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

Appeal from Final Orders of the
Florida Public Service Commission

REPLY BRIEF OF APPELLANT MCI TELECOMMUNICATIONS CORPORATION

HOPPING BOYD GREEN & SAMS
Richard D. Melson

420 Lewis State Bank Bldg.
Post Office Box 6526
Tallahassee, Florida 32314

Attorneys for Appellant
MCI Telecommunications Corporation

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Florida Statutes

IN THE FLORIDA SUPREME COURT

MCI TELECOMMUNICATIONS CORP.,	)	
	)	
Appellant,	)	
vs.	)	
	)	CASE NO. 66,404
FLORIDA PUBLIC SERVICE COMMISSION, et. al.,	)	(Consolidated with Case No. 66,125 & Case No. 66,403)
	)	
Appellees.	)	
	)	

REPLY BRIEF OF APPELLANT
MCI TELECOMMUNICATIONS CORPORATION

Introduction

The fundamental issue in this case turns on the meaning and effect of the 1982 amendments to Chapter 364, Florida Statutes:

1. No party disputes that, prior to 1982, the Legislature had made the fundamental and primary policy decision that all telephone service in Florida would be provided on a monopoly basis.

2. No party disputes that, in 1982, the Legislature "made the 'fundamental and primary policy decision' that

there be competition in long distance telephone service" [1] and that only local exchange service would continue as a statutory monopoly.

3. The parties do dispute whether the power reserved to the Commission to grant competitive long distance certificates "with modifications in the public interest" [§364.335(4), F.S.] includes the authority to draw geographic areas within which long distance telephone service is to be provided on a monopoly basis by the local exchange telephone companies, and thus to ban competition in the long distance telephone market.

Appellees construe Sections 364.335 and 364.337, Florida Statutes, as endowing the Commission with authority to create long distance monopoly areas, if the Commission finds that banning competition is "in the public interest." MCI submits that Appellees' construction of the statute simply is wrong, and cannot withstand the scrutiny of this Court.

---

[1] Microtel, Inc. v. Florida Public Service Commission, Case Nos. 64,801, 65,307, 65,351, 65,449 (Fla. February 28, 1985), slip op. at 2.

ARGUMENT

1. The Appellees' characterizations of the Commission's decision do not resolve the underlying question of statutory authority.

Appellees' briefs characterize the Commission's decision as an "interim measure" (PSC Brief, p.12) designed to "determine the pace at which competition for long distance service will be introduced" (United Brief, p. 7) by banning competition for toll transmission while leaving certified long distance carriers free to "compete" through the resale of local exchange company services (General Brief, p.7). These characterizations are erroneous for several reasons and do not consider the critical issue of statutory authority.

First, the interim nature of the Commission's decision is not relevant to this appeal. The fundamental question before the Court is one of statutory authority. Either the Commission has the authority to ban competition and create monopoly areas or it does not. If it does not, then the Commission cannot accomplish on an "interim" basis what it has no authority to do in the first place.

Second, the Commission's decision is not even an interim one at all. Admittedly, the Commission has indicated it will revisit the toll monopoly question by September, 1986. The Commission does not intend, however, to reconsider its present

decision. Rather it intends to make a new "public interest" determination at that time. (Order 13750, page 11) Thus, the decision on appeal must be viewed as a final order, and not an interim one, with significant adverse effects on long distance telephone competition.

Third, the decision does not merely regulate the pace at which competition will be introduced. Rather, it bans totally long distance competition within specified geographic areas, thereby bestowing toll monopolies on local exchange carriers in flagrant violation of the statutory mandate.

Fourth, the existence of "resale" authority creates only the illusion of competition. A customer, or even this Court, may perceive that resale provides to the consumer a competitive choice among carriers other than the local exchange carrier. Other carriers, however, must purchase the underlying service from the local telephone companies who are both the sole suppliers of the service to the carriers and competitive providers of the service to the consumer. How can MCI, or any other carrier, provide true competition to a local telephone company who is supplying the very service MCI is required to "resell"? Rudimentary business economics dictate that other carriers will be unable to price the "resold" service competitively, since the local telephone company will be offering the same service to the consumer with the advantage of wholesale cost. The Commission's orders deny the same

advantage to other carriers. Thus, true competition will not exist.

2. Under Appellees' construction of the statute, the Commission could, merely by making "public interest" findings, ban all long distance competition within Florida, notwithstanding the Legislature's public policy decision to allow such competition.

Appellees stress that the Commission retains the authority under Section 364.335, Florida Statutes, to grant, deny, or modify long distance telephone company certificates "in the public interest". The Commission's decision to create 22 toll transmission monopoly areas is then characterized as a "modification" to the long distance carriers' certificates. That modification is said to be supported by "public interest findings" that (i) competition may impact adversely the local telephone companies' revenue streams during the transition to a competitive environment, and (ii) economies of scale which might exist in the local exchange companies' current toll transmission facilities may be lost if competition were permitted.

These findings amount to nothing more than a Commission determination that the local exchange companies should be insulated from long distance competition within certain

major markets in the state.[2/] Chapter 364 does not, however, grant to the Commission authority to ban competition in any long distance telephone market. Thus, the Commission cannot under the guise of "public interest" findings ban long distance telephone competition. Moreover, were the Commission's decision upheld, there would be nothing to prevent the Commission from banning intrastate long distance competition altogether by making findings that it is the public interest to protect the local exchange companies' revenues and investments from any long distance competition. Clearly, this latter action would directly disregard the Legislature's fundamental policy decision that competition in long distance service in Florida is in the public interest. The Orders on appeal similarly disregard the legislative mandate.

The Commission claims to have been guided in making its toll monopoly determination by the "public interest" test contained in Section 364.335(4), as supplemented by the

---

[2/] That the Commission wants to protect the local exchange carriers is evidenced further by its order on reconsideration, in which it eliminated a previous exception to the toll monopoly restrictions for any long distance carrier who could demonstrate that it would be more economical to provide service using its own facilities. In essence, the Commission has decided to protect local companies from competition, even in the absence of the economies of scale and the serving of the public interest, upon which its decision purportedly was based.

provisions of Section 364.335(1).[3] Those sections authorize the Commission, in connection with certification decisions, to make

> a detailed inquiry into the ability of the applicant to provide service, a detailed inquiry into the territory and facilities involved, and a detailed inquiry into the existence of service from other sources within geographical proximity to the territory applied for.[4]

There is no hint in these standards that protection of local companies from competition is an appropriate consideration when performing the public interest calculus. Indeed, this Court previously has construed those standards in light of the underlying legislative policy in favor of competition:

> The clear legislative intent to foster competition also illuminates the public interest standard of section 364.335(4). We are of the opinion that adequate standards and guidelines are provided in this statute in light of the legislative objective to bring competition into this business area which had not heretofore existed.

Microtel v. F.P.S.C., supra., slip op. at 3.

---

[3] The Order itself makes no reference to Section 364.335, nor does it explicitly apply the guidelines contained in that section.

[4] Southern Bell argues that the Commission's decision is also supported by the standard in Section 364.337(2)(d), F.S. This argument overlooks this Court's ruling in Microtel v. F.P.S.C., supra., that Section 364.337's standards relate only to the regulation of companies after certification, and have no bearing on the certification decision itself.

For the Commission and other Appellees now to argue that these standards permit the Commission to ban competition in order to protect the local exchange telephone companies from competition defies the whole purpose of the 1982 amendments to Chapter 364.

3. The actions of other states have no relevance to this appeal.

General Telephone's answer brief seeks to support the Commission's ban on competition by pointing to other state commission decisions which have limited intrastate long distance competition. While the activities of other states may be interesting, they have no bearing on this appeal. Furthermore, there has been no showing that those states have comparable statutes regarding telephone companies or comparable constitutional provisions regarding the permissible delegation of legislative power.

Conclusion

For the reasons set forth above and in MCI's Initial Brief, the portions of the Commission's orders purporting to create toll monopoly areas should be vacated.

Respectfully submitted this 10th day of May, 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 Corporation

Of Counsel:

Pamela J. Wisne
MCI Telecommunications Corporation
5901-B Peachtree-Dunwoody
Suite 410
Atlanta, Georgia 30319

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Reply Brief of Appellant of MCI Telecommunications Corporation have been served by U.S. mail this 10th day of May, 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

Bruce Renard
Messer Vickers Caparello
French & Madsen
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
Robert L. Hinkle
Aurell Fons Radey & Hinkle
P.O. Box 10154
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