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

INITIAL BRIEF OF APPELLANT MCI TELECOMMUNICATIONS CORPORATION

HOPPING BOYD GREEN & SAMS
Richard D. Melson

420 Lewis State Bank Bldg.
Post Office Box 6526
Tallahassee, FL 32314
(904) 222-7500

Attorneys for Appellant

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IN THE FLORIDA SUPREME COURT

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FLORIDA PUBLIC SERVICE	)	
COMMISSION, et. al.,	)	(Consolidated with
	)	Case No. 66,125 &
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	)	

INITIAL BRIEF OF APPELLANT
MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation appeals from a final order issued by the Florida Public Service Commission on October 5, 1984 (A. 1), 1/ and from the Commission's order on reconsideration issued on December 11, 1984 (A. 15). The appeal challenges the Commission's authority to establish monopoly areas for long distance service in Florida.

1/ "R. ___" refers to pages of the Record. "Tr. ___" refers to pages of the final hearing Transcript. Appellant's Appendix ("A. ___") contains relevant portions of the record. The Supplemental Appendix bound with this brief ("S.A.___") contains a slip opinion of this Court and excerpts from various Commission and U.S. District Court orders cited herein and an exhibit from the proceedings before the Commission which is the subject of an accompanying motion to supplement the record.

GLOSSARY

The orders appealed from use a number of acronyms and terms that are peculiar to the telephone industry. A glossary follows:

1. LEC: local exchange company. A local telephone company (such as Southern Bell or Centel) that provides local telephone service in its franchise area. There are fourteen LECs in Florida, each of which serves customers in a different area or areas of the state. In addition to local telephone service, LECs also provide some long distance telephone service and "access" service to long distance telephone companies.

2. Interexchange service: Long distance (toll) telephone service.

3. IXC: interexchange carrier. A long distance telephone company (such as AT&T or MCI) that has authority to provide interexchange telephone service to customers throughout the state. There are currently six IXCs in Florida.

4. Access: The service sold by an LEC to an IXC which enables telephone customers to use their telephones to place long distance telephone calls using the IXC.

5. Equal access: Oversimplified, a telephone customer's ability to predesignate which IXC will handle his phone calls when he places a long distance call by dialing "1" followed by an area code and telephone number. LECs generally must invest in additional switching equipment in order to provide their customer's the ability to choose any long distance company besides AT&T using this simplified dialing pattern. Equal access was first introduced by Southern Bell in some parts of Florida in October, 1984 and eventually will be available in most parts of the state.

7. MFJ: Modification of Final Judgment. The U.S. District Court's Order in the AT&T antitrust case that approved the divestiture by AT&T of the Bell operating companies. United States v. Western Electric Company, 552 F.Supp. 131 (D.D.C. 1982) aff'd sub nom. Maryland v. United States, ____ U.S. ____, 103 S.Ct. 1240, 75 L.Ed. 2d 472 (1983). The MFJ requires the Bell companies to provide their customers equal access to all IXCs.

8. LATA: local access and transport area. A geographic area created pursuant to the MFJ. Under the MFJ,

the Bell companies can provide long distance service within LATAs (intraLATA service), but cannot provide long distance service between LATAs (interLATA service). AT&T and other IXCs can provide both interLATA and intraLATA service, subject to any valid state regulation. There are seven LATAs in Florida.

9. EAEA: equal access exchange area. One of the twenty-two geographic areas into which the state was divided by the Public Service Commission's orders in this case. The Commission created EAEAs as a framework for defining the LECs' obligations under state law to provide equal access. EAEAs are subsets of LATAs, since no EAEA boundary crosses a LATA boundary.

10. Toll transmission: The transmission of a long distance telephone call from one local calling area to another by an IXC or LEC over facilities (telephone circuits) that it owns or controls.

11. MTS: message telephone service. Regular long distance telephone service, charged on a per call basis.

12. WATS: wide area telephone service. Long distance service provided over a separate telephone access line, charged on a per hour basis. For a large volume long distance caller, WATS service is less expensive than MTS.

13. Reseller: A long distance telephone company that owns its own switching equipment, but does not own toll transmission facilities. A reseller typically purchases WATS from an IXC (such as AT&T or MCI) or an LEC (in effect, at wholesale prices) and resells that service to its customers at retail prices. Some IXCs supplement their own toll transmission facilities by reselling WATS to complete calls to areas in which they do not have their own facilities.

STATEMENT OF THE CASE AND FACTS

MCI holds a certificate of public convenience and necessity from the Commission authorizing it to provide long distance telephone service within the State of Florida. The order granting MCI's certificate was issued on July 25, 1983 and was recently affirmed by this Court. Microtel, Inc. vs. Florida Public Service Commission, Case Nos. 64,801, 65,307, 65,351, 65,449 (Fla. Feb. 28, 1985), affirming Fla. P.S.C. Order No. 12292 (1983). (S.A. 1, 6)

In the orders appealed from (A. 1, 15), the Commission created twenty-two "toll transmission monopoly areas" for long distance service within the State of Florida.[2] The transmission of long distance telephone conversations within each area is reserved exclusively to the LEC which serves that area. The transmission of long distance telephone conversations between those areas can be provided by any certified IXC, and in general may also be provided by the LEC which serves the area.[3] (A. 10-11, 17-18)

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[2] The boundaries of these twenty-two monopoly areas are coextensive with the boundaries of the twenty-two "equal access exchange areas" (or EAEAs) created by those orders for a different purpose relating to the technical provision of equal access (A. 5, 11).

[3] Under the Modification of Final Judgment entered in the AT&T divestiture case, Southern Bell is excluded from providing interLATA long distance service. U.S. v. Western Electric, 552 F.Supp. 131, 227-230 (D.D.C. 1982).

By creating toll transmission monopoly areas, the Commission has limited MCI's ability as a certified interexchange carrier to provide statewide long distance telephone service to its customers in the most efficient and least expensive manner (Tr. 717-718).[4/]

In the orders appealed from, the Commission expressly determined that it had the statutory authority to establish toll transmission monopoly areas (A. 11, 17-18) MCI insists that the Commission does not have such authority. Hence this appeal.

The development of the Commission's EAEA/toll monopoly area concept took place at series of hearings held over the course of more than a year.

During 1983, the Commission held hearings in its Docket No. 820537-TP on the general topic of "access charges" -- the charges paid by IXCs to LECs for the local companies' service in delivering their telephone customers' long distance calls to the IXCs. This docket went far beyond just the rate level and rate structure for such charges, and dealt with a host of issues regarding the way in which such access would be provided by LECs.

[4/] MCI and the other IXCs can still complete calls within the toll transmission monopoly areas by purchasing and reselling regular long distance service (MTS) or wide area telephone service (WATS) provided by the LEC because this resale involves the use of the LEC's toll transmission facilities (A. 14). Under the orders, MCI cannot complete such calls over its own toll transmission facilities.

The first major order in that docket was entered in December, 1983 (Order No. 12765) (A. 22), at which time the Commission announced that:

(i) it was considering the development of EAEAs;

(ii) further hearings on EAEAs would be held during 1984;

(iii) EAEAs would be implemented on July 1, 1984, unless the parties opposing the EAEA concept proved that EAEAs were not in the best interest of Florida ratepayers; and

(iv) it was establishing "temporary" toll monopoly areas pending a final decision by June, 1984 on the two issues of EAEAs and "permanent" toll monopoly areas.

That order was reconsidered in early 1984, and another order was issued in March, 1984 (Order No. 13091) (A. 41), clarifying the geographic scope of the "temporary" monopoly areas.

During 1984, the Commission held workshops, and later hearings, on the EAEA concept and on the separate but related idea of toll monopoly areas. On October 5, 1984, the Commission issued Order No. 13750 (one of the orders appealed from here) which:

(i) established EAEAs for the purpose of setting out LEC obligations to provide equal access (A. 5); and

(ii) established toll transmission monopoly areas whose boundaries were identical to the EAEAs. (A. 10)

Timely petitions for reconsideration were filed by a number of parties. On reconsideration, the Commission not only reaffirmed its decision to create toll transmission monopoly areas, but also eliminated an exception contained in the October order which would have allowed an IXC to carry intraEAEA traffic on its own facilities if it could show that it was more economical to do that than to resell service provided by the LEC (A. 16). This appeal followed.

SUMMARY OF ARGUMENT

This appeal presents a single issue:

Does the Florida Public Service Commission have the authority to create monopoly areas for the provision of long distance telephone service?

MCI contends that the answer to this question is "no".

As a creature of statute, the Commission has only those powers conferred on it by the Legislature. The power the Commission attempted to exercise in this case by creating long distance monopoly areas (i) has no basis in the statutes, and (ii) is contrary to the express legislative policy in favor of long distance competition.

Prior to 1982, there was a statutory monopoly for both local and long distance service in Fla. In 1982, the Legislature amended Chapter 364, Florida Statutes, to allow the certification of competitive long distance carriers, retaining a statutory monopoly only for local exchange service.

The 1982 amendments to Chapter 364 represent a Legislative policy decision to abandon the monopoly provision of long distance service. The Commission cannot circumvent this public policy by administratively recreating

monopoly areas for any portion of the long distance market. In fact, in the only other cases involving the interpretation of amended Chapter 364, the Commission has previously told this Court, through its pleadings, that the amended statute contemplates continued monopolies only for local exchange service, not long distance service.

To read into Chapter 364, as the Commission has done, the power for the Commission to create toll monopoly areas would result in an unconstitutional delegation of legislative power, since Chapter 364 contains no standards or guidelines against which the courts can judge the monopoly area boundaries established by the Commission.

Finally, the effect of the Commission's toll monopoly decision is to prohibit intraLATA competition within those parts of LATAs that are located within the same EAEA. In prior federal court pleadings in the AT&T divestiture case addressing the proper scope of the LATA boundaries in Florida, the Commission represented to Judge Greene that intraLATA competition would be permitted in Florida. Based in part on these representations, Judge Greene modified the boundary of one of the Florida LATAs, over the opposition of MCI and other Florida interexchange carriers. These representations estop the Commission from now imposing restrictions that preclude full intraLATA competition.

ARGUMENT

Standard of Review

We are concerned here with the extent of powers granted to the Florida Public Service Commission by Chapter 364, Florida Statutes.

It is well settled that as a statutory creature, the Public Service Commission's "powers and duties are only those conferred expressly or impliedly by statute. . . . And any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it." Department of Transportation v. Mayo, 354 So.2d 359, 361 (Fla. 1977). Accord, City of West Palm Beach v. Florida Public Service Commission, 224 So.2d 322 (Fla. 1969); City of Cape Coral v. GAC Utilities Inc. of Florida, 281 So.2d 493 (Fla. 1973).

Thus while the orders of the Commission are ordinarily afforded a presumption of regularity, the Court:

> . . .cannot apply such a presumption to support the exercise of jurisdiction where none has been granted by the Legislature. If there is any doubt as to the lawful existence of a particular power that is being exercised, the further exercise of that power should be arrested.

Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So.2d 577, 582 (Fla. 1964).

THE COMMISSION DOES NOT HAVE THE AUTHORITY TO CREATE TOLL MONOPOLY AREAS.

A. The Commission lacks authority to overrule the Legislature's public policy decision that toll service can be provided on a competitive basis and that only local exchange service is to be a monopoly service.

In 1982, the Legislature made a public policy decision to eliminate the statutory monopoly for long distance telephone service within the State of Florida, and to retain a monopoly only for the provision of local telephone service.

Prior to 1982, Section 364.335(4), Florida Statutes, had granted a statutory monopoly for both local service and long distance service. This monopoly restriction was implemented by prohibiting the certification of any telephone company whose services would compete with or duplicate those of an existing company, unless the certificate of the existing company was first amended to eliminate the competition. §364.335(4), Fla. Stat. (1981).

The enactment of Chapter 82-51, Laws of Florida, amended Section 364.335(4) to limit the statutory monopoly only to

local exchange services.[5] Subsequent to the enactment of Chapter 82-51, the Commission has granted competitive long distance certificates to six long distance carriers -- Microtel, MCI, AT&T, GTE Sprint, Satellite Business Systems, and United States Transmission Systems. The grant of certificates to four of these carriers, including MCI, was recently affirmed by this Court. Microtel, Inc. v. Florida Public Service Commission, Case Nos. 64,801, 65,307, 65,351, 65,449 (Fla. February 28, 1985).

The orders appealed from reintroduce toll monopolies in the State of Florida. Nowhere, however, has the Legislature granted the Commission the authority to create monopoly areas. To the contrary, this Court has previously found a clear legislative policy that long distance service is to be competitive, not monopolistic:

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[5] This change was accomplished by adding the words "local exchange" to Section 364.335(4). Chapter 82-51, Laws of Florida reads in pertinent 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 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.

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

Microtel v. F.P.S.C. supra, slip op. at 2 (S.A. 2).

The Court's holding in Microtel v. F.P.S.C. that the legislature has made a policy decision in favor of full competition in the long distance market echoed the position taken by the Commission, through its general counsel, in its Motion to Dismiss the appeal in Case No. 64,801: [6]

> [Subsection 364.335(4), F.S. (1983)] limits the statutorily mandated monopoly solely to local exchange telephone service, thereby opening interexchange and other intrastate services to full competition. (S.A. 15).

In the same Motion, the Commission also stated that:

> The present provisions of Chapter 364, Florida Statutes, contemplate competition in the provision of long distance telephone service within the state. At the time of the adoption, all proponents of the legislative revisions . . . intended the changes to initiate full competition in intrastate telecommunications other than local exchange service. (emphasis added) (S.A. 17-18)

While the Commission has discretion to implement this policy decision by certifying IXCs pursuant to guidelines and standards established by the Legislature, the Commission does not have authority to reverse the policy decision, even

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[6] Although this motion is not part of the record in this case, it is in this court's record in the only previous case construing §364.335(4), Fla. Stat., as amended in 1982.

in part, and recreate monopoly areas after the Legislature has expressly abolished them.

The Commission's primary rationale for establishing toll monopoly areas sheds no light on what statutory power or legislative policy the Commission believes it is implementing:

> We find that toll transmission monopoly areas are appropriate on an interim basis in order to provide a transitional period during which LECs can adjust to competitive circumstances. Continuing toll monopolies will support the LECs' revenue stability in the short term. (A. 11)

If the Legislature in 1982 had intended to provide a transitional period to protect LECs from the effects of the newly authorized toll competition, it would have done so; or at least would have granted the Commission express authority to consider the impacts of such competition on the LECs in making its decisions to certify competitive long distance carriers. It did neither. Instead, by authorizing long distance competition where before there was none, the Legislature made the fundamental policy decision that protection of the existing telephone companies from long distance competition is no longer a public policy of this state.

The Commission's action therefore must fall for inconsistency with the public policy of the state as well as for lack of express statutory authority.

B. An interpretation of Chapter 364 that gives the Commission authority to establish toll monopoly areas would unconstitutionally delegate legislative power to the Commission.

Since the Commission has cited no statutory authority for its decision to create toll monopoly areas, MCI is left to speculate as to what authority the Commission is purporting to implement. Presumably, the Commission will rely on the provisions of Section 364.335 that authorize it to grant "modified" authority to applicants for interexchange authority [subsection (4)] and to "amend" certificates once granted [subsection (5)].

However, any construction of these or other provisions of Chapter 364 that allows the Commission to create toll monopoly areas would result in an unconstitutional delegation of legislative power, since Chapter 364 provides no guidelines or standards to govern the Commission in the design of toll monopoly areas.

Article II, Section 3, Florida Constitution establishes in Florida the principle of nondelegation of legislative power.

> Under this doctrine, fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.

Askew v. Cross Keys Waterways, 372 So.2d 913, 925 (Fla. 1978). As this Court stated in the only prior case interpreting the amended provisions of Chapter 364:

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

Microtel v. F.P.S.C., supra, slip op. at 2. (S.A. 2)

One can search Chapter 364 in vain for any standards or guidelines that could control the Commission in its creation of toll monopoly areas. 7/ The Commission in this case drew twenty-two monopoly areas. It could just as easily have drawn two monopoly areas -- one consisting of Key West and the other consisting of the rest of the state -- and allowed long distance competition to and from Key West, but disallowed long distance competition elsewhere in the state. And there is no guideline or standard in Chapter 364 against which this Court can measure the Commission's boundary decisions to say whether twenty-two monopoly areas are consistent with the Legislative direction or whether two monopoly areas are consistent with that direction. The absence of such a standard renders the Commission's

7/ In Microtel v. Florida Public Service Commission, supra, the Court held that §364.335(4), Fla. Stat. (1982), does contain adequate guidelines and standards to govern the granting of competitive long distance certificates. Those guidelines, however, are inapposite to the creation of toll monopoly areas.

interpretation of the statute unconstitutional. Askew v. Cross Keys Waterways, supra.

C. The Commission is estopped to create toll monopoly areas by its prior pleadings before the U.S. District Court in which it represented that intraLATA toll service in Florida would be provided on a competitive basis.

The Modification of Final Judgment entered by the Judge Greene in the AT&T divestiture case required the creation of LATAs throughout the Bell operating areas. Under the MFJ, Bell is authorized to carry telephone calls between points within a LATA, but is precluded from carrying calls between LATAs. See, U.S. v. Western Electric, 569 F.Supp. 990, 993-994 (D.D.C. 1983) ("Order Approving LATAs").

Because of the importance of LATAs to the purposes of the decree, Judge Greene reserved the right to review and approve the proposed LATAs. In particular, express consent of the court was required for the establishment of any LATA which included more than one "standard metropolitan statistical area" or SMSA. Id. at 1001-1002.

Because the LATA proposed by Southern Bell for the southern part of Florida (the Southeast Florida LATA) included two existing and one proposed SMSAs (Miami-Ft. Lauderdale, West Palm Beach and Fort Pierce), this LATA required special review and approval by the court. Id. at 1030.

Consolidation of these three Florida SMSAs into a single LATA was opposed by the Department of Justice and MCI, among others; consolidation was supported by the Florida Public Service Commission. The court ultimately approved the Southeast LATA as proposed by Bell, relying in part on representations made to it by the Commission that intraLATA competition would be permitted.

> 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.[219/] 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.[220/]
>
> 219/ Microtel intends to provide service between Miami and Ft. Lauderdale, between Ft. Lauderdale and West Palm Beach, between West Palm Beach and Melbourne, and "between dozens of 'local' exchanges in between said cities all of which are located within the Southeast LATA." . . .
>
> 220/ 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 as Microtel requests.

Id. at 1032. Judge Greene's understanding that competition would be permitted throughout the Southeast LATA was reiterated in a later opinion dealing with other LATA issues.

> There is some merit to that argument [that the Bell companies should not receive "undesignated intra-LATA traffic] particularly in states where the Court approved large LATAs on the expectation that there would not be significant barriers to intra-LATA competition. Microtel's primary state of operation, Florida, is a case in point. The Court allowed consolidation of three SMSAs to form the Southeast LATA (Miami, West Palm Beach, and Ft. Pierce) with the understanding that there would be intra-LATA competition for calls between these cities.

U.S. v. Western Electric, 569 F.Supp. 1057, 1109 n. 224 (D.D.C. 1983).

The Commission's decision on toll monopoly areas attempts to take away at least part of the intraLATA competition that it represented to the federal court would take place in Florida. For example, under the EAEA boundaries drawn by the Commission, intraLATA calls between Miami and Ft. Lauderdale are no longer subject to competition, nor are calls between West Palm Beach and Ft.

Pierce, both of which were referred to by the federal court in its LATA decisions.[8/]

The Commission is therefore estopped by its pleadings from now attempting to prohibit the competition that it represented to the federal court would be allowed. See, Guerra v. State Department of Labor & Employment Security, 427 So.2d 1098, 1101 n.3 (Fla. 3rd DCA 1983).

[8/] The Commission, recognizing this inconsistency, states in its order that:

> Finally, the Commission, in establishing toll monopoly areas, is acting within the scope of its authority and such action is harmonious with state and federal law. Judge Harold Greene, prior to affirming LATA boundaries, expressed concern that there might not be competition within the Southeast LATA. The Southeast LATA has been divided into two EAEAs, thus permitting competition in that LATA.

This explanation falls short of the mark. A fair reading of both the federal court's orders and the Commission's pleadings before that Court (excerpts from which are set out at S.A. ___) shows that the Commission represented that full competition would exist for "non-exchange" telephone service within the Southeast Florida LATA -- and by implication in other LATAs throughout Florida.

CONCLUSION

For the reasons set forth above, the Commission's attempt to establish toll monopoly areas within the State of Florida should be rejected by the Court, and the portions of the orders purporting to create such areas should be vacated.

Respectfully submitted this 21st day of March, 1985.

HOPPING BOYD GREEN & SAMS

By Richard D. Melson

Richard D. Melson
420 Lewis State Bank Bldg.
Post Office Box 6526
Tallahassee, Florida 32314
(904) 222-7500

Attorneys for Appellant,
MCI Telecommunications Corp.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Initial Brief of Appellant of MCI Telecommunications Corporation have been served by U.S. mail this 21th day of March 1985, on the following:

Susan F. Clark
Deputy General Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301-8153

William B. Barfield
Joaqui R. Carbonell
Southern Bell Telephone and
Telegraph Company
Room 632
666 N.W. 79th Avenue
Miami, FL 33126

William H. Adams, III, Esq.
P.O. Box 4099
Jacksonville, FL 32201

Jerry M. Johns
Alan N. Berg
P.O. Box 5000
Altamonte Springs, FL 32701

Kevin H. Cassidy
J. Manning Lee
Savery Gradoville
Satellite Business Systems
8283 Greensboro Drive
McLean, VA 22101

Thomas F. Woods
Woods & Carlson
Suite 112
1030 E. Lafayette Street
Tallahassee, FL 32301

Mark J. Bryn
Reisman and Bryn
Suite 400D
2699 South Bayshore Drive
Miami, FL 33131

Jeffrey Pardo
21st Floor, Flagler Center
Building
44 West Flagler Street
Miami, FL 33130

Lee Willis, Jr.
Ausley, McMullen, McGehee,
Carothers & Proctor
P.O. Box 391
Tallahassee, FL 32302

R. Douglas Lackey
Southern Bell Telephone and
Telegraph Company
4300 Southern Bell center
675 West Peachtree St., N.E.
Atlanta, GA 30375

Jack Shreve
Michael Wilson
Office of Public Counsel
624 Crown Building
202 Blount Street
Tallahassee, FL 32301

John P. Fons
Michael Andre Donella
P.O. Box 7800
1200 Peachtree Street, N.E.
Atlanta, GA 30357

James E. Wharton
Lucerne Plaza, Suite 300
100 W. Lucerne Circle
Orlando, FL 32801

Norman Horton, Esq.
Mason, Erwin & Horton, P.A.
Suite 202
1020 East Lafayette Street
Tallahassee, FL 32301

James V. Carideo
Thomas Parker
General Telephone Company
of Florida
P.O. Box 110, MC 717
Tampa, FL 33601

Ethan Minsky, Esquire
Holywell Corporation
300 Miami Center
100 Chopin Plaza
Miami, FL 33131

Kenneth B. Gatlin, Esq.
Madigan & Parker
Post Office Box 669
Tallahassee, FL 32302

Patrick K. Wiggins
Messer Rhodes & Vickers
701 Lewis State Bank Building
Tallahassee, FL 32301

Dellon E. Coker
Chief Regulatory Law Office
U.S. Army Legal Services Agency
ATTN: JALS-RL 3208
5611 Columbia Pike
Falls Church, VA 22041

John K. Aurell
Holland & Knight
P.O. Drawer 810
Tallahassee, FL 32302

Stephen H. Watts, II
McGuire, Woods & Battle
1400 Ross Building
Richmond, VA 23219

Robert M. Peak
Susan Coleman
Reboul MacMurray Hewitt Maynard
& Kristol
45 Rockefeller Plaza
New York, NY 10111

W. D. Lines
Lines Hinson & Lines
P.O. Box 550
Quincy, FL 32351

J. Lloyd Nault
Southern Bell Telephone and
Telegraph Company
4300 Southern Bell Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375

Irwin M. Frost
Suite 123 Dadeland Towers
9400 South Dadeland Boulevard
Miami, Florida 33156

Randall B. Lowe
67 Broad Street
New York, NY 10004

Barrett G. Johnson
Suite 346, Barnett Bank
Building
P.O. Box 1308
Tallahassee, FL 32302

Daniel R. Loftus
Watkins, McGugin, McNeilly &
Rowan
18th Floor, First American Center
Nashville, TN 37238

Noreen Davis
Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

Brian R. Giloman
100 S. Wacker Drive
7th Floor
Chicago, IL 60606

Winston Pierce
Division of Communications
651 Larson Building
Tallahassee, FL 32301

Wallace S. Townsend
ALLTEL Florida, Inc.
P.O. Box 550
Live Oak, FL 32060

Sam Wahlen
Central Telephone Company
of Florida
P.O. Box 2214
Tallahassee, FL 32304

James W. Tyler
Vista-United Telecommunications
P.O. Box 1161
Lake Buena Vista, FL 32830

Marie Cox Lyons
Gulf Telephone Company
P.O. Box 1120
Perry, FL 32347

Dick Fletcher
344 Barnett Bank Building
315 S. Calhoun Street
Tallahassee, FL 32301

Richard D. Melson

Attorney