IN THE SUPREME COURT OF FLORIDA

MICROTEL, INC., Appellant, -v.- FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	Case No. 66,125
GTE SPRINT COMMUNICATIONS CORP., Appellant, -v.- FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	Case No. 66,403
MCI TELECOMMUNICATIONS CORP., Appellant, -v.- FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	Case No. 66,404

BRIEF OF APPELLANT GTE SPRINT COMMUNICATIONS CORPORATION

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INTRODUCTION

GTE Sprint Communications Corporation ("GTE Sprint") has filed this appeal pursuant to Fla. R. App. P. 9.110 to seek judicial review of two orders of the Florida Public Service Commission (the "Commission"): first, Order No. 13750 establishing Equal Access Exchange Areas ("EAEAs") and toll monopoly areas, issued by the Commission in its Docket No. 820537-TP on October 5, 1984 (A.1);[1] and, second, Order No. 13912, issued by the Commission on December 11, 1984, to dispose of various petitions for reconsideration and clarification in the same docket (A.15). By order of January 25, 1985, the Court consolidated this appeal with related appeals filed by MCI Telecommunications Corporation ("MCI") and Microtel, Inc.

STATEMENT OF THE CASE

By Order No. 11551, issued January 26, 1983, the Commission, on its own motion, initiated this docket to establish a structure for intrastate access charges to be paid by long distance telephone companies, also known as interexchange carriers, to the local exchange companies for use of their local

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1 Citations to GTE Sprint's Appendix, annexed to its brief, will be in the form of "A.___." Citations to the transcript of the hearings below will be in the form of "Tr.___."

networks to originate and terminate toll telephone traffic within the State of Florida (A.2). On December 9, 1983, in Order No. 12765, the Commission issued its initial decision regarding the structure of intrastate access charges and introduced the concept of EAEAs and toll monopoly areas (A.2). The Commission determined to implement EAEAs "by July 1, 1984 unless evidence was received by the Commission demonstrating that it would not be economically beneficial to the ratepayers" (A.3). Following hearings held in June of last year, the Commission issued its Orders Nos. 13750 and 13912 establishing and implementing EAEAs and toll monopoly areas.

A. The Business of GTE Sprint

GTE Sprint (formerly known as Southern Pacific Communications Corporation) is a telecommunications common carrier which operates a nationwide telecommunications system that provides voice, data and facsimile transmission services to customers throughout the United States.[2] GTE Sprint competes with AT&T Communications of the Southern States, Inc. ("AT&T") and

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2 Currently, GTE Sprint's long distance telecommunications network serves approximately 1,300,000 governmental, business and residential customers in more than 370 metropolitan areas located in 48 states and the District of Columbia. GTE Sprint has been granted authority to offer intrastate services within 29 states, including Florida, and has applications pending in 4 others.

other interexchange carriers in the toll or long distance telephone market, on an interstate and intrastate basis, in Florida and in other states.

GTE Sprint's long distance telecommunications network consists of microwave, satellite, fiber optic and similar transmission facilities that transmit telephone calls. Because GTE Sprint has no local telephone exchange facilities of its own -- that is, GTE Sprint offers no local telephone service and does not own any facilities that connect its customers' premises with its long distance network -- GTE Sprint is dependent upon local telephone companies, like Southern Bell Telephone and Telegraph Company ("Southern Bell") and General Telephone Company of Florida ("General") and other independent telephone companies, for access to its customers.

By Order No. 12391, issued August 19, 1983, the Commission granted GTE Sprint the authority to offer intrastate services in Florida through the resale of WATS and MTS services purchased from other certificated telephone companies. Pursuant to that order, GTE Sprint filed its first intrastate tariff on or about October 24, 1983, which became effective on or about November 10, 1983. GTE Sprint has thus offered intrastate telecommunications services within the State of Florida since that date. By Order No. 12913, issued January 20, 1984,

the Commission expanded GTE Sprint's authority by granting it a certificate of public convenience and necessity to provide intrastate long distance telecommunications services in Florida through the use of GTE Sprint's own facilities.

B. Competition in the Interstate Telecommunications Market

The provision of long distance telephone service was formerly a franchised monopoly of the Bell System -- AT&T and the Bell Operating Companies ("BOCs"), including Southern Bell -- and the independent telephone companies. In 1959, the FCC began to open the interstate transmission market to competition with its decision in Above 890, 39 F.C.C. 650 (1959). That decision allowed the use of privately owned microwave facilities in place of AT&T-provided private lines. As experience with competition was gained in the interstate market, other markets, including the provision of private line, foreign exchange and private network services, were opened up to alternative carriers, and new entrants, such as GTE Sprint and other alternative common carriers ("OCCs") were able to gain a foothold in the interstate market.

In the period from 1971 to 1978, the FCC and the federal courts opened the interstate switched voice market -- ordinary long distance calling -- to the beginnings of

competition with their decisions in the Specialized Common Carrier, 29 F.C.C.2d 870 (1971), aff'd sub nom. Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975) and Execunet matters. See MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978); MCI Telecommunications Corp. v. FCC, 580 F.2d 590 (D.C. Cir.), cert. denied, 439 U.S. 1040 (1978). Because long distance companies like GTE Sprint did not own any local exchange facilities, those decisions were crucial in the development of long distance competition, because they imposed upon the Bell System the obligation to provide its competitors with access to the local network.

AT&T did not, however, voluntarily yield its control over access to the local exchange network. Rather, following the Specialized Common Carrier decision, exchange access disputes accompanied virtually every attempt to expand the services of the new long distance companies. At first, AT&T and the BOCs tried to prevent the OCCs from obtaining access at all. Access disputes delayed the offering by new entrants of various telecommunications services, including switched voice services, and were resolved only after years of litigation before the FCC and the courts. See MCI Telecommunications Corp.

v. FCC, 580 F.2d at 591 ("Since the seminal Specialized Common Carrier decision . . . MCI has met with almost continuous resistance from AT&T in its efforts to provide communications services"); Bell System Tariff Offerings, 46 F.C.C.2d 413 (1974), aff'd sub nom. Bell Telephone Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975). Indeed, the improper conduct of AT&T and the BOCs in denying access to GTE Sprint and other long distance competitors was a major aspect of the government's antitrust case against AT&T. United States v. American Telephone and Telegraph Co., 524 F. Supp. 1336, 1352-57 (D.D.C. 1981).

C. The Divestiture of the Bell System

In 1974, the federal government brought an antitrust action against AT&T in the United States District Court for the District of Columbia. A key allegation of that action was the government's claim that the Bell System had used its power over the "bottleneck" of access to local exchanges to harm competitors such as GTE Sprint and to preserve its monopoly over toll service.

In 1981, the Hon. Harold H. Greene, to whom the case was assigned, denied AT&T's motion to dismiss that action and held that the government had proved a prima facie case that AT&T had violated the antitrust laws. 524 F. Supp. at 1381.

Shortly thereafter, in January 1982, AT&T and the Department of Justice announced a settlement of that action. The three elements of that settlement particularly relevant here were (i) that AT&T was divested of its ownership of the BOCs, (ii) that the BOCs, which formerly provided statewide intrastate long distance services, were restricted to the provision of toll calling within zones known as "LATAs",[3] and (iii) that the BOCs were obligated to provide all long distance companies with "equal access", i.e., access to the local exchange network equal in quality to that provided to AT&T. Following further proceedings, Judge Greene approved these elements of the settlement and caused the Modification of Final Judgment (the "MFJ") to be entered. United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

As a result of the divestiture, AT&T, for the first time, became a provider of intrastate long distance services, because the MFJ required the BOCs to transfer to AT&T their rights to carry intrastate traffic between LATAs. 552 F. Supp. at 227. Pursuant to the MFJ, Southern Bell's territory in

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3 The acronym "LATA" stands for Local Access and Transport Area. United States v. Western Electric Co., 569 F. Supp. 990, 993 n.4 (D.D.C. 1983).

Florida was divided into seven LATAs. United States v. Western Electric Co., 569 F. Supp. 990, 1030-33 (D.D.C. 1983). For example, a call from Miami to Pensacola is an inter-LATA call, because both cities are located in different LATAs. A call from Miami to Key West is an intra-LATA call, because both cities are located in the Southeast LATA.

D. The Implementation of Equal Access

One of the most important provisions of the MFJ was the requirement that the BOCs provide the OCCs with equal access, i.e., access to the local exchange network that is equal in quality to that provided to AT&T and its affiliates. 552 F. Supp. at 196. Judge Greene explained the purpose of the equal access requirement as follows:

> "One of the Government's principal contentions in the AT&T case was that the Operating Companies provided interconnections to AT&T's intercity competitors which were inferior in many respects to those granted to AT&T's own Long Lines Department. There was ample evidence to sustain these contentions. . . .
>
> "Although after divestiture the Operating Companies will no longer have the same incentive to favor AT&T, a substantial AT&T bias has been designed into the integrated telecommunications network, and the network, of course, remains in that condition. It is imperative that any disparities in interconnection be eliminated so that all interexchange and information service providers will be able to compete on an equal basis."

552 F. Supp. at 195. Therefore, pursuant to the MFJ, Southern Bell is required to provide equal access to all interexchange carriers from 100% of its non-exempt end offices no later than September 1, 1986. 552 F. Supp. at 196-97, 232-33.[4]

In providing equal access to all interexchange carriers, the local exchange companies will give customers the opportunity to presubscribe to alternative carriers. Under the design of the integrated Bell System network, and prior to the implementation of equal access, AT&T is the only interexchange carrier which can be reached without the use of a multiple-digit access code. United States of America v. Western Electric, 578 F. Supp. 668, 670 (D.D.C. 1983). While a customer can place an interexchange call over AT&T's network by dialing 1+ a normal 10-digit number (11 digits), a customer who wishes to place a call over any other interexchange carrier must dial a 12 to 14 digit access code plus the 10 digit number (22-24

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4 A similar obligation has been imposed on General and the other GTE Corporation operating companies pursuant to the consent decree between the United States Department of Justice and GTE Corporation in United States v. GTE Corporation, Civ. Action No. 83-1298 (D.D.C.). Pursuant to that decree, GTE must provide equal access to all interexchange carriers from its non-exempt end offices no later than December 31, 1990. Id. slip op. at 32-33 (Dec. 13, 1984). In addition, the FCC has imposed certain limited equal access obligations on other independent telephone companies. MTS and WATS Market Structure, Common Carrier Docket No. 78-72, Phase III (Report and Order released Mar. 19, 1985).

digits). Id. at 670. As Judge Greene noted, this "substantial disparity in dialing convenience has had a significant adverse impact on competition." 552 F. Supp. at 197.

Therefore, as any end office is converted to equal access, each customer served by the office is given the opportunity to presubscribe to a primary interexchange carrier, and his toll calls will be routed automatically to the interexchange carrier of his choice when he dials 1+ a telephone number. See 578 F. Supp. at 670. However, the equal access switching programs are designed in such a way that a customer is not able to presubscribe to one interexchange carrier in order to make interstate calls and to a different interexchange carrier for his intrastate calling.

E. The Commission's Consideration of Equal Access

In its initial order in this docket, Order No. 12765, issued December 9, 1983, the Commission broadly defined the goals of its proceeding:

> "The primary goal in the proceeding was to set access charges that would adequately compensate the LECs for the use of their local facilities for originating and terminating toll traffic and to provide incentives for competition, while maintaining universal telephone service."

Order No. 12765 at 5 (emphasis added); see id. at 6, 16, 27. In addition, in the Commission's Order No. 13750, it noted that

"[c]onsistent with these broad policy goals, the Commission sought to implement equal access, a goal under the MFJ" and that the "vehicle chosen by the Commission to implement equal access in Florida was the Equal Access Exchange Area (EAEA)" (A.2-3). In its December 9, 1983, order, the Commission had decided to implement EAEAs by July 1, 1984 "unless evidence was received by the Commission demonstrating that it would not be economically beneficial to the ratepayers" (A.3).

As the Commission explained it its Order No. 13750, the EAEAs define "geographic areas, configured based on 1987 planned toll center/access tandem areas, in which LECs are responsible for providing equal access to both carriers and customers of carriers in the most economically efficient manner" (A.5). The Commission defined "equal access" as follows:

> "'Equal access' is technically equal access with respect to the number of digits dialed, access for customers with rotary dial or push button telephones, automatic number identification, the availability of billing information, the availability of presubscription and equal transmission quality."

(A.3)

In addition to the obligations imposed on the local exchange companies, the Commission's decision imposed a number of obligations on interexchange carriers (see A.8, A.9). Among these obligations is the requirement that interexchange

carriers seeking to serve customers located in an EAEA "shall be required to accept all traffic delivered to them at that location in a non-discriminatory manner up to the limit of their capacity" (A.8). However, even though the Commission recognized that interexchange carriers, other than AT&T, should be required to accept customers only up to the limit of their capacity, the Commission in effect penalized carriers that would be unable to accept new customers:

> "However, if the demand for a particular IXC's services increases to a point that 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 prescribed blockage rate."

(A.8) Therefore, since customers are unable to presubscribe separately for interstate and intrastate purposes, the Commission, in effect, has sought to prevent carriers from presubscribing customers for both interstate and intrastate purposes.

F. The Commission's Creation of Toll Monopoly Areas

In Order No. 13750, the Commission ordered that "there shall be toll transmission monopoly areas in which the LECs shall be the sole supplier of transmission facilities" (A.10). In other words, the Commission prohibited interexchange carriers from competing with local exchange

companies by carrying calls between points within an EAEA over the interexchange carriers' own facilities. The Commission's orders required interexchange carriers to route all intra-EAEA calls through facilities and services purchased from the local exchange companies and to implement blocking and screening technology to ensure that intra-EAEA calls would be properly routed (A.10, A.11, A.16).

The Commission's initial order permitted two exceptions to the general rule that all intra-EAEA calls must be carried over the local exchange companies' facilities. First, the Commission initially ordered that "if an IXC does not have facilities with technology in place for screening and blocking unauthorized calls[,] . . . the IXC may carry traffic over its own facilities and pay the existing MTS rates to the LEC" (A.10, A.11). However, on reconsideration, the Commission ordered that this exception would apply only to existing facilities and that therefore, interexchange carriers would be required to implement the appropriate blocking and screening technology in any new facilities (A.15). Second, the Commission had initially ordered that another exception would exist if "an IXC can demonstrate that [it] can handle the traffic in a more economical and timely manner [than the LEC] . . ." (A.11). In its order on reconsideration, the Commission

decided that the second exception should be "held in abeyance" until September 1, 1986, when the entire issue of toll monopoly areas would be revisited (A.16).

SUMMARY OF ARGUMENT

GTE Sprint presents two issues for review in this appeal. First, GTE Sprint contests the lawfulness of the Commission's decision to establish toll monopoly areas and to prohibit facilities-based competition within EAEAs. GTE Sprint argues that the Commission is precluded from banning intra-EAEA facilities-based competition because of its representations to the court in United States v. American Telephone and Telegraph Co. In addition, GTE Sprint argues that, in establishing such toll monopoly areas, the Commission exceeded its authority under the relevant Florida Statutes and clearly contravened the intent of the Legislature. Lastly, GTE Sprint submits that the Commission's action in this regard is without support in the record and is arbitrary and capricious.

With regard to the second issue raised in this appeal, GTE Sprint submits that the Commission's decision to restrict the presubscription rights of interexchange carriers is in conflict with federal law. Because it is impossible for interexchange carriers to presubscribe customers separately for interstate and intrastate purposes, the Commission's

restrictions on their ability to presubscribe customers for intrastate purposes necessarily infringes their ability to presubscribe customers for interstate purposes. The case law clearly holds that in cases of such intermixed interstate and intrastate facilities and services, federal regulation preempts contrary state regulation.

ARGUMENT

I.

THE COMMISSION ACTED UNLAWFULLY IN ESTABLISHING TOLL MONOPOLY AREAS.

For several reasons, the Commission acted unlawfully in prohibiting facilities-based competition within toll monopoly areas. First, since the toll monopoly areas are coextensive with the EAEAs and with the LATAs established pursuant to the MFJ (with the exception of the Southeast LATA), the Commission has contradicted its representations in United States v. American Telephone and Telegraph Co. that intra-LATA competition in Florida would be permitted. Second, the Commission in establishing toll monopoly areas exceeded its authority under Chapter 364 of the Florida Statutes. Third, the Commission's decision to prohibit facilities-based competition within EAEAs was not supported by the record and was arbitrary and capricious.

A. THE COMMISSION'S REPRESENTATIONS IN UNITED STATES V. AMERICAN TELEPHONE AND TELEGRAPH CO. PRECLUDE IT FROM BARRING INTRA-EAEA COMPETITION.

The Commission has ordered that toll monopoly areas shall be coextensive with EAEAs and that, with the exception of the Southeast LATA, EAEAs shall be coextensive with the LATAs established pursuant to the MFJ (A.11). Therefore, the Commission's decision to create toll monopoly areas will have the effect of banning intra-LATA competition, contrary to the intentions of the court in United States v. American Telephone and Telegraph Co. and contrary to the Commission's representations to the court in that case.

In his opinion approving and modifying the consent decree in United States v. American Telephone and Telegraph Co., Judge Greene reviewed the evidence of AT&T's anticompetitive conduct and the effects that conduct had had on the telecommunications industry. 552 F. Supp. at 160-65. The court found that the government had demonstrated, inter alia, that AT&T had "used its control over its local monopoly to preclude competition in the intercity market." 552 F. Supp. at 161. Therefore, Judge Greene concluded that the proposed decree was warranted to open up the intercity telecommunications market to competition and to serve the pro-competitive goals of the antitrust laws, 552 F. Supp. at 165-66, which rest upon

> "the fundamental premise of our economic system that 'unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.'"

552 F. Supp. at 149-50 (quoting Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958)).

In considering whether the MFJ would conflict with state telecommunications regulation, Judge Greene held that, because AT&T's anticompetitive conduct was "well within the jurisdiction of the federal antitrust laws . . .[,] it would make no sense to hold that, in providing a remedy for the anticompetitive conduct, the Court must refrain from interfering with state regulation." 552 F. Supp. at 158. However, the judge refused to preempt all state telecommunications regulation, and, in his subsequent decision reviewing the configuration of the LATAs, he declined to require intrastate toll competition.[5] United States v. Western Electric Co., 569 F. Supp. at 1004-06.

Although Judge Greene was unwilling to preempt the jurisdiction of state commissions and to require that

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5 In declining to order intrastate toll competition, Judge Greene noted that Virginia "appears [to be] the only state which prohibits competition for intrastate phone calls." 569 F. Supp. at 1005 n.71.

intrastate toll competition be permitted, his LATA decision made clear that, under the MFJ, "competition with respect to all toll traffic was always contemplated." Id. at 1005 n.72 (emphasis added). Indeed, the court explicitly reiterated that the MFJ was intended to produce intrastate competition not only in the inter-LATA toll market but in the intra-LATA toll market as well:

> "The Court agrees with the intervenors that the lack of competition in this [intra-LATA] market would constitute an intolerable development. The opening up of competition lies at the heart of this lawsuit and of the decree entered at its conclusion, and the significant amount of the traffic that is both intrastate and intra-LATA should not be reserved to the monopoly carrier."

Id. at 1005 (emphasis added). Therefore, Judge Greene sought to prevent the BOCs themselves from blocking intra-LATA competition and required them to file written commitments to provide equal access to all interexchange carriers for both intra-LATA and inter-LATA toll traffic. Id. at 1005-06. Southern Bell and all other BOCs have filed such a commitment. United States v. Western Electric Co., 569 F. Supp. 1057, 1107 (D.D.C. 1983).

In addition, Judge Greene's LATA opinion clearly indicated that he would reconsider, if necessary, what steps should be taken to promote intrastate competition:

> "[T]he trend among the states has been toward encouraging intrastate competition. Thus, the Court need not consider at this point what measures could or should be taken under the decree or

> otherwise if states attempted on a significant scale to impede the development of the competitive environment envisioned by the decree."

569 F. Supp at 1005 n.71. Therefore, in a subsequent decision, Judge Greene ordered that the Los Angeles, California, LATA be redrawn and reduced in size when it appeared that the California Public Utilities Commission would prohibit intra-LATA competition. United States v. Western Electric Co., Civ. Action No. 82-0192, slip op. at 12-15 (D.D.C. Feb. 6, 1984). Judge Greene explained that he had decided to approve relatively large LATAs because he had expected that intra-LATA competition would be allowed:

> "It is quite true, as this Court pointed out in its Opinion of April 20, 1983, that the state regulatory bodies retain the authority under the decree to control traffic within the LATAs themselves. United States v. Western Electric Co., 569 F. Supp. 990, 1005 (D.D.C. 1983). The Court has also made it abundantly clear, however, that its decision on the size of the LATAs would be substantially influenced by the decisions of the States and their public utilities commissions with regard to intra-LATA competition. As the Court stated last April, 'the lack of competition in [the intra-LATA] market would constitute an intolerable development.' 569 F. Supp. at 1005. In approving LATA boundaries the Court has accordingly taken into account that a particular state public utilities commission 'is . . . committed to promoting competition' (569 F. Supp. at 1032) or that it is opposed to intra-LATA competition."

> "The Court has frequently opted in favor of relatively large LATAs notwithstanding significant Department of Justice opposition because it wished to expand the area in which the local operationg companies might carry telecommunications traffic,

thus to strengthen them financially and otherwise. But is has always been an essential corollary of those decisions that the areas in question would not be artificially closed to competition."

Id. at 13-14 (emphasis added) (footnote omitted).

Similarly, in Judge Greene's consideration of the configuration of the LATAs in Florida, he explicitly took into account the Commission's stated position in favor of intra-LATA competition. In its comments to Judge Greene prior to his LATA decision, the Commission had unequivocably stated its position:

"Of great concern to us is the viability and actuality of intra-LATA competition, particularly in a LATA such as the proposed Southeast LATA in which several large cities are located. . . ."

". . . .

"At the October 27, 1982 Workshop, Microtel, Inc., an OCC licensed by the Florida Public Service Commission to provide intra-state toll service within Florida, voiced its concern about its ability to provide inter-city service when those cities are within one LATA (such as the Southeast LATA). Microtel, Inc. was assured by Bell that the BOC would provide access between points within a LATA, i.e. between local exchanges. We expect those assurances of intra-LATA competition to come to fruition and ask the Court to require the parties to reduce this understanding to a written submission in this case."

(A.26, A.28) In its supplemental comments, which concerned the Southeast LATA, the Commission reaffirmed its support of intra-LATA competition:

"Our concerns about the configuration of proposed Southeast LATA are not so much directed towards its size per se, but toward the effect its

> size would have on competition. This Commission strongly favors competition as being in the public interest. The initial information we had received from the Bell System was insufficient to assure us that the proposed Southeast LATA configuration was not anti-competitive. With the additional information and written assurances we have received from Southern Bell, we are much more comfortable with the Southeast LATA as proposed."

(A.37)

Judge Greene took Southern Bell's assurances into account in approving a single Southeast LATA:

> "Finally, the Court is convinced that the competitive objectives of the decree will not be unduly hampered if a single LATA is created. . . . With regard to intra-LATA competition, the Court notes that Florida has already licensed an intrastate carrier, Microtel, Inc. to compete with Southern Bell for inter-city intra-LATA calls. The State Public Service Commission, in its filings with the Court, has persuaded the Court that it is a strong body and one committed to promoting competition."

569 F. Supp. at 1032 (footnotes omitted). After noting that he had been persuaded that the Commission is "committed to promoting competition," Judge Greene used, as an example, his understanding that interexchange carriers would be able to establish multiple points of presence within the Southeast LATA:

> "For instance, the Commission only endorsed the Southeast LATA after it was assured by Southern Bell that Bell would provide access within the LATA to as many points of presence as an intra-LATA carrier such an Microtel requests."

569 F. Supp. at 1032 n.220. Of course, now the Commission's decisions have rendered any such assurances worthless, because, although the Southeast LATA has been divided into two EAEAs, calls between the points of presence that, for example, Microtel might have located in one half of the Southeast LATA must not be carried over Microtel's own facilities.

Given its representations to Judge Greene that intra-LATA competition would be permitted in Florida, and given Judge Greene's reliance on those representations in drawing the LATA boundaries, it is difficult to understand how the Commission can now advocate the establishment of toll monopoly areas, which are, in all cases but one, coextensive with the LATAs. The Commission cannot avoid the obligations imposed by its representations in United States v. American and Telegraph Co. merely by dividing the Southeast LATA into two EAEAs. In effect, that attempt to address the Commission's obvious concern regarding its representations before Judge Greene accomplishes little in terms of true intra-LATA competition in Florida.

B. THE COMMISSION ACTED CONTRARY TO ITS STATUTORY AUTHORITY IN CREATING TOLL MONOPOLY AREAS.

An administrative agency, such as the Commission, is purely a creature of legislation. It has only those powers granted by statute. Florida Bridge Co. v. Bevis, 363 So.2d 799

(Fla. 1978); Florida Department of Law Enforcement v. Hinson, 429 So.2d 723 (Fla. 1st DCA 1983); Department of Environmental Requlation v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla. 1st DCA 1982); Department of Citrus v. Office of Comptroller, 416 So.2d 820 (Fla. 2d DCA 1982); Fiat Motors of North America v. Calvin, 356 So.2d 908 (Fla. 1st DCA), cert. denied, 360 So.2d 1247 (Fla. 1978). Where reasonable doubt exists whether a particular power is vested in the administative body, the power is deemed to have been denied. Florida Bridge Co., 363 So.2d at 802. As set forth by this Court in Florida Bridge Co.,

> "'[The] 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.'"

363 So.2d at 802 (quoting Cape Coral v. GAC Utilities, 281 So.2d 493 (Fla. 1973)).

Chapter 364 of of the Florida Statutes, which governs the regulation of telephone companies, not only does not grant the Commission the power to prevent all new entrants from competing with established intrastate interexchange telephone companies, but it also explicitly limits the Commission's authority to create monopolies to the local exchange network.

§ 364.335, Fla. Stat. Section 364.335(4), which was amended in 1982, currently provides, in relevant part, 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, 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."

The history of the amendment of this section demonstrates clearly the Legislature's intent to open the intrastate toll market to competition. Prior to the amendment of Section 364.335, Florida's telephone statutes, like many similar statutes in other states, protected the monopoly of a company that was "first in the field." The District Court of Appeal for the First District explained the rationale of such "first-in-the-field" statutes as follows:

> "Fundamental concepts of our form of government permit any citizen to engage in any business he so desires unless the State by properly exercising its police power restricts this right to a limited class. . . ."
>
> "Another valid limitation of those entitled to engage in a particular business is found in the regulation of communications, transportation and public utility companies. The basic premise for limitation in this field is the public welfare or public interest in that monopolistic fields are sanctioned by the State upon the theory that duplication and cutthroat competition among these industries will inevitably result in depriving the

> public of reliable services, such as telephone, electric, freight carrying, or transportation of passengers."

Carbo, Inc. v. Meiklejohn, 217 So.2d 159, 160 (Fla. 1st DCA 1968), cert. denied, 225 So.2d 533 (Fla. 1969).

That statutory scheme, however, was drastically changed in the telecommunications field when, during the 1982 legislative session, Senate Bill 868, amending Section 364.335, became law. Prior to its amendment, Section 364.335(4) provided in part 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 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 at first amends the certificate of such other telephone company to remove the basis for competition or duplication of services."

§ 364.335, Fla. Stat. (amended 1982). Senate Bill 868 amended this section to provide that the Commission's authority to create monopolies would apply only to "local exchange services." The Legislature's clear intent, therefore, was to repeal its "first-in-the-field" statute with regard to the intrastate toll market but to perpetuate that statutory scheme for the purpose of the local exchange market.

This Court's recent opinion in Microtel, Inc. v. Florida Public Service Commission, No. 64,801, slip op. (Fla.

Feb. 28, 1985), confirms this understanding of the Legislature's intent in amending Section 364.335. In considering the standards and guidelines that will apply to competitive intrastate toll services, the Court noted its understanding of "the legislative objective to bring competition into this business area which had not heretofore existed." Id. at 3. Moreover, the Court explicitly held that:

> "the legislature made the 'fundamental and primary policy decision' that there be competition in long distance telephone service."

Id. at 2.

The Commission's decision to create toll monopoly areas completely contravenes the Legislature's intent in amending Section 364.335. The Commission's decision on toll monopoly areas is a blatant and total prohibition of facilities-based toll competition within the EAEAs. This decision is not one that sets standards for allowing certain companies to compete with the existing intra-LATA toll providers and for denying that authority to other potential new entrants. Rather, the decision creates one sole intra-EAEA toll monopolist and requires all other carriers to route their potential intra-EAEA over its network.

Ironically, the Commission's decision imposes a more onerous standard for new entrants than the inadequacy of

service standard contained in the former Section 364.335. Pursuant to the Commission's order on reconsideration, facilities-based intra-EAEA competition will apparently not be permitted even in circumstances where an applicant can show that it can handle traffic in a more economical and timely manner than the local exchange companies (A.16). For these reasons, there can be no question that the Commission has acted contrary to its statutory authority in creating toll monopoly areas.

C. THE COMMISSION'S DECISION TO ESTABLISH TOLL MONOPOLY AREAS IS NOT SUPPORTED BY THE RECORD.

In the various orders in its access charge proceedings, the Commission has repeatedly stated its policy in favor of the development of intrastate competition. For example, in its Order No. 12765, issued December 9, 1983, the Commission stated that

> "[t]he primary goal in this proceeding was to set access charges that would adequately compensate the LECs for the use of their local facilities for originating and terminating toll traffic and to provide incentives for competition, while maintaining universal telephone service."

Order No. 12765 at 5 (emphasis added); see id. at 6, 16, 27. The Commission's goal of providing incentives for the development of intrastate competition was then reaffirmed in its initial order in the EAEA phase of the case (A.2).

Despite these statements in favor of toll competition, the Commission in its December 9, 1983, Order No. 12765 decided to prohibit, on a temporary basis, facilities-based competition "within a geographic bound served by an existing toll center":

> "We also find that the provision of toll within a geographic bound served by an existing toll center should be an LEC monopoly until July 1, 1984, provided EAEAs are implemented on that date. This restriction does not apply to the resale of WATS."

Order No. 12765 at 28. The Commission offered no reasoning for its decision to ban such competition until July 1, 1984. In addition, its decision to establish toll monopoly areas is similarly unsupported by the record in this case.

Dr. Steven R. Brenner, who testified on behalf of GTE Sprint, explained the benefits of competition during his testimony in these proceedings:

> "Competition benefits customers because it forces carriers to provide services efficiently. Competition forces carriers to provide the services customers most demand, and it forces them to seek out the least cost method of providing service and over time use new technologies that can lower costs. Restricting competition potentially denies customers those benefits."

(Tr.599). If regulatory barriers are in place, consumers are likely to lose benefits they otherwise would gain from such expanded competition (Tr.600).

Moreover, it makes no sense to restrict intra-EAEA competition to carriers using resold facilities. Where interexchange carriers have facilities available that may be used to carry intra-EAEA traffic, it would be inefficient to order such carriers to bypass their own facilities and to carry intra-EAEA traffic over resold lines. As technology and calling patterns change, the marketplace will most efficiently decide where intra-EAEA competition is feasible and where the use of a carrier's own facilities, rather than resold facilities, is more efficient (Tr.600).

The local exchange companies, with the exception of Centel Telephone Company, generally argued below against intra-EAEA competition on two grounds. First, the local exchange companies argued that, because of the subsidy from toll to local services, intra-EAEA competition would cause a sudden increase in basic exchange rates. Second, the local exchange companies argued that such competition would threaten bypass of the local exchange. Neither argument can withstand close examination.

With regard to the first of these issues, the local exchange companies claimed that intra-EAEA competition would increase local rates and destroy whatever subsidy the Commission wished to preserve from intra-EAEA toll rates. However,

the local exchange companies had proposed, and the Commission had approved, an inter-LATA access charge mechanism which is intended to preserve the current subsidy flowing from inter-LATA calls to the local exchange. The testimony in the hearings in this proceeding showed that, if the Commission believed that current level of subsidy should be preserved, there was no reason why a similar access charge mechanism could not be designed for intra-EAEA calls. As Dr. Daniel Kelley testified on behalf of MCI:

> "Toll monopoly areas are not necessary in order to preserve contributions to other services. If for non-economic policy reasons the Florida Commission chooses to subsidize some end users by raising the money from intraEAEA toll users, these subsidies can be collected through access charges on all carriers as easily as they could be collected through monopoly toll rates."

(Tr.673).

Similarly, the local exchange companies' argument with regard to the threat of bypass was groundless. The threat of bypass, and the danger that the subsidy from toll to local will not be preserved, exists whether there is a single provider or many carriers of intra-EAEA toll services. The threat of bypass exists today insofar as intra-EAEA toll rates have been artificially inflated by the inclusion of a subsidy designed to support the costs of the local exchange. This threat would not be changed if there were many carriers of intra-EAEA

toll traffic, all of whom paid access charges that included the subsidy currently included in the local exchange companies' intra-EAEA toll rates. In sum, competition is in no way the cause of any bypass threat that may exist.

Therefore, the Commission acted arbitrarily and capriciously in approving the establishment of toll monopoly areas and in banning intra-EAEA facilities-based competition. The Commission's decision to ban such competition within EAEAs is wholly inconsistent with its decisions promoting competition between LATAs and between EAEAs and is, therefore, unsupported by the record.

II.

THE COMMISSION'S ORDERS VIOLATE GTE SPRINT'S FEDERAL RIGHTS TO PRESUBSCRIBE INTERSTATE CUSTOMERS.

In its Order No. 13750, the Commission has required that when an interexchange carrier, other than AT&T, initially enters an EAEA, it shall be required to accept all traffic delivered to it up to the limits of its capacity, but that an interexchange carrier "need not possess capacity to handle all potential traffic in the EAEA" (A.8). However, the Commission has gone on to require that

> "if the demand for a particular IXC's services increases to a point that 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 prescribed blockage rate."

(A.8) This latter language would significantly infringe GTE Sprint's rights and abilities to presubscribe interstate customers, and, therefore, this requirement is preempted by federal law.

As is explained above, Southern Bell, pursuant to the MFJ, General, pursuant to its consent decree, and other independant local exchange companies, pursuant to FCC order, are required in certain circumstances to provide equal access to all interexchange carriers. Among the requirements of equal access is the obligation to allow customers to presubscribe to a 1+ interexchange carrier other that AT&T. Beginning in September of 1984, customers have been given the opportunity to presubscribe to alternative long distance companies, but are able to choose only a single 1+ carrier for both interstate and intrastate purposes. Therefore, by denying carriers the ability to presubscribe to new customers, the Commission is denying such carriers the opportunity to offer an interstate, as well as intrastate service.

The Commission's decision regarding presubscription presents a classic case for federal preemption. As the United States Supreme Court noted in Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963):

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field. . . . A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulation is a physical impossibilty for one engaged in interstate commerce."

373 U.S. at 142-43 (citations omitted).

As the Second Circuit has explained in a case holding that attempted state regulation of a microwave carrier was preempted by federal law:

> "Under the Supremacy Clause of the Constitution, Art. VI, cl. 2, a federal law preempts state law when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Even in an area where Congress has not completely foreclosed state regulation, 'a state statute is void to the extent that it actually conflicts with a valid federal statute.'. . . In determining whether it conflicts with the federal law, the Court must look to the effect, rather than the purpose of the state law."

New York State Commission v. FCC, 669 F.2d 58, 62 (2d Cir. 1982) (citations omitted). Here, an order limiting GTE Sprint's rights to presubscribe customers would "stand as an obstacle to the accomplishment" of the federal objectives of equal access for the OCCs in the telecommunications field. Whatever benefits the Commission may cite for such an order, its effect would be to impede interstate transmissions and frustrate federal policies.

Numerous cases have held that where some intrastate usage is intermixed with and not segregable from primarily interstate services and facilities, then federal jurisdiction predominates. For example, in North Carolina Utilities Commission v. FCC, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976), a conflict between a federal tariff which allowed customers to connect to their telephone lines equipment not provided by local exchange companies and proposed state regulations which prohibited such interconnection was resolved by the Fourth Circuit in favor of the federal regulatory scheme. The court held in an opinion by Judge Hastie that the Communications Act of 1934 preempted state regulation of telephone terminal equipment used for both interstate and intrastate communication when such regulation conflicted with federal rules governing the same equipment. The court found that it was practically and economically unfeasible to limit terminal equipment to purely interstate or intrastate transmissions and that it was imposssible to implement separate federal and state regulatory schemes. Moreover, the court held that the federal regulatory scheme preempted contradictory state regulation even though the terminal equipment was used 97% of the time to make intrastate rather than interstate calls. North Carolina Utilities Commission v. FCC, 552 F.2d 1036, 1044 n.7 (4th Cir.), cert. denied, 434 U.S. 874 (1977).

Similarly, in Puerto Rico Tel. Co. v. FCC, 553 F.2d 694 (1st Cir. 1977), the court held that federal regulation preempted the Commonwealth of Puerto Rico's jurisdiction over PBX equipment, even though such equipment was used predominantly for intrastate calls and even though local calls generated five times the revenues generated by interstate calls. The First Circuit held that:

> "The clear import of the Communications Act, as it has been construed by the FCC and by the courts for many years, is that no matter how frequently or infrequently a subscriber places interstate calls, he is entitled to have the conditions placed on access to the interstate telephone system measured against federal standards of reasonableness under §201 [of the Communications Act]."

Id. at 700. Therefore, even if a state's regulation appears to regulate purely intrastate matters, federal regulation preempts inconsistent state regulation. See National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984) (FCC has jurisdiction to impose an end user access charge on all subscribers to telephone service, even if they only use their equipment for intrastate calls), cert. denied, 53 U.S.L.W. 3599 (U.S. Feb. 19, 1985) (No. 84-95).

Although the North Carolina Utilities Commission and Puerto Rico Telephone cases involved jurisdiction over communications equipment rather than interexchange communications services, the holdings of those cases are equally applicable to

the regulation of interexchange services. Therefore, for example, the cases have held that private line facilities capable of both interstate and intrastate usage are subject to the FCC's regulatory jurisdiction. In American Telephone and Telegraph Co., 56 F.C.C.2d 14 (1975), aff'd sub nom. California v. FCC, 567 F.2d 84 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978), the FCC held that it had jurisdiction over physically intrastate private lines which were designed to extend interstate foreign exchange ("FX") or Common Control Switching Arrangement ("CCSA") services from interstate terminal points to other points in the same state. As with GTE Sprint's network, these facilities provided the capability of terminating communications both within and outside a state, and there was no practicable way in which to segregate the two. In affirming the FCC's decision, the court of appeals held that the FCC may properly regulate facilities used both for interstate and intrastate communications to the extent it proves "technically and practically difficult" to separate the two types of communications. 567 F.2d at 86. See U.S. Department of Defense v. General Telephone Co., 38 F.C.C.2d 803, aff'd sub nom. St. Joseph Telephone and Telegraph Co. v. FCC, 505 F.2d 476 (D.C. Cir. 1974); AT&T-TWX, 38 F.C.C. 1127 (1965).

These precedents for federal jurisdiction over intermixed intrastate and interstate facilities and services are not limited to the FCC and the federal courts. State precedents are in accord. In Southern Pacific Communications Company v. Oklahoma Corporation Commission, 586 P.2d 327 (Sup. Ct. Okla. 1978), the Supreme Court of Oklahoma reversed a decision of the Oklahoma Corporation Commission and held that the state commission lacked jurisdiction over intrastate private lines which were designed to interconnect with an interstate network. The court held that FX facilities were subject to the FCC's jurisdiction even though they were capable of being used for both interstate and intrastate communications. There, the interstate capability was sufficient to confer FCC jurisdiction irrespective of predominant usage. As the court stated,

> "no matter how frequently or infrequently a subscriber places interstate calls, he is entitled to have the conditions placed on access to the interstate phone system measured by federal standards of reasonableness . . . ."

586 P.2d at 333.

As the above review of the case law indicates, where federal and state regulation of intermixed interstate and intrastate services or facilities conflict, federal regulation must preempt state regulation. The Commission's decision to restrict interexchange carriers' abilities to presubscribe customers when certain network capacity limitations exist, clearly

conflicts with federal policies, because it is impossible to presubscribe a customer separately for interstate and intrastate purposes. Under these circumstances, federal regulation must govern.

CONCLUSION

For the foregoing reasons, this Court should reverse the Florida Public Service Commission's decision: (1) to establish toll monopoly areas; and (2) to limit the presubscription rights of carriers offering interstate and intrastate services in Florida.

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