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

REPLY BRIEF OF APPELLANT GTE SPRINT COMMUNICATIONS CORPORATION

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND RULES

OTHER

INTRODUCTION

GTE Sprint Communications Corporation ("GTE Sprint") submits this reply to the answering briefs filed in these consolidated appeals by the Florida Public Service Commission (the "Commission"), Southern Bell Telephone & Telegraph Company ("Southern Bell"), General Telephone Company of Florida ("General") and United Telephone Company of Florida ("United").[1]

SUMMARY OF ARGUMENT

The intent of the Legislature is clear that there should be competition in long distance telephone service in Florida. The Commission's Orders Nos. 13750 and 13912 violate that legislative intent by banning facilities-based intra-EAEA competition. Although the Commission has attempted to justify its decision by noting that interexchange carriers are "permitted" to route their potential intra-EAEA traffic to the facilities and services of local exchange companies, this aspect of the Commission's orders merely guarantees that local exchange companies will share in the revenues of their potential competitors' businesses. This is not real competition consistent with either the intent of the Legislature or the representations made by the Commission to the Hon. Harold H. Greene in United States v. American Telephone and Telegraph Co.

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

In addition, the Commission's orders violate federal law to the extent that they infringe on GTE Sprint's abilities to presubscribe interstate customers. No matter what other actions the Commission may lawfully take to require interexchange companies to maintain particular network capacities and blockage rates, it may not order that such companies will lose their abilities to presubscribe interstate customers in circumstances where prescribed blockage rates are exceeded. It is indisputable that the Commission's orders would affect interexchange carriers' federal presubscription rights, and the orders are, therefore, preempted by federal law.

ARGUMENT

I.

THE COMMISSION ACTED UNLAWFULLY IN ESTABLISHING TOLL MONOPOLY AREAS.

In response to the arguments set forth in GTE Sprint's initial brief, the Commission and the local exchange companies argue that (a) the Commission has ample authority under Chapter 364 of the Florida Statutes to establish toll monopoly areas and (b) the Commission has honored its commitments to Judge Greene in United States v. American Telephone and Telegraph and, in any case, is not estopped by its representations to establish toll monopoly areas. Neither, in fact, is the case.

A. THE COMMISSION'S ORDERS CREATING TOLL MONOPOLY AREAS ARE CONTRARY TO THE LEGISLATIVE INTENT IN AMENDING CHAPTER 364 OF THE FLORIDA STATUTES.

As is explained in GTE Sprint's initial brief, the 1982 amendment to Section 364.335 of the Florida Statutes reflects the Legislature's "fundamental and primary policy decision that there be competition in long distance telephone service." Microtel, Inc. v. Florida Public Service Commission, No. 64,801, slip op. at 2 (Fla. Feb. 28, 1985). See GTE Sprint Brief at 23-26. In contravention of the Legislature's intent, the Commission's orders create one sole intra-EAEA toll monopolist and require all other carriers to route their potential intra-EAEA traffic over its network. Thus, pursuant to the orders, interexchange carriers must route all intra-EAEA calls through facilities and services purchased from the local exchange companies and implement blocking and screening technology to ensure that intra-EAEA calls will be properly routed (A.10, A.11, A.16).

The Commission and the local exchange companies argue that the Commission has indeed allowed intra-EAEA competition by creating so-called "toll transmission monopoly areas" and by, therefore, permitting interexchange carriers to resell local exchange companies' intra-EAEA services. See, e.g., Commission Brief at 11-12; Southern Bell Brief at 11. In addition, General points out in its brief that, given the

Commission's requirement that intra-EAEA calls be routed to the local exchange companies' networks, customers would perceive that intra-EAEA competition existed and would not be aware that a local exchange company's toll facilities were involved in carrying an intra-EAEA call intended to be placed over an interexchange carrier's network. General Brief at 7.

These arguments merely demonstrate, however, that the Commission's scheme is doubly wrong. First, it doesn't establish true competition pursuant to the intent of Section 364.335. This is so because it requires that all intra-EAEA calls be routed to the local exchange companies' facilities even where the facilities of interexchange carriers are available, and even where interexchange carriers can show that they can handle traffic in a more economical and timely manner than the local exchange companies (A.16). What the Commission has in effect done in "permitting" resale is to adopt a mechanism under which the local exchange companies will always share in any revenues from any intra-EAEA calls that customers believe they are placing over interexchange carriers' networks. No one can seriously maintain that competition exists when interexchange carriers are ordered to route their potential intra-EAEA calls to "competitors" facilities and to share potential revenues with these "competitors." Second, the Commission's orders will function in such a way that customers will be misled to

believe that there is intra-EAEA competition, when in fact there is not.

The Commission and the local exchange companies further argue that the establishment of toll monopoly areas is temporary and that toll monopoly areas will be discontinued come September of 1986. See, e.g., Commission Brief at 12; United Brief at 13. In this regard, the Commission has stated that

> "toll transmission monopoly areas are hereby established on a transitional basis until September 1, 1986. Prior to that date hearings will be held to determine whether toll monopoly areas should be continued as structured herein. Parties advocating that toll monopoly areas be retained have the burden of demonstrating that such areas should continue in the public interest."

(A.11 (emphasis added)) Clearly evident from this language is the fact that there is no guarantee that toll monopoly areas will be terminated in 1986. Indeed, whatever the Commission's order may have said concerning the burden of proof on this issue, the above underscored language demonstrates that toll monopoly areas may simply be continued past September 1986 once they are in place.

Finally, the Commission argues that because it has the authority to grant a certificate pursuant to Section 364.335, it also has the authority to establish toll monopoly areas. In doing so, the Commission refers this Court to GTE Sprint's certification decision where it ruled that

"the scope of authority granted to Sprint is subject to limitation and amendment by our decisions in . . . Docket No. 820537-TP . . . ."

Commission Brief at 10. While GTE Sprint concedes that the Commission has the authority to monitor the telephone services provided by GTE Sprint pursuant to its certificate, it respectfully submits that the quoted language in the GTE Sprint certification decision does not empower the Commission unlawfully to obstruct competition. The Commission had the authority neither to enter its orders banning facilities-based intra-EAEA competition nor to restrict the certificates of every interexchange carrier, including GTE Sprint, so as to deny them the ability to carry intra-EAEA calls over their own networks.

B. THE COMMISSION IS JUDICIALLY ESTOPPED FROM ESTABLISHING TOLL MONOPOLY AREAS BY ITS REPRESENTATIONS IN UNITED STATES V. AMERICAN TELEPHONE & TELEGRAPH CO.

The Commission argues in its answering brief that "the circumstances regarding the Commission's comments on LATA boundaries and its decision in this case do not meet the requirements for estoppel." Commission Brief at 17. However, in so arguing the Commission's brief completely confuses the estoppel argument made by GTE Sprint and obscures the difference between judicial estoppel and equitable estoppel.

Florida has long recognized the rule that where a party has taken a position in one judicial proceeding, he is

estopped to make a contrary assertion in that or a later proceeding. This is commonly known as the doctrine of judicial estoppel or preclusion against inconsistent positions. See Hodkin v. H.D. Perry, 88 So.2d 139 (Fla. 1956); Sommers v. Apalachicola Northern R.R., 85 Fla. 9, 96 So. 151 (1922); Rigg v. Vernell, 428 So.2d 668 (Fla. 3d DCA 1982); Federated Mutual Implement and Hardware Insurance Co. v. Griffin, 237 So.2d 38 (Fla. 1st DCA), cert. denied, 240 So.2d 641 (1970). See generally 1B Moore's Federal Practice ¶ 0.405[8] (1982).

In Hodkin, a physican was estopped to question the validity of a by-law adopted by the Board of Commissioners of a hospital district when, prior to the adoption of the by-law, the physican had actively supported and voted for it. This Court held that

> "the plaintiff cannot now be heard to say that the by-law is invalid, merely because the 'shoe is on the other foot,' since his present position is so inconsistent with that previously assumed by him as to work a quasi-estoppel against him under the rule of Campbell v. Kauffman Milling Co., 1900, 47 Fla. 328, 29 So. 435, that a party cannot, either in the course of litigation or in dealings in pais, occupy inconsistent positions."

88 So.2d at 139. Similarly, in Federated Mutual, where a party was estopped from taking an inconsistent position in a separate proceeding, the court held that

> "a party may not take inconsistent positions in a litigation. . . . So, one who assumes a particular attitude in a case and adopts a particular theory is generally estopped to assume in a pleading filed in a later phase of that same case, or

> another case any other or inconsistent position toward the same parties and subject matter."

237 So.2d at 40.[2]

In arguing that estoppel does not apply to this case, the Commission inappropriately relies on Greenhut Construction Co. v. Henry A. Knoll, Inc., 247 So.2d 517 (Fla. 1st DCA 1971). However, the Court in Greenhut ennunciated the doctrine of equitable estoppel, not judicial estoppel, which are separate legal doctrines and have distinctly different applications. As the court stated in Uslife v. U.S. Life Insurance Co., 560 F. Supp. 1302 (N.D. Tex. 1983):

> "Judicial estoppel is distinct from equitable estoppel, which may also be applied to prevent a party from contradicting a position taken in a prior judicial proceeding. Equitable estoppel focuses on the relationship between the parties to the prior litigation, and it applies where one of the parties has detrimentally relied upon the position taken by the other party in the earlier proceeding. . . .
>
> "By contrast, the judicial estoppel doctrine looks to the relationship between the litigant and the judicial system and is intended to protect the integrity of the judicial procees."

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2 See also Tuveson v. Florida Governors Council on Indian Affairs, 734 F.2d 730, 735 (11th Cir. 1984) ("Where a party has taken a position under oath in one judicial proceeding, he is estopped to make a contrary assertion in a later proceeding."); Uslife Corporation v. U.S. Life Insurance Co., 560 F. Supp. 1302 (N.D. Tex. 1983) (judicial estoppel applies in cases where party attempts to contradict its own sworn statements in prior litigation); Gravitt v. Southwestern Bell Telephone, 416 F. Supp. 830 (W.D. Tex. 1976) (a party is estopped where he alleged or admitted in his pleadings under oath in a former proceeding the contrary to the assertion sought to be made).

560 F. Supp. at 1304 (citations omitted). See Federated Mutual Implement and Hardware Insurance v. Griffin, 237 So.2d at 41 ("The quintessence . . . of [the judicial] estoppel rule is probably the integrity of our system of justice."). See generally 1B Moore's Federal Practuce ¶ 0.405[8] (1981) (distinguishing various forms of estoppel).[3]

In the instant case, the doctrine of judicial estoppel applies because the representations at issue are those made by the Commission in its pleadings and submissions to Judge Greene in United States v. American Telephone and Telegraph Co. The Commission's representations stating its position in favor of intra-LATA competition are fully set forth in GTE Sprint's initial brief. GTE Sprint Brief at 16-22. With the assurances from the Commission that intra-LATA competition in Florida would be allowed, Judge Greene divided Florida up into only seven fairly large LATAs. GTE Sprint Brief at 20-21. Moreover, relying upon those statements, Judge Greene endorsed the configuration of a single Southeast LATA. GTE Sprint Brief at 21-22.[4]

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3 United also argues in its answering brief that collateral estoppel does not preclude the Commission's change of position. United Brief at 23-24. However, as is explained above, judicial estoppel, not collateral estoppel applies in this case.

4 In its answering brief, General, after noting that the "LATAs approved by the Court in the antitrust suit are very

(Footnote Continued)

It would clearly violate "the integrity of the judicial process" to ignore the Commission's representations and to permit the implementation of toll monopoly areas. Under the doctrine of judicial estoppel, the Commission is estopped to take actions contrary to those representations on which Judge Greene relied in issuing his decisions and orders in United States v. American Telephone and Telegraph Co.

II.

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

In its initial brief, GTE Sprint argued that the Commission's orders violated GTE Sprint's federal rights to presubscribe interstate customers by requiring that an interexchange carrier "not receive any additional presubscribed

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(Footnote Continued)

similar in physical scope to the EAEAs created by the Florida Commission," General Brief at 11, reproduces a chart showing states which allow interLATA and intraLATA competition. Id. at 11-12. Purportedly the chart shows "the reasonableness of the Florida Commission's order in regard to EAEAs and that such action is not an isolated event." Id. at 13. Although the developments in other states have no legal bearing on the issues in this case, precedents from other states support rather than contradict, GTE Sprint's position. For example, the New York Public Service Commission made representations to Judge Greene similar to those made by the Florida Commission with respect to intra-LATA competition, and such competition is allowed today in New York. See United States v. Western Electric, 569 F. Supp. 990, 1017 (D.D.C. 1983); General Brief at 12.

traffic until it has increased its capacity to permit it to handle additional traffic without violating its prescribed blockage rate" (A.8). Since customers are able to presubscribe to only a single 1+ carrier for both interstate and intrastate purposes, the Commission's decision to penalize carriers whose networks exceed a prescribed blockage rate by denying them the ability to presubscribe customers necessarily affects the carriers' abilities to offer an interstate, as well as intrastate, service. As is discussed in GTE Sprint's initial brief, the Commission's orders infringe interexchange carriers' federal rights to presubscribe interstate customers and are, therefore, preempted by federal law. GTE Sprint Brief at 31-38.

The Commission, the only party to respond to GTE Sprint's argument, does not take issue with much of GTE Sprint's position and explicitly agrees with the general statement that "[f]ederal preemption of a state action occurs 'where compliance with both federal and state regulation is a physical impossibility for one engaged in interstate commerce.'" Commission Brief at 20 (quoting Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)). Moreover, the Commission does not disagree that, as a factual matter, customers are being given the opportunity to presubscribe to alternative long distance companies in such a manner than they can choose only a single 1+ carrier for both interstate and intrastate

purposes.[5] Rather, the Commission's response to GTE Sprint's argument on this point seems limited to the claim that "[t]he Commission is unaware of any federal law or case which gives Sprint the right to presubscribe more customers than it has capacity to serve." Commission Brief at 19.

Surely the Commission cannot be unaware that presubscription is one of the most important provisions of the equal access requirements of the Modification of Final Judgment ("MFJ") approved in 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 is discussed in GTE Sprint's initial brief, Judge Greene found that there was "ample evidence" to sustain the contentions that "the [Bell] 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," 552 F. Supp. at 195, and that the "substantial disparity in dialing convenience [between AT&T's services and those of its competitors] has had a significant adverse impact on competition," id.

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5 In fact, the Commission acknowledged this fact in a recent order in the same docket in which the two orders that are the subject of this appeal were issued. In its Order No. 13858 in Docket No. 820537-TP, issued on November 15, 1984, the Commission noted that "[w]hile the network technically could be engineered to presubscribe to a different carrier for intrastate traffic than for interstate, it would be an expensive and unnecessarily cumbersome approach" (R.A.6).

at 197. See GTE Sprint Brief at 8-10. To correct this "substantial disparity in dialing convenience" and to implement the equal access requirements of the MFJ, the former Bell Operating Companies have been required to install the necessary switching equipment to allow customers to presubscribe to alternative long distance companies. See United States v. Western Electric Co., 578 F. Supp. 668, 670 (D.D.C. 1983).

Similar equal access obligations have been imposed on the GTE Corporation operating companies pursuant to a consent decree approved by Judge Greene and on the independent local exchange companies by order of the FCC. See United States v. GTE Corporation, 5 Trade Reg. Rep. (CCH) ¶ 66, 354, at 64, 762-64 (D.D.C. Dec. 13, 1984); GTE Sprint Brief at 9 n.4. These equal access obligations and the arrangements pertaining to presubscription are contained in tariffs filed by the local exchange companies and approved by the FCC. See Order, Access and Divestiture Related Tariffs, 50 Fed. Reg. 9462, 9465 (Mar. 8, 1985) (FCC Common Carrier Docket No. 83-1145, Phase I).

It is, therefore, incontestable that the obligations to provide equal access and to allow alternative long distance carriers to presubscribe customers are federal obligations established by federal case law and regulations. By virtue of the MFJ and the FCC's orders, these obligations imposed on

local exchange companies were implemented, to the benefit of alternative long distance companies and their customers, for the purpose of reversing a significant impediment to competition. Judge Greene and the FCC have not made the exercise of these federal presubscription rights contingent in any way on the development of any particular amount of network capacity or on the maintenance of any particular blockage rate.

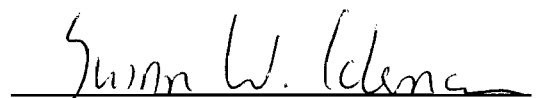
No matter what authority the Commission may have by other means to regulate interexchange carriers' network capacities and blockage rates, the Commission may not seek to regulate such carriers by denying them the right to presubscribe customers. Because customers do not have separate interstate and intrastate presubscription choices, it is, in the words of the Florida Lime opinion, "a physical impossibility" for local exchange companies and long distance carriers both to comply with the Florida Commission's orders and to implement federal equal access and presubscription requirements. The Commission's orders that interexchange carriers lose their presubscription rights if their networks exceed prescribed blockage rates conflict with and are, therefore, preempted by federal law.

CONCLUSION

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

Dated: New York, New York
May 6, 1985

Respectfully submitted,



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