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

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

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STATEMENT OF FACTS AND CASE

Prior to 1982, telephone service in Florida was provided on a monopoly basis. Customers in any given location could obtain local or long distance telephone service only from the certificated carrier authorized to serve that location exclusively. See Section 364.335(4), Florida Statutes (1981).

In 1982, the Florida legislature made the fundamental policy decision to end monopoly provision of long distance (that is, "toll" or "interexchange") telephone service. See Ch. 82-51, Laws of Fla., now codified as Section 364.335(4), Florida Statutes (1983). The legislature amended that provision so that the monopoly requirement would apply to local exchange telephone service only. The legislature authorized the Public Service Commission to issue certificates of public convenience and necessity to qualified providers of competitive interexchange service. Id.

In response to applications for certificates of public convenience and necessity, the Commission has found at least six firms qualified to provide interexchange service over their own facilities and thus has issued certificates for operation as facilities-based interexchange carriers to AT&T Communications of the Southern States, Inc.;[1] Microtel, Inc.;[2] MCI Telecommuni-

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[1]See 83 F.P.S.C. 12:209.

[2]See 82 F.P.S.C. 8:201.

cations Corporation; [3] GTE Sprint Communications Corporation;[4] Satellite Business Systems;[5] and United States Transmission Systems.[6]

On appeal from the orders issuing several of those certificates, the Commission explained to this Court that its decision to issue the certificates resulted from the legislature's 1982 policy decision favoring interexchange competition. The Commission told this Court 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, ___ So.2d ___, 10 F.L.W. 141 (Fla. February 28, 1985) at 2 (emphasis added). Continuing, the Commission explained:

> 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

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[3]See 83 F.P.S.C. 7:415

[4]See 84 F.P.S.C. 1:270.

[5]See 84 F.P.S.C. 1:262.

[6]See 84 F.P.S.C. 2:164. In addition, the Commission has found at least 37 firms qualified to provide interexchange service by purchasing Wide Area Telephone Service ("WATS") from facilities-based carriers and "reselling" the service to individual customers on a call-by-call basis. These "resellers" compete with facilities-based carriers and with one another. See 82 F.P.S.C. 9:190.

a vigorous competitive environment with many companies providing service.

Id. at 5 (emphasis added). Further, and importantly to this case, the Commission told the Court that the 1982 amendments "permit competition in all but the provision of 'local exchange service.'" Brief of Appellee Florida Public Service Commission, Microtel, Inc. v. Florida Public Service Commission, ___ So.2d ___, 10 F.L.W. 141 (Fla. February 28, 1985) at 5 (emphasis added). Moreover, this Court, accepting those assertions, affirmed the Commission's issuance of certificates to multiple interexchange competitors. Microtel, Inc. v. Florida Public Service Commission, ___ So.2d ___, 10 F.L.W. 141 (Fla. February 28, 1985).

Despite its own assertions that the Florida legislature's policy, as embodied in the 1982 provisions, required "full competition" in the interexchange market and permitted competition "in all but the provision of 'local exchange service,'" the Commission, in a proceeding instituted on its own motion (Docket No. 820537 - "Equal Access Exchange Area" Proceeding) addressed the issue of whether it should create "Toll Monopoly Areas" within which long distance service would be a monopoly of the local telephone company. It must be emphasized that, as the name makes clear, "Toll Monopoly Areas" deal with "toll" calls (also known as "long distance" or "interexchange" calls); the concept of "Toll Monopoly Areas" deals not at all with local exchange calls.

The evidence at the hearings conducted in this proceeding established without contradiction that full interexchange

competition was technically and economically feasible in the proposed Toll Monopoly Areas.[7] Moreover, not even a scintilla of evidence questioned the technical and financial qualifications of the six certificated interexchange carriers to provide adequate competitive service within such areas. It was and is uncontested that those carriers meet the criteria established by Section 364.335(4) for certification as interexchange carriers. Indeed, they are so certificated.

On October 5, 1984, however, without addressing its earlier statements to this Court, the Commission issued Order No. 13750 establishing 22 Toll Monopoly Areas within which interexchange service would be a monopoly of the local telephone company and from which the certificated interexchange carriers would be excluded.[8] Although some of the Toll Monopoly Areas are small, others are large, especially in terms of the volume of long distance telephone service that they insulate from competition. For example, the Commission's order maintains an absolute monopoly for the transmission of long distance telephone service over

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[7]See, e.g., Tr. of June 4-7, 1984 hearings at 80; id. at 668-70.

[8]See R.2165-78. The Commission's order did not prohibit the resale of interexchange service purchased from the monopoly provider. With respect to the transmission and initial sale of interexchange telephone service, however, the Commission's order established absolute monopolies within the designated Toll Monopoly Areas, subject only to narrow exceptions (which may never be invoked) for carriers technically unable to block prohibited traffic and for monopoly carriers unable to provide timely and effective service. See R.2174-75.

such important interexchange routes as Ft. Lauderdale to Miami.[9] Moreover, the order establishes a toll monopoly throughout the entire certificated area of Florida's second largest telephone company, General Telephone Company of Florida. General's Toll Monopoly Area has over 2.6 million residents and includes a multiplicity of interexchange routes such as those between the cities of Tampa, St. Petersburg, Sarasota and Bradenton.[10]

In total, the Commission's order eliminates competition for the transmission of over 35 percent of intrastate long distance telephone service in Florida.[11]

The Commission indicated that these Toll Monopoly Areas would remain in effect at least until September 1, 1986 -- acknowledging that the sole purpose of its action was to protect the local telephone companies, who provide both local and interexchange service, from competition for interexchange service within the Toll Monopoly Areas. The Commission cited no statutory authority for its attempt to retain monopolies in significant parts of the interexchange market.

AT&T Communications and three other interexchange carriers bring these consolidated appeals.

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[9]See, e.g., Tr. of June 4-7, 1984 hearings at 1081, 1100, 1117.

[10]See Tr. of June 4-7, 1984 hearings at 1080.

[11]The 35 percent figure is calculated from annual revenues provided in the record. See Tr. of June 4-7, 1984 hearings at 865-66; Tr. of October 31-November 1, 1984 hearings at 2976-77.

SUMMARY OF ARGUMENT

Prior to 1982, Florida law required that local and long distance telephone service be provided only on a monopoly basis. Competitive telephone service was prohibited.

In 1982, the legislature made the "fundamental and primary policy decision"[12] to institute "full competition in intrastate telecommunications other than local exchange service."[13] The Commission has issued certificates of public convenience and necessity to six competitive interexchange carriers. Under the 1982 legislation, those certificates entitle the carriers "to be in competition with other companies, except for local exchange services."[14]

In the order under review, however, the Commission has attempted to carve out Toll Monopoly Areas in which the admittedly qualified interexchange carriers are prohibited from competing with the local telephone companies or with each other. The Commission has done so for the express purpose of protecting the

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[12]Microtel, Inc. v. Florida Public Service Commission, ____ So.2d ____, 10 F.L.W. 141 (Fla. February 28, 1985).

[13]Motion to Dismiss filed by Florida Public Service Commission in Microtel, Inc. v. Florida Public Service Commission, ____ So.2d ____, 10 F.L.W. 141 (Fla. February 28, 1985) at 5.

[14]Senate Staff Analysis and Economic Impact Statement on Committee Substitute for Senate Bill 868, enacted as Ch. 82-51, Laws of Fla., now codified as Section 364.335(4), Florida Statutes (1983), paragraph I.B.; see also Brief of Appellee Florida Public Service Commission, Microtel, Inc. v. Florida Public Service Commission, ___ So.2d ___, 10 F.L.W. 141 (Fla. February 28, 1985) at 5.

favored local telephone companies from competition in substantial parts (that is, over 35 percent) of the total interexchange long distance market.

The Commission action contravenes the plain language of the legislative provisions, the interpretation of those provisions by this Court in the only case that has addressed them, the intent of the provisions as confirmed by the legislative history, and the Commission's own prior analysis of the provisions as expressed to this Court. Moreover, the settled law is that, as a creature of statute, the Public Service Commission has only such authority as is conferred on it by statute, and that any reasonable doubt concerning whether the Commission possesses any particular power must be resolved against the exercise thereof.

The Commission does not possess the power to create Toll Monopoly Areas for the local telephone companies.

Whether there should be full competition for interexchange telephone service is a policy question that, under our form of state government, properly must be resolved by the legislature. The legislature has resolved that question in favor of full competition, and the Public Service Commission has no authority to depart from the legislature's decision.

ARGUMENT

I. BY ADOPTING THE 1982 AMENDMENTS TO SECTION 364.335(4), FLORIDA STATUTES, THE FLORIDA LEGISLATURE MADE THE "FUNDAMENTAL AND PRIMARY POLICY DECISION" TO INITIATE "FULL COMPETITION IN INTRASTATE TELECOMMUNICATIONS OTHER THAN LOCAL EXCHANGE SERVICE," AND THE FLORIDA PUBLIC SERVICE COMMISSION THEREFORE HAS NO AUTHORITY TO CREATE "TOLL MONOPOLY AREAS" FOR THE LOCAL TELEPHONE COMPANIES IN WHICH IT PROHIBITS COMPETITION FOR INTEREXCHANGE SERVICE BY ADMITTEDLY QUALIFIED CARRIERS, SOLELY IN ORDER TO PROTECT THE LOCAL COMPANIES FROM COMPETITION.

This case presents the straightforward legal question of whether the Florida Public Service Commission has authority to prohibit competition for interexchange telephone service by admittedly qualified carriers for the express purpose of protecting other carriers from competition. By adopting Chapter 82-51, Laws of Florida, which amended section 364.335(4), Florida Statutes, the Florida legislature resolved the question in favor of competition. The Public Service Commission's attempt to establish Toll Monopoly Areas contravenes this legislative mandate.

A. The 1982 Amendment to Section 364.335(4), Florida Statutes, Precludes The Establishment of "Toll Monopoly Areas."

Prior to 1982, Florida law prohibited competition for either local or interexchange telephone service:

> 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 extention 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 services.

Section 364.335(4), Florida Statutes (1981) (emphasis added).

In 1982, the legislature adopted Chapter 82-51, Laws of Florida, which amended section 364.335(4), with the changes shown in legislative format, 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 ~~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."

Ch. 82-51, §3, Laws of Fla. (underlining and striking in original). The addition of the words "local exchange" to describe the type of service that would continue to be provided on a monopoly basis made clear the legislature's intention that non-local service would become subject to competition.[15]

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[15]That intention was underscored by the legislature's simultaneous adoption of section 364.337, Florida Statutes (1983), which allows the Commission to reduce the level of regulation or vary the service standards that it imposes on competitive interexchange carriers, see section 364.337(1), and to consider, in deciding whether to do so, the number of competitive firms, the geographic availability of their services, the quality of their services, and the effect of reduced regulation on telephone

The Court has accepted this analysis and has recognized that the 1982 amendment of section 364.335(4) signalled the end of monopoly provision of interexchange service. In Microtel, Inc. v. Florida Public Service Commission, ___ So.2d ___, 10 F.L.W. 141 (Fla. February 28, 1985), one certificated interexchange carrier (Microtel) challenged the Commission's issuance of certificates to various other interexchange carriers. Microtel asserted that, prior to issuing such certificates, the Commission should have considered various "public interest" factors that purportedly would have justified restricting interexchange competition. The Court found Microtel's arguments "completely without merit," deferring to the legislative preference for competition in the interexchange market. Addressing the 1982 legislative enactments, the Court said:

> In the instant situation, the legislature made the 'fundamental and primary policy decision' that there be competition in the long distance market.

Microtel, Inc. v. Florida Public Service Commission, ___ So.2d ___, 10 F.L.W. 141 (Fla. February 28, 1985). The Court also noted that section 364.335(4) manifested a "clear legislative intent to foster competition." Id. The Commission's action restricting the provision of long distance services within the Toll Monopoly Areas solely to the local telephone company squarely contravenes the legislature's "fundamental and primary policy decision" and the "clear legislative intent" to establish

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rates, see section 364.337(2). Section 364.337 clearly contemplates the existence of competitive interexchange carriers.

competition in the long distance market.

B. The Legislative History of the 1982 Amendment Confirms the Intent to Preclude The Establishment of "Toll Monopoly Areas".

The legislative history of Chapter 82-51 also confirms the legislature's intent to foster interexchange competition. The statute resulted from adoption of the Committee Substitute for Senate Bill No. 868, which was sponsored by Senator Stuart and reviewed by the Senate Economic Community and Consumer Affairs Committee. The committee analysis noted that the effect of the proposed change was to:

> Permit the PSC to grant certificates to companies which will allow them to be in competition with other companies, except for local exchange services . . . .

Senate Staff Analysis and Economic Impact Statement, Committee Substitute for Sentate Bill 868, paragraph I.B. (emphasis added).[16] The committee report also noted the reason for favoring competitive rather than monopoly provision of interexchange service:

> With normal market forces at work, increased competition fosters better service at a lower cost to consumers. It is assumed that this will occur in the telecommunications field.

Id., paragraph II.A. The committee report was unequivocal in its endorsement of competition and in its statement that the certif-

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[16]The Staff Analysis is in the Appendix to this Brief.

icates to be issued to competitive interexchange carriers would "allow them to be in competition with other companies, except for local exchange services." In listing "local exchange services" as the sole exception that would attend a certificated interexchange carrier's ability to compete, the committee left no room for any suggestion that the Public Service Commission would have authority to override the legislative preference for competition by carving out so called "Toll Monopoly Areas."

When Committee Substitute for Senate Bill 868 came to the Senate floor, Senator Stuart explained the effect of his bill:

> It allows companies to compete in providing telephone services - very important to this state as we continue to grow.

Proceedings on the Floor of the Florida Senate, March 3, 1982. Senator Stuart, consistent with the committee analysis, suggested not at all that the Public Service Commission would have authority to depart from the language of the bill by establishing Toll Monopoly Areas. Following Senator Stuart's remarks, the Senate passed the bill by a 34-0 vote.

Similarly, on the floor of the House of Representatives, Representative Sheldon briefly explained the bill and, like Senator Stuart and the Senate committee, gave no indication that the Public Service Commission would have authority to preclude competition for interexchange service in designated areas. See Proceedings on the Floor of the Florida House of Representatives, March 5, 1982. The House passed the bill by

a 94-1 vote. The legislature's overwhelming and unequivocal endorsement of interexchange competition is squarely at odds with the Commission's establishment of Toll Monopoly Areas.

C. The Public Service Commission's Own Prior Analysis Confirms That the 1982 Amendment was Intended to Initiate "Full Competition" in Interexchange Service and Thus to Prohibit the Establishment of Toll Monopoly Areas.

That the language and history of the 1982 enactments require "full competition" is confirmed by the Commission's own prior statements to this Court. When the Commission issued certificates to MCI Telecommunications Corporation, GTE Sprint Communications Corporation and Satellite Business Systems, another certificated interexchange carrier, Microtel, Inc., appealed to this Court, arguing that the Commission should have conducted hearings to determine whether the public interest required protecting Microtel from such competition, at least for an interim period.[17] The Commission, in response, strongly demurred to Microtel's assertion that the Commission properly could consider whether the "public interest" would be served by limiting interexchange competition. Moving to dismiss Microtel's appeal on the grounds that the 1982 amendments required the Commission to issue certificates to qualified interexchange carriers and thus afforded prior certificated carriers no standing to seek to

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[17]Microtel, Inc. was the first interexchange carrier certificated by the Commission pursuant to the 1982 enactments. That certificate authorized Microtel, Inc. to operate a statewide telephone utility unrestricted by any Toll Monopoly Areas. See 82 F.P.S.C. 8:201.

restrict such competition, the Commission explained to this Court 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, ____ So.2d ___, 10 F.L.W. 141 (Fla. February 28, 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 5 (emphasis added). In its brief on the merits, the Commission told this Court that the 1982 provisions "permit competition in all but the provision of 'local exchange service.'" Brief of Appellee Florida Public Service Commission, Microtel, Inc. v. Florida Public Service Commission, ___ So.2d ___, 10 F.L.W. 141 (Fla. February 28, 1985) at 5 (emphasis added). The Commission repeatedly emphasized that the 1982 provisions required competition and that competition would produce better results than regulation. Id. at 5,7,13,14,18-19. The Commission described Microtel's position as a quest for unconstitutional "protectionism," Id. at 13, a label no less applicable to the Commission order now under review.

AT&T Communications agrees with the position that the

Commission advanced in the Microtel case that monopoly telephone service in Florida now is limited "solely to local exchange telephone service"; that the legislature's action has "open[ed] interexchange and other intrastate services to full competition"; and that the 1982 legislation was intended "to initiate full competition in intrastate telecommunications other than local exchange service." The Commission ought not be heard now to depart from its earlier, correct analysis of the 1982 legislation in an effort to insulate the local telephone companies from the interexchange competition that the legislature has mandated.

D. The Absence of Commission Authority to Establish Toll Monopoly Areas is Especially Clear In Light of the Accepted Principle That Any Reasonable Doubt Concerning Commission Authority Must Be Resolved Against Allowing Exercise of the Authority At Issue.

The legislature's 1982 revocation of the Commission's authority to prohibit interexchange competition is especially fatal to the Commission's position in light of the Commission's lack of any inherent or general authority to regulate public utilities. The Commission has no inherent authority to restrict competition, nor do the more general provisions of the Florida statutes provide such authority.

First, it is settled law that the Florida Public Service Commission, as a creature of statute, has only such authority as is conferred by statute. Moreover, any reasonable doubt as to the lawful existence of a particular power must be resolved against the exercise thereof. For example, in City of Cape Coral v. GAC Utilites, Inc., 281 So.2d 493 (Fla. 1973), this

Court noted:

> [T]he Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State. . . . Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, . . . and the further exercise of the power should be arrested. . . . The legislature of Florida has never conferred upon the Public Service Commission any general authority to regulate public utilities."

281 So.2d at 496 (citations omitted; emphasis added). See also Aloha Utilities, Inc. v. Florida Public Service Commission, 376 So.2d 850, 851 (Fla. 1979); Florida Bridge Company v. Bevis, 363 So.2d 799, 802 (Fla. 1978); Deltona Corporation v. Mayo, 342 So.2d 510, 512 (Fla. 1977); Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So.2d 577, 582 (Fla. 1964).

Second, the absence of Commission authority to restrict competition is especially clear when the legislature has manifested an intention that competition exist. For example, in State Department of Transportion v. Mayo, 354 So.2d 359 (Fla. 1977), the Commission concluded after hearings that price competition among motor carriers of road building and construction aggregates would lead such carriers to reduce safety measures. The Commission thus concluded that the public interest required establishment of minimum price schedules for aggregate carriers, and the Commission attempted to establish such schedules under its statutory authority to impose safety standards for all motor carriers, including aggregate carriers. This Court agreed that

the Commission had clear and express authority to regulate the safety of operations by aggregate carriers. The Court noted, however, that the legislature had exempted aggregate carriers from the Commission's statutory authority to fix motor carrier rates. Accordingly, the Court said:

> Our analysis begins with the recognition that the Public Service Commission was created and exists through legislative enactment. Being a statutory creature, its powers and duties are only those conferred expressly or impliedly by statute. City of West Palm Beach v. Florida Public Service Commission, 224 So.2d 322 (Fla. 1969). Southern Gulf Utilities Inc. v. Mason, 166 So.2d 138 (Fla. 1964). Any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it. City of Cape Coral v. GAC Utilities Inc. of Florida, 281 So.2d 493 (Fla. 1973).
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> The intent of the Legislature cannot be clearly gleaned from the statute. But we think there is at least reasonable doubt that the Legislature intended to confer on the Commission authority to set minimum rates in the interest of safety for carriers of road building aggregates when the aggregates carriers are specifically exempted from the Commission's rate-fixing power.

Id. at 361. Because there existed at least a reasonable doubt, the Court concluded that the Commission lacked the authority it had sought to exercise.

The statute under review in State Department of Transportation v. Mayo excepted aggregates carriers from the Commission's statutory authority to regulate motor carrier rates. Similarly, in the case at bar the Florida legislature has excepted interexchange service from the express requirement that telephone service be provided on a monopoly basis. The legislature thus has evinced a clear intention to allow competition for

interexchange service, as this Court and the Commission itself previously have recognized. Here, as in State Department of Transportation v. Mayo, the legislature's decision requires reversal of the Commission's action.[18]

Nor does the Commission's reference to the "public interest" allow it to go beyond its statutory authority. The asserted "public interest" in protecting local exchange companies from interexchange competition is a far less substantial concern than the asserted public interest in promoting motor carrier safety that underlay the Commission action in State Department of Transportation v. Mayo. This Court's response to the Commission's "public interest" argument in that case is equally applicable here. To the Commission argument that unlimited price competition would impair public safety, this Court responded:

> If such a result is undesirable, then it is up to the Legislature to clearly provide the Commission with the power to fix minimum rates for the aggregate carriers. Until then the Commission may not set rates for the aggregate carriers since it does not have the power to do so.

State Department of Transportation v. Mayo, 354 So.2d 359, 362 (Fla. 1977). Further, the Court recognized that the competitive marketplace, through its unrestricted operation, was the appro-

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[18]Indeed, the absence of Commission authority here is even clearer than in State Department of Transportation v. Mayo. There, the Commission was attempting to act under its express and unquestioned authority to regulate safety of aggregates carriers. Here, the Commission has invoked no such grant of authority; there simply is no statutory basis for its action.

priate mechanism for responding to the asserted "public interest."[19] In the case at bar, the Senate Economic Community and Consumer Affairs Committee similarly noted the advantage of competition:

> With normal market forces at work, increased competition fosters better service at a lower cost to consumers. It is assumed that this will occur in the telecommunications field.

Senate Staff Analysis and Economic Impact Statement, Committee Substitute for Senate Bill 868, paragraph II.A. Moreover, in noting that the intent of the 1982 amendment of section 364.335(4) was to foster full competition in the interexchange market, the Commission has repeatedly emphasized to this Court the advantages of full interexchange competition. See Brief of Appellee Florida Public Service Commission, Microtel, Inc. v. Florida Public Service Commission, ___ So.2d ___, 10 F.L.W. 141 (Fla. February 29, 1985) at 5,7,13,14, 18-19.[20]

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[19]The fact that the Commission has agreed to reexamine the need for Toll Monopoly Areas prior to September 1, 1986, in no way saves the Commission's action. Indeed, it points up the very inconsistency of the Commission's action with the intention of the statute. If the Commission's action is ab initio inconsistent with the statute, then that inconsistency is not eradicated by its temporary nature. Likewise, the minor exceptions to the toll monopoly restrictions imposed by the Commission -- see page 4 note 8 supra -- do not make the Toll Monopoly Areas any less repugnant to the statute. Those conditions do not alter the fact that the Commission's Toll Monopoly Areas eliminate the interexchange competition that the legislature found appropriate.

[20]This Court and the Public Service Commission have agreed that when "a competing service is justified, it generally results in a better service to the public." Tamiami Trail Tours, Inc. v. Mayo, 234 So.2d 4, 6 (Fla. 1970) (quoting Florida Public Service Commission).

Here, as in State Department of Transportation v. Mayo, the Court should uphold the Florida legislature's "'fundamental and primary policy decision' that there be competition in long distance telephone service." Microtel, Inc. v. Florida Public Service Commission, ___ So.2d _____, 10 F.L.W. 141 (Fla. February 28, 1985). The Florida Public Service Commission's order attempting to preclude admittedly qualified carriers from competing for interexchange service within designated "Toll Monopoly Areas" should be reversed.

CONCLUSION

In 1982 the Florida legislature squarely addressed the question whether there should be competition for long distance telephone service in Florida. The legislature made the "fundamental and primary policy decision" to end monopoly provision of long distance service and to institute full competition.

The Florida Public Service Commission has departed from the legislative mandate and ordered the establishment of Toll Monopoly Areas for the express purpose of protecting certain carriers from competition. As a creature of statute, however, the Commission has only such authority as is conferred by statute; moreover, any reasonable doubt concerning the Commission's statutory authority must be resolved against the exercise thereof. The Commission's attempt to establish Toll Monopoly Areas constitutes a clear departure from the legislature's decision to institute full competition and from the standards this

court has established for testing Public Service Commission authority.

The Commission's attempt to preclude full competition by qualified interexchange carriers should be reversed.

Respectfully submitted,

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