Sarasota, and Pinellas prohibiting interexchange competition between exchanges within said territories.

This order also based the monopoly territories not on the toll centers as they exist today and have existed for years, but upon toll centers as they are planned by the LEC as of January 1987.

This appeal is from Order No. 13750 and the order on reconsideration being Order No. 13912.

Statement of Fact

There is basically no disagreement as to the essential facts involved in the instant appeal. This record consists of thousands of pages of technical and financial data, but essentially involves the issue of whether or not local exchange companies should be granted monopolies to transport toll traffic within an EAEA and specifically, whether or not General Telephone should be granted a monopoly throughout the counties of Hillsborough, Sarasota, and Pinellas.

Pursuant to the issues in the proceeding below, testimony and evidence was presented as to the location of toll switches within the state of Florida at the present time and what the plans would be as of 1987 as to where such toll switches would be located; and how toll traffic has been handled traditionally interexchange in Florida in the past and how the local exchange companies propose to handle such traffic in the future.

ISSUES PRESENTED

Issue I

Issue I - THE FLORIDA LEGISLATURE HAS ANNOUNCED A LEGISLATIVE INTENT THAT INTEREXCHANGE COMPETITION BE INTRODUCED IN FLORIDA AND THE ORDERS OF APPELLEE ON APPEAL CONTRAVENE THIS LEGISLATIVE INTENT.

Issue II - THE COMMISSION, IN EXPANDING THE MONOPOLY TERRITORY OF THE LECs, IS ENGAGING IN STATUTORY MODIFICATION OF CHAPTER 364, FLORIDA STATUTES IN VIOLATION OF THE FLORIDA CONSTITUTION.

Summary of Argument

Section 364.335 (4), Florida Statutes 1985, contemplates that there shall be monopoly territory for local exchange companies only in "the local exchange services provided" by such local exchange companies.

The Commission's action with respect to the establishment of toll monopoly areas based on expanded toll areas is contrary to said statute. Prior to 1982, Florida law required the providing of local and toll telephone service on a monopoly basis. See §364.335(4), Florida Statutes (1981). In 1982, however, the Florida Legislature, with the Commission and industry support changed the law to preserve monopoly character of "local exchange service" only. §364.335(4), Florida Statutes, 1982. At the same time, the Legislature enacted §364.337, which expressly authorizes competition other than for local exchange services. Thus, the public policy of this State as expressed by the Legislature contemplates competitive provision of interexchange toll telephone service.

This limitation of monopoly treatment to local exchanges only was recognized by the Commission before this Court in Microtel, Inc. vs. FPSC, Case No. 64,801. At Page 1 of the Commission's brief in said case, it is

stated that the 1982 law permitted competition in all but "local exchange service."

At Page 5 of said brief, the Commission stated that the 1982 law permitted competition in "all but the provision of local exchange service."

The FPSC had previously recognized that competition in interexchange service was permitted and authorized by law in granting to Microtel its initial authority under date of August 23, 1982 wherein it stated that public convenience and necessity required that Microtel be authorized to provide telecommunications services interexchange between all points within the state of Florida. App. C. The Commission subsequently recognized that the statute contemplated the grant of "interexchange" competitive authority in the grant of certificates to MCI Telecommunications Corp., Satellite Business Systems, GTE Sprint Corporation, and United States Transmission Systems. The grants of authority to the latter four companies were affirmed by this Court in Microtel, Inc. vs. FPSC, Case Nos. 64,801; 65,307; 65,351; and 65,449 by decision dated February 28, 1985.

There is no compelling reason to delay moving to a fully competitive environment in the toll market. Such competition is technically feasible. Competition would provide a number of advantages by bringing into

play forces which would require carriers to be more efficient and provide facilities at the least cost to customers. No economic analysis was presented by any local exchange company which establishes that it would be harmed by interexchange toll competition. Yet under the Commission's final order, competition is barred from substantial markets. For example, the General Telephone Company certificated area would be completely isolated from competition. It is one of the fastest growing regions and is generally recognized as an area that will continue to grow in the future. Within its boundaries are the cities of Tampa, St. Petersburg, Bradenton, Sarasota, and Lakeland. It has a population of in excess 2.6 million. It is currently served by four toll centers. There is significant traffic between these toll centers which could and should be the subject of competition. It is absolutely inconsistent and illogical aside from being in contravention of the statute to deny the citizens of such a large populated area the benefits of competition and at the same time, permit competition between such lesser areas within the state such as Ft. Myers, Sarasota, Arcadia, Lakeland, Dade City, and Tampa, etc.

The action of the Commission is unauthorized by the statute; is in contravention of the statute; opposite to the prior position of the Commission before

this Court; and the recognition by this Court of the competitive aspects contemplated by the Legislature. No evidence has been presented to warrant such action but to the contrary evidence of the benefits of competition have been recognized by all parties in this proceeding.

Argument

Issue I

THE FLORIDA LEGISLATURE HAS ANNOUNCED A LEGISLATIVE INTENT THAT INTEREXCHANGE COMPETITION BE INTRODUCED IN FLORIDA AND THE ORDERS OF APPELLEE ON APPEAL CONTRAVENE THIS LEGISLATIVE INTENT.

As indicated previously, the Commission, in granting its first interexchange competitive certificate to Microtel, clearly recognized that the distinctions that had been made in legislation by the 1982 Legislature. A copy of the Microtel order is attached as App. C. Reference to the Microtel order will disclose the following findings by the Commission in the Microtel docket.

At Page 2 of said order, No. 11095, App. C:

> "In contrast, during the 1982 legislative session, we supported legislation that would permit the granting of certificates to telephone companies for intrastate interexchange service which might be in direct competition with existing service. On March 18, 1982, the Governor signed into law Senate Bill 868, which limited the applicability of the restrictive provisions contained in §364.335, Florida Statutes, to local exchange service."

The 1982 legislation that created §364.335(4) provides specifically as follows:

> "...the Commission shall not grant a certificate for a proposed telephone company, or for the extension of an existing telephone company which will be in competition with or duplicate the local exchange services provided by any other telephone company..." (emphasis supplied)

Notwithstanding the prior finding of the Commission in the issuance of the Microtel order in 1982 and notwithstanding the clear mandate of the statute limiting monopoly areas to local exchange services, the Commission, in Order No. 13750 at Page 10 thereof (App. A) stated as follows:

> "...the Commission finds that there shall be toll transmission monopoly areas in which the LECs shall be the sole supplier of transmission facilities..."

The parties repeatedly brought to the Commission's attention that this was an improper extension of monopoly territory under the statute, but not withstanding such argument, the Commission, in Order No. 13912 reaffirmed:

> "...therefore, we reiterate that planned toll center areas for 1987 continue to be appropriate EAEA and monopoly areas..."

The Commission, therefore, is saying in effect to the Legislature and to the interexchange companies that it has previously certificated to provide interexchange service that it is ignoring the law and

its orders granting interexchange certificates expanding monopoly territories for the local exchange telephone company. This is unbridled discretion at its worst and is prohibited by this State's adherance to the doctrine of non-delegation of legislative power pursuant to Article II, §3, Florida Constitution. As this Court has clearly stated in Askew vs. Cross Key Waterways, 372 So2nd 913, 925 (1978):

> "Under this doctrine fundamental and primary policy decisions shall be made by members of the Legislature who are elected to perform those tasks and administration of legislative program must be pursuant to some minimal standards and guidelines and ascertainable by reference to the enactment established in the program." (emphasis added)

It may be that the new policy announced by the Commission in this proceeding is a wise one, or could be justified under some other circumstance. However, the Legislature set the policy in the 1982 statute and the Commission must administer the policy enunciated by the Legislature. The policy set by the Legislature was that there was to be a monopoly only in the local exchange services of a telephone company. This Court can take judicial notice by reference to the front pages of any telephone book in this State what local exchange services mean and what toll services mean. This has been true for in excess of fifty years. Service between

exchanges has traditionally been toll service and an additional charge for such service is based generally on time of call and distance of call. The term interexchange and local exchange have been words of art for many, many years and were clearly understood by Microtel when it sought authority to provide interexchange service. Such was clearly understood by the Commission at the time it granted a certificate to Microtel to provide interexchange service. The new policy enunciated in the orders under attack contravenes the prior precedent and the clear mandate of the statute.

Issue II

THE COMMISSION IN EXPANDING THE MONOPOLY TERRITORY OF THE LOCAL EXCHANGE IS ENGAGING IN STATUTORY MODIFICATIONS OF CHAPTER 364, FLORIDA STATUTES IN VIOLATION OF THE FLORIDA CONSTITUTION.

As indicated previously in this brief, the 1982 legislation authorized competitive certificates and competitive service in all telephone communications except for local exchange services. In 1984, the Legislature again amended Chapter 364 by adding a paragraph (3) to §364.337 (the section pertaining to duplicative or competitive services), which provides as follows:

> "Each amount paid by an interexchange telephone company to a telephone company providing local service for use of the local network shall be deducted from gross operating revenues for purposes of determining the amount of regulatory fee assessed the interexchange telephone company pursuant to §350.113." (emphasis supplied)

Here again, the Legislature recognized the distinction between an interexchange telephone company and a company that provides local service and local network and gives a credit to the interexchange company for purposes of computing the regulatory fee to be paid by the interexchange company.

The Commission, in effect, is telling the public of this State that it is not entitled to have competing carriers between two interexchange points within an EAEA and is telling members of the public in the entire General Telephone territory that it is not entitled to have competing service. Notwithstanding the fact that the Legislature has clearly indicated that it is the policy of this State to provide all people a choice of interexchange service.

Furthermore, the Commission has indicated that the monopoly territory shall be that territory served by a toll center as of January 1987, not as of the present time or as of the time of the hearing, or as of the time of the granting interexchange certificates to Microtel and other competing carriers. Any local exchange carrier, as has General Telephone, could establish one toll center for its entire territory and accordingly, do away with vast areas of the State being entitled or given the opportunity of competing interexchange services. There are fourteen telephone companies servicing the state of Florida. Each of these companies could decide to establish a standard toll center area by January 1987 and thereby cause an ever diminishing territory that could be served by the certificated interexchange carrier. Such clearly is not the intent of Chapter 364 as enacted in 1982 and amended

in 1984. This action by the Commission is an obvious enlargement of the monopoly territory under Chapter 364 and constitutes legislative action by an administrative agency in violation of the existing statute that created the agency and gave the agency its initial power.

This proceeding commenced in 1983 and was in process during 1984 while the Legislature was in session. If the Commission desired to have additional authority to grant larger monopoly territories, why didn't it seek such legislative action from the appropriate body? The expansion of the monopoly territory by the Commission on its own, not only is improper under the statute, but constitutes a taking away of authority from the existing interexchange carriers. Carriers such as Microtel have expended millions of dollars in putting in place plant and equipment to enable it to provide interexchange service pursuant to its certificated authority. To now take away vast portions of the ability to utilize such plant and equipment constitutes an improper taking of rights from an interexchange carrier and causes tremendous damages which are not recoverable from anyone.

The Legislature is the law making branch of government in this state. Article II, §3, Florida Constitution. Its legislative power cannot be delegated. Pensley vs. Ft. Myers, 100 So 366 (1924);

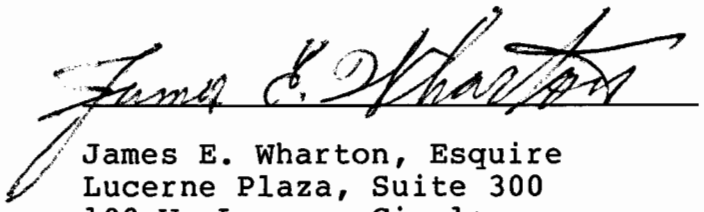
Bailey vs. Van Pelt, 82 So 789 (1918). In the instant case, the Commission has engaged in legislative action enlarging monopoly territories.

Conclusion

The enlargement of monopoly territories to local exchange companies by the Commission contravenes the statutory language in Chapter 364. Moreover, the enlargement is based upon what the local companies plan their toll areas to be January 1987. This not only takes away the right of the interexchange company, but places it in an impossible situation for network planning purposes.

This legislative action by the Commission violates the separation of powers and damages the interexchange carrier for which there is no relief except by this Court.

Respectfully submitted,



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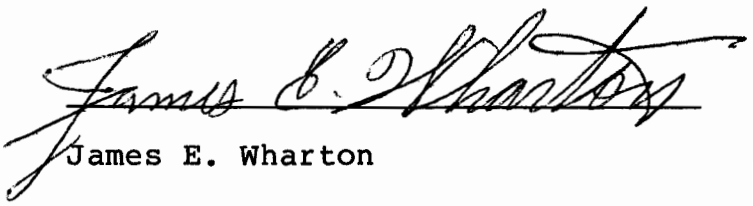
Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished to all parties of record on this 20th day of March, 1985.



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