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

REPLY BRIEF OF APPELLANT AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.

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I. THE 1982 AMENDMENT OF SECTION 364.335(4) ESTABLISHES COMPETITION, NOT PROTECTIONISM, AS THE POLICY GOVERNING INTEREXCHANGE TELEPHONE SERVICE IN FLORIDA.

In 1982, the Florida Legislature ended the statutory monopoly previously enjoyed by providers of interexchange telephone service. By limiting the authorized monopoly to "local exchange services," the Legislature made the "'fundamental and primary policy decision' that there be competition in the long distance market."[1] The issue in this case is whether the Florida Public Service Commission may ignore that "fundamental and primary policy decision" in favor of its own view of the "public interest."

In their briefs in this Court, the Commission and local exchange companies (hereafter collectively referred to as "appellees") do not, because they cannot, deny that the 1982 legislation was intended to foster competition in the interexchange market. They do not deny that the service at issue in this case is interexchange service. Nor do they deny that the order at issue restricts rather than fosters competition for such service.

Instead, appellees seem to suggest that the Legislature was wrong when it opted for full competition in the interexchange telephone market. The Commission, citing an expert witness who testified for one of the parties, says that at least some long

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[1]Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189, 1191 (Fla. 1985).

distance service is a "natural monopoly"; but the Commission does not, because it cannot, cite any statutory provision allowing it to ban interexchange competition for areas that allegedly constitute "natural monopolies." The local exchange companies advance the facially implausible theory that competition will be bad for consumers and that monopolies must be protected in order to keep rates low. But, by opting for competition, the Legislature rejected this view. It is, of course, the Legislature's view that is controlling, when that view is embodied in the law, as it is here.

Moreover, appellees have been unable to reconcile their positions on this appeal with the Commission's position before this Court in Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985). When Microtel sought to have the Commission preclude competition for interexchange telephone service, the Commission quickly and decisively rejected Microtel's assertion that the "public interest" would be better served by shielding existing carriers from such competition. The Commission simply explained that the Legislature had mandated full competition and that consumers would be best served by allowing such competition. The Commission decried Microtel's plea for limits on competition as unjustifiable "protectionism." Answer Brief of Florida Public Service Commission in Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985) at 13.

In its initial brief in the case at bar, AT&T Communications accurately reported the Commission's position in

Microtel and demonstrated that that position required reversal of the order under review. For example, the Commission told this Court in Microtel that the 1982 legislation:

> limits the statutorily mandated monopoly solely to local exchange telephone service, thereby opening interexchange and other intrastate services to full competition.

Motion to Dismiss filed by Florida Public Service Commission in Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985) at 2 (emphasis added). The Commission elaborated:

> At the time of the adoption [of the 1982 amendments], all proponents of the legislative revisions . . . intended the changes to initiate full competition in intrastate telecommunications other than local exchange service. The provisions were conceived to bring about a vigorous competitive environment, with many companies providing service.

Id. at 4-5 (emphasis added). The Commission's brief on the merits repeatedly emphasized the importance of adhering to the Legislature's decision to bring to interexchange service the benefits of full competition.[2]

Appellees in the case at bar have failed to address these statements by the Commission in Microtel because there simply is no way to respond. The analysis set forth in the Commission's Microtel filings is consistent with the 1982 amendment and requires reversal of the order under review.

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[2]The Motion to Dismiss and Answer Brief of the Commission in Microtel are in the Appendix to this Reply Brief.

Banning competition for the transmission of interexchange telephone service contravenes Section 364.335(4), Florida Statutes, regardless of whether the party seeking "protectionism" is an interexchange carrier (as in Microtel) or a local exchange company (as in the case at bar). The Legislature chose competition, not "protectionism," and this Court should reject the Commission's attempt to overrule the legislative mandate.

II. NOTHING IN FLORIDA LAW AUTHORIZES THE PUBLIC SERVICE COMMISSION TO ESTABLISH MONOPOLIES FOR THE TRANSMISSION OF INTEREXCHANGE TELEPHONE SERVICE IN OVER 35% OF THE FLORIDA MARKET.

While failing to come to grips with the Legislature's "fundamental and primary policy decision" in favor of interexchange competition, appellees suggest a variety of theories that they say justify the Commission's departure from the legislative mandate. None will withstand analysis.

A. Toll Monopoly Areas Cannot Be Justified As Territorial Restrictions

Prior to the introduction of interexchange competition in 1982, the Commission issued certificates of public convenience and necessity only to local exchange companies. Such certificates authorized operation only in designated geographic areas that, consistent with the statutory requirement of monopoly service, did not overlap. As would be expected, Section 364.335, Florida Statutes, includes references to such geographic territories.

To its credit, the Commission has never attempted to justify Toll Monopoly Areas by the untenable argument that such areas constitute territorial restrictions of the type comtemplated by Section 364.335.[3] Nevertheless, appellee Southern Bell Telephone and Telegraph Company ("Southern Bell") has advanced just such a "territorial restrictions" argument. The argument fails to comport with the facts.

The Commission has issued certificates of public convenience and necessity to six interexchange carriers. Each of the certificates authorizes its holder to provide service to all points in Florida. Under the certificates, every customer in Florida may subscribe to service from any of the six interexchange carriers.

In brief, this is not a case in which the Commission has determined that a carrier should be allowed to serve only part of the State of Florida. Rather, it is a case in which the Commission has determined that six interexchange carriers are technically and financially qualified to provide interexchange service to all points in Florida but has elected, for reasons deriving no support from the Florida Statutes, to foreclose those carriers from competing for over 35% of the interexchange market. Southern Bell's unsupported and unsupportable attempt to

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[3]Appellees General Telephone Company of Florida and United Telephone Company of Florida, like the Commission, also do not claim that the Toll Monopoly Areas constitute territorial restrictions.

characterize Toll Monopoly Areas as restrictions on the territories in which certificated carriers can operate does not save the Commission's order.

B. Exempting Resellers From The Ban on Competition Does Not Cure The Statutory Violation

Appellee General Telephone Company of Florida ("General") candidly acknowledges that the 1982 legislation constituted a "clear indication" of the Legislature's intent that there be competition for interexchange service.[4] Unable, however, to find any statutory authority justifying the retention of toll monopolies, General advances the imaginative argument that the Commission has not done so. General notes that the Commission's order leaves interexchange carriers free to purchase service from the local exchange companies and in turn to resell such service to consumers. That the Commission has allowed resale, however, affects not at all its absence of authority to establish transmission monopolies.

First, the 1982 amendments authorize monopolies only for "local exchange services." The transmission of interexchange calls is not "local exchange service" and therefore is not service for which the statute condones monopoly. The Commission's order, however, establishes an absolute monopoly for the transmission of interexchange calls within Toll Monopoly Areas, as General has effectively conceded. Such a monopoly

[4]See Answer Brief of Appellee General Telephone Company of Florida at 6.

contravenes the statute.

Second, General's position apparently is that, although the Commission cannot preclude interexchange competition, it nonetheless can require that all calls be carried over the local exchange companies' facilities, thereby avoiding the use of duplicative facilities. However, General's effort to distinguish a ban on competition from a ban on duplicative facilities draws no support from the Florida Statutes, which treat competition and duplicative facilities in precisely identical fashion as part of the very same sentence and phrase of Section 364.335(4). Prior to 1982, that section provided that the Commission could not authorize service "which will be in competition with, or which will duplicate the services provided by, any other telephone company . . . ." The 1982 amendment limited the monopoly to local exchange services, providing that the Commission could not authorize service "which will be in competition with or duplicate the local exchange services provided by any other telephone company . . . ." General has suggested no basis for splitting the quoted phrase and reading it to authorize a ban on duplicative interexchange facilities but not on competition through resale. The statutory language cannot be read to support General's position.

Finally, General's position fails to comport with logic. Common sense abundantly indicates that the benefits of competition will not be available so long as the local exchange companies enjoy an absolute monopoly in the transmission of interexchange service. To be sure, resellers can purchase

service from the local company and resell it to consumers, but so long as the local exchange company transmits every call and receives therefor its tariffed rate, the local company will have no competitive incentive either to lower its prices or to improve the quality of the available service. The Legislature chose to bring to Florida the benefits of interexchange competition; it did not authorize Toll Monopoly Areas.

C. As The Commission Acknowledges, Section 364.337 Does Not Authorize Toll Monopoly Areas

Simultaneously with the 1982 amendment of Section 364.335(4), the Legislature adopted Section 364.337, Florida Statutes, which authorizes the Commission to reduce the level of regulation or vary the service standards that it imposes on competitive interexchange carriers. The purpose of Section 364.337 was to recognize that a lower level of regulation or different service standards might be appropriate for competitive services; competition is, in many respects, a substitute for government regulation in inducing carriers to provide good service at desirable prices.

The Commission has never attempted to justify the creation of Toll Monopoly Areas on the basis of Section 364.337. Instead, the Commission candidly has acknowledged, and this Court squarely has ruled, that Section 364.337 has nothing whatsoever to do with the process by which the Commission issues certificates to competitive interexchange carriers.

In Microtel, Inc. v. Florida Public Service Commission,

464 So.2d 1189 (Fla. 1985), Microtel asserted, as do Southern Bell and General in the case at bar, that the factors set forth in Section 364.337 properly could be considered by the Commission in determining whether to allow interexchange competition. The Commission, however, strongly (and correctly) disagreed. After noting that in 1982 the Legislature amended Section 364.335(4) to provide for competition "in all but the provision of 'local exchange service,'" the Commission said:

> "In addition to changing this certificating procedure, the Commission suggested to the legislature that some lessening of regulation was appropriate since the market would better control the practices of competing entities. A new section of Chapter 364 [that is, Section 364.337] was added in the bill that permitted the reduction of regulation, if it was found to be in the public interest. . . .
>
> . . . The greater the level of competition, the less the need for regulation. Competition will assure adequate service at reasonable costs. . . .
>
> The Appellant [Microtel], in his brief, states that the Commission did not consider the factors in Section 364.337, Fla. Stat., in granting competitive authority to MCI, GTE-Sprint, SBS and USTS. The Commission did not consider those factors in granting authority to Microtel either. The authority for granting certificates of public convenience and necessity for the provision of intrastate toll service is found in Section 364.335, Fla. Stat., and not Section 364.337, Fla. Stat.

Answer Brief of Florida Public Service Commission in Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985) at 5-7 (emphasis added).

This Court accepted in all respects the Commission's position on the relevant roles of Sections 364.335 and 364.337. The Court said:

> 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 proviso that certification be in the public interest. Only after the Commission has decided to certify do the provisions of section 364.337 come into play. The enumerated criteria of section 364.337(2) are to be considered in determining what special requirements and exemptions from regulation should govern the certified company. They are not relevant to the initial determination of whether to issue the certificate.

Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189, 1190-91 (Fla. 1985) (emphasis added). As appellee United Telephone Company of Florida ("United") has said in the case at bar, Section 364.337 is "not at issue in this proceeding." Answer Brief of United Telephone Company of Florida at 16.

Section 364.335(4), Florida Statutes, as amended in 1982, opened interexchange telephone service to competition. The Legislature did not take away in Section 364.337 what it had granted in Section 364.335(4).

D. The Commission Has No Authority To Overrule the Legislature's Assessment Of the Public Interest

Next, several appellees note that Section 364.335 provides that the Commission "may grant a certificate, in whole or in part or with modifications in the public interest . . . ." Appellees assert that the Commission was protecting "the public interest" when it established Toll Monopoly Areas.

Appellees' position is wrong for two separate

reasons. First, the public interest test of Section 364.335 deals with the financial and technological fitness of the applicant, not with the desirability of competition. The Florida Public Service Commission explained this when it compared the Section 364.335 public interest test (which deals with the fitness of the applicant) with the public interest test of Section 364.337 (which deals with the desirability of reducing regulation of competitive carriers). The Commission explained:

> There are, therefore, two public interest tests. Under the certificating statute, Section 364.335, the applicant must demonstrate that it is able financially and technologically to provide the service, define precisely the service offered and the cost of the service it intends to provide. Once that test is met, factors found in Section 364.337 become relevant in determining the level of regulatory involvement. . . . The greater the level of competition, the less the need for regulation. Competition will assure adequate service at reasonable costs.

Answer Brief of Florida Public Service Commission in Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985) at 6-7 (emphasis added).[5]

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[5]In the Microtel case, Microtel asked the Commission to invoke precisely the kind of "public interest" arguments advanced by appellees here. The Commission refused to do so, saying the Legislature had endorsed competition. This Court affirmed. Nothing in Section 364.335 explains the Commission's apparent view that the public interest is irrelevant when Microtel seeks to invoke it but relevant when the local exchange companies do so. The Commission's abrupt change in direction is precisely the type of administrative reversal that courts long have viewed as a likely indication of departure from the original legislative intent. See, e. g., Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 507, 517-19 (1985) (collecting and quoting cases). Recent decisions reviewing agency action have renewed the traditional emphasis on "agency fidelity to congressional [that is, legislative] intent as the central concern of administrative law." Id. at 591.

The Commission properly has determined, and appellees have not disputed, that the six certificated interexchange carriers are qualified to provide interexchange service. Section 364.335 requires nothing more.

Second, and even more significantly, the Florida Legislature already has addressed the question of whether competition for interexchange services is in the public interest. As this Court has said, "the legislature made the 'fundamental and primary policy decision' that there be competition in long distance telephone service." Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189, 1191 (Fla. 1985). This Court squarely addressed the significance of that legislative determination to the public interest standard of Section 364.335(4):

> The clear legislative intent to foster competition also illuminates the public interest standard of section 364.335(4).

Id. Appellee's assertion that the Commission has authority under the "public interest" language of Section 364.335(4) to prohibit interexchange competition stands on its head the proper relationship between the Legislature and the administrative body it created. The Legislature has determined that interexchange competition is in the public interest; the Florida Public Service

Commission is not free to overrule that public interest determination.[6]

E. That The Commission's Departure From Its Legislative Mandate May Be Temporary Does Not Cure The Violation

Finally, several appellees note that the Commission has said that it will reassess the appropriateness of Toll Monopoly Areas as of September 1, 1986.[7] Whether the Commission's Toll Monopoly Areas would end at that time is unclear.[8]

When the Legislature amended Section 364.335(4) to authorize interexchange competition, it provided that the

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[6]In Microtel, this Court found that Section 364.335(4) is not an unlawful delegation of legislative authority "in light of the legislative objective to bring competition into this business area which had not heretofore existed." 464 So.2d at 1191. If, however, the Commission could ignore the legislative policy decision based on its view of "natural monopoly" or other factors with no statutory foundation, then Section 364.335(4) would indeed constitute an unlawful delegation of unrestrained legislative authority.

[7]United categorically asserts that Toll Monopoly Areas "will end" on September 1, 1986. Answer Brief of United Telephone Company of Florida at 7. Nothing in the record supports that statement.

[8]In two respects the Commission's actions seem to suggest a substantial possibility that Toll Monopoly Areas will continue beyond September 1, 1986. First, the Commission established Toll Monopoly Areas based on toll centers as they will be configured in 1987, not as they are presently configured. Second, the Commission in its brief in this Court seems to suggest that Toll Monopoly Areas should be retained wherever interexchange service constitutes a "natural monopoly" and that, although the boundaries of the Toll Monopoly Areas may be reconfigured as of September 1, 1986, the "natural monopolies," and thus the Toll Monopoly Areas, are expected to continue thereafter. Answer Brief of Florida Public Service Commission at 14.

amendment would take effect immediately. The new law went into effect on March 19, 1982. The Legislature did not authorize the Public Service Commission to delay the effective date until September 1, 1986 or thereafter.

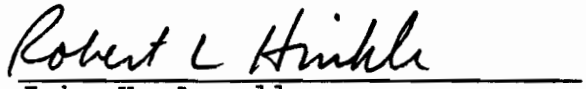
The Commission has no authority to establish Toll Monopoly Areas. That it has promised to reassess its erroneous decision at a later point does not preclude effective appellate review now.

CONCLUSION

The Florida Legislature determined in 1982 that monopoly provision of interexchange telephone service should end. The Florida Public Service Commission, however, has disagreed with the legislative determination and has ordered the preservation of "Toll Monopoly Areas." This Court should reject the Commission's attempt to overrule the Legislature's "fundamental and primary policy decision" in favor of interexchange competition.

The Commission's order establishing Toll Monopoly Areas should be reversed.

Respectfully submitted,



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