IN THE SUPREME COURT OF FLORIDA

U. S. SPRINT COMMUNICATIONS COMPANY,

Appellants,

vs. CASE NO. 69,169

JOHN R. MARKS, et al.,

Appellees.

MICROTEL, INC.,

Appellants,

vs. CASE NO. 69,159

JOHN R. MARKS, et al.,

Appellees.

On Appeal From The Florida Public Service Commission

ANSWER BRIEF OF APPELLEE, UNITED TELEPHONE COMPANY OF FLORIDA

Alan N. Berg
General Attorney
United Telephone Company of Florida
Post Office Box 5000
Altamonte Springs, FL 32715-5000
(305) 889-6018

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ABBREVIATIONS, ACRONYMS, AND SHORTENED NAMES

AT&T	AT&T Communications of the Southern States, Inc.
Centel	Central Telephone Company of Florida
EAEA	Equal Access Exchange Area
EAS	Extended Area Service
FG	Feature Group
FPSC	Florida Public Service Commission
General	General Telephone Company of Florida
IXC	Interexchange Carrier
LATA	Local Access and Transport Area
LEC	Local Exchange Company
MCI	MCI Telecommunications Corporation
MFJ	Modification of Final Judgment
MTS	Message Toll Service
NTS	Non-Traffic Sensitive
POP	Point of Presence
Southern Bell	Southern Bell Telephone and Telegraph Company
T	Transcript of the Hearing before the FPSC
TMA	Toll Monopoly Area (Same as TTMA)
TTMA	Toll Transmission Monopoly Area (Same as TMA)
United	United Telephone Company of Florida
US Sprint	US Sprint Communications Company
WATS	Wide Area Telephone Service

GLOSSARY

This Glossary is provided for the assistance of the reader of this Brief, and the Order under review, to explain some of the telecommunications industry terms used.

LEC

Local Exchange Company. A local telephone company. Florida has thirteen local telephone companies. United Telephone Company of Florida and General Telephone Company of Florida have intervened in this Appeal. At most places in this Brief, a local telephone company is referred as a local telephone company, rather than a LEC.

IXC

Interexchange carrier. A long distance telephone company, such as AT&T, US Sprint or MCI, that has authority to provide interexchange telephone service to customers throughout the state.

Reseller

An entity that resells local telephone company and facilities based IXC MTS and WATS service. Some IXCs resell service, in addition to providing such service over their own facilities. Resale occurs at the interLATA, intraLATA, interEAEA and intraEAEA levels of service.

End User

This term denotes any customer of a telecommunications service, who is not a local telephone company, IXC, reseller, or similar telecommunications business.

Access Service

Communications service provided to an IXC by a local telephone company for origination and termination of toll calls over an IXC's network. Since the local telephone companies have local telephone service facilities in place, the IXCs do not have to provide telephone lines to each of their customers, they "rent" access to their customers over the local telephone companies' facilities. Different types of access service are designated by the type features offered for that service. The four most common types of access service are divided into Feature Group A, B, C, and D. Special access can also be ordered.

Access Charge

The compensation paid by an IXC to a local telephone company for access service. Access charges are normally assessed based on

the type of access service ordered. Feature D service is equal access service, which is in the process of being implemented throughout the State. Feature Groups A and B are generally referred to as non-premium access, and the charge is less for these services than for Feature Groups C and D, which are referred to as premium access services. Access charges consist of several elements.

Bypass

1) Service bypass - lease of private lines dedicated to the lessee from a local telephone company for local access to end users.

2) Facilities bypass - use of non-local telephone company facilities for local access to an end user, thus avoiding the use of the local telephone companies facilities, and charges for use of those facilities, as well as avoiding access charges.

LATA

Local access and transport area. A geographical area established for the purpose of defining the territory within which a Bell telephone company may offer its telecommunications and access services. In areas without a Bell telephone company present, similar areas are called Market Service Areas. Florida has seven LATAs and three Market Service Areas.

Market Service Area

An area similar to a LATA, but within which there is no Bell telephone company.

InterLATA

Telecommunications services originating in one LATA or Market Service Area and terminating in another LATA or Market Service Area.

IntraLATA

Telecommunications services provided totally within the boundaries of a LATA or Market Service Area.

EAEA

A subdivision of a LATA, established around a local telephone company toll center to facilitate the offering of equal access. Florida has 22 EAEAs.

MTS

Message telecommunications service. Standard long distance service.

WATS

A special bulk discounted form of MTS.

EAS

Extended area service. Telephone service which provides service beyond the usual boundary to contiguous areas without toll charges. This exists in areas where there is a community of interest. The toll charges are not applied in return for a somewhat higher basic local telephone service rate. The general effect is to convert a toll route into local service. EAS is generally ordered by the FPSC after hearings.

TMA/TTMA

Toll Monopoly Areas and Toll Transmission Monopoly Areas. When the FPSC created EAEAs, it gave the local telephone companies toll transmission monopolies within the EAEAs for a transitional period, but authorized resale competition. The terms are synonymous as used in this Breif, and the Order under review. Local telephone companies generally prefer to use toll transmission monopoly areas, while IXCs prefer to use toll monopoly areas.

Non-Traffic Sensitive Costs

That portion of the cost of facilities used for providing local service to end users that does not vary because of the amount of traffic carried over the facilities (e.g., the cost of a telephone pole). Deloading of NTS costs refers to reducing the portion on NTS costs now included in access charges.

Bill and Keep

Currently, all intraLATA toll revenues received by local telephone companies are placed in a pool administered by Southern Bell. The local telephone companies first draw their costs of providing intraLATA toll service from the pool, and then divide any remaining funds in the pool. This pooling system is in the process of being changed to a system in which each local telephone company will bill for use of its intraLATA toll network, and keep the revenues it bills. The exact plan for implementing bill and keep is the subject of an open docket before the FPSC.

STATEMENT OF THE CASE

In this proceeding Appellants, US Sprint Communications Company, Microtel, Inc., AT&T Communications of the Southern States, and MCI Telecommunications Corporation, seek review of Florida Public Service Commission (FPSC) Order No. 16343, issued July 14, 1986, in Docket No. 820537-TP, which concerned toll transmission monopoly areas (TTMA's).

This is the second time that an FPSC Order concerning TTMAs has been reviewed by this Court. On February 6, 1986, in Microtel, Inc. v. Florida Public Service Commission, 483 So.2d 415 (Fla. 1986) (hereinafter referred to as Microtel II), this Court upheld FPSC Order Nos. 13750 and 13912, issued October 5, 1984, and December 11, 1984, respectively. These FPSC Orders, among other things, created TTMAs.

FPSC Order No. 13750 stated in part "that toll transmission monopoly areas shall be allowed on an interim basis until September 1, 1986. Hearings shall be held prior to that date to allow advocates an opportunity to demonstrate why continuation of such areas is in the public interest . . ." (at page 13).

On May 1 and 2, 1986, pursuant to FPSC Order No. 13750, a hearing on TTMAs was held before the FPSC. Based on evidence presented at that hearing, FPSC Order No. 16343, retaining TTMAs at present, was issued on July 14, 1986. That Order is the subject of this appeal.

STATEMENT OF THE FACTS

FPSC Order No. 16343, under review in this appeal, and FPSC Orders No. 13750 and 13912, reviewed in Microtel II, supra, were all issued in FPSC Docket No. 820537-TP. This Docket was established by the FPSC in 1982 as an investigatory docket.

With the introduction of competitive long distance services, the FPSC undertook an investigation of where and how providers of long distance service could be accommodated in Florida. These long distance carriers, also referred to as interexchange carriers, or IXCs, were involved in providing long distance services either over their own facilities, or over resold facilities of existing local and long distance telephone companies.

These IXCs do not provide customer to customer service but, instead, use the existing facilities of local telephone companies, also referred to as local exchange companies, or LECs, to originate or terminate long distance calls. The local telephone companies' facilities allow the IXCs reach or access to the local telephone companies' customers, and those customers can either originate or receive long distance calls over the same facilities used for their local telephone service. The local telephone companies receive access charges as compensation for use of their facilities in originating and terminating intrastate long distance calls carried by IXCs. These charges were established by the FPSC in the first phase of Docket No. 820537-TP, and are not at issue in this appeal.

In the second phase of Docket No. 820537-TP, the FPSC established criteria for providing "equal access" by local telephone company customers to all IXCs desiring such access.

The telephone network was originally designed to accommodate only one IXC: that IXC was AT&T. With the introduction of competitive long distance service, IXCs other than AT&T were disadvantaged because long distance calls could be placed through AT&T by simply dialing a 0 or a 1 followed by the telephone number to be called. To reach other IXCs required the dialing of a minimum of seven digits, followed by the telephone number to be called. In an effort to provide equal access to all IXCs, this dialing inequality, and other factors, were addressed by the FPSC in hearings, which resulted in the issuance of FPSC Order No. 13750, on October 5, 1984.

In Order No. 13750, the FPSC recognized that if all Florida residents and businesses were to be provided access to multiple IXCs, the concept of equal access would have to be construed from the customers' perspective, rather than the IXCs' perspective. The FPSC's concern was that if the focus was on equal access from the IXCs' point of view, competitive services would be offered only "in high volume and urban markets, but not in low volume and rural markets." (FPSC Order No. 13750, page 3).

With this perspective in mind, the FPSC, in Order No. 13750, created a system for providing equal access based on 22 equal access exchange areas (EAEA's), each centered on a local telephone company toll center. The intent was that an IXC could serve the entire state by locating its points of presence (POP's) near each

of the 22 toll centers. The local telephone companies would be responsible for delivering all customer toll traffic to the toll center, where it could be switched to the IXC selected by the customer. The FPSC ordered that such equal access be made available when it was economically feasible to do so, or when existing switches were replaced by digital technology switches capable of providing equal access features. (FPSC Order No. 13750, page 5). This process of switching to equal access is still in process. Southern Bell, pursuant to the Modification of Final Judgment (MFJ) 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, 103 S.Ct. 1240, 75 L.Ed 2d 472 (1983), has provided substantial equal access, while other local telephone companies not bound by the MFJ are only beginning to provide such access as it becomes economically feasible.

As a part of the transition to equal access, the FPSC also determined that, within each of the EAEAs, the local telephone companies would be the sole providers of toll transmission facilities. (Order No. 13750, page 10). This determination was subject to exceptions: 1) if the local telephone company could not provide service as economically as the IXC, and in a timely manner, the IXC could provide the service without compensation to the local telephone company, or 2) if the IXC could not technically prohibit or screen intraEAEA calls from being placed on its facilities, it was allowed to carry the calls, but had to compensate the local telephone company at regular message toll service (MTS) rates.

Resellers and IXCs were allowed to compete within the EAEA's through the use of local telephone company-provided wide area telephone service (WATS), and MTS.

Thus, the State of Florida at present has interLATA long distance competition (which is limited to some degree because certain local telephone companies are prohibited from competing in the interLATA market by the MFJ or other consent decrees), has intraLATA long distance competition between EAEA's, and has intraEAEA long distance competition (which at present is limited to resale of local telephone company provided MTS and WATS services). Of the two areas where competition is at present restricted, one, interLATA competition is controlled at the federal level of government, and the other, intraEAEA competition, is controlled at the State level of government. Competition does exist in and between all of the geographic areas, i.e., LATAs, market areas, and EAEA's, into which telephone service has been divided.

TTMAs were created on an interim basis "to provide a transitional period during which local telephone companies could adjust to competitive circumstances. Continuing toll monopolies will support LECs' revenue stability in the short term." (Order No. 13750, page 11).

Order No. 13750 established a deadline of September 1, 1986, to determine if continuation of the TTMAs was in the public interest. The FPSC met its commitment to reexamine its decision on TTMAs, and on May 1 and 2, 1986, held hearings on the subject. FPSC Order No. 16343 was issued on July 14, 1986, and based on

evidence presented at the hearings, found that "the retention of TTMAs is in the public interest at present." (FPSC Order No. 16343, page 4, emphasis added). Almost every reference in the Order to retention of toll transmission monopoly contains a time qualifier. Nowhere does the word "permanent" appear in the Order, nor can it be reasonably assumed from the context of the Order, or the evidence presented at the hearing, that permanent retention of TTMAs was the intention of the FPSC or of any of the parties.

SUMMARY OF ARGUMENT

United supports the FPSC Order under review in this appeal. The Appellants argue that the FPSC has exceeded its authority by establishing permanent TTMAs. This argument is based on the conclusion reached by the Appellants that the TTMAs established by the FPSC in Order No. 13750, and retained in Order No. 16343, are permanent. None of the Appellants' briefs cite, or quote, language from Order No. 16343 to support their conclusion that the toll transmission monopoly areas are permanent.

The Order does not support such a conclusion. Almost every reference in Order No. 16343 to retention of the TTMAs contains a time qualifier. Nowhere does the Order refer to permanent retention of TTMAs.

This Court, in Microtel II, supra, decided that the Legislature had made a fundamental and primary decision that there would be competition in intrastate long distance telephone service. This Court also stated that it did not read the statute (Section 364.335(4), Florida Statutes) or Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985) (hereinafter referred to as Microtel I) so expansively as to require instant, unlimited competition in all long distance services. (Microtel II, at page 418).

The FPSC, in accordance with its statutory responsibilities, is attempting at this time to achieve several goals simultaneously. It must implement equal access to competing long distance companies, while minimizing the cost of the transition. It must also maintain the universality and quality of service. Further, it must provide for compensation to local telephone

companies for use of their facilities in originating and completing long distance calls. In addition, the FPSC has an open docket examining the appropriate method of moving local telephone companies from pooling of intraLATA toll revenues to a system where those revenues are billed and the revenues kept by the LEC or local telephone companies providing service. The FPSC is also examining proposals to provide competition at the local service level in several dockets. The FPSC is also examining the deloading of non-traffic sensitive costs from access charges. All of these dockets indicate that the telecommunications market is in a state of transition. Based on this transitional nature of the telecommunications market place, the FPSC has decided, based on evidence presented at the hearing, that it was in the public interest "at this time" to retain toll transmission monopoly areas.

The Appellants also argue that even if the retention of toll transmission monopoly areas is authorized, that the FPSC's actions are not supported by competent substantial evidence.

The record is replete with evidence of adverse financial impact presented by the local telephone companies. This evidence was questioned by the IXCs in their testimony and by cross-examination. It is the responsibility of the trier of fact to resolve disputed evidence, and the conclusions reached should not be overturned on appeal if they comport with the essential requirements of law. The Appellants are in essence requesting that this Court reweigh the evidence, and reach the conclusion they supported in the hearing below.

ARGUMENT

POINT I

THE FLORIDA PUBLIC SERVICE COMMISSION HAS NOT EXCEEDED ITS STATUTORY AUTHORITY BY ALLOWING TOLL TRANSMISSION MONOPOLY AREAS TO CONTINUE DURING A TRANSITION PERIOD.

Section 364.335(4), Florida Statutes, was amended by Chapter 82-51, Section 3, Laws of Florida, 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 Microtel II, supra, this Court stated that the above quoted changes were "[i]n apparent anticipation of the forthcoming consent judgment in the AT&T case and motivated by a desire to promote competitive long distance service within Florida . . ." (at page 417).

In Microtel II, supra, the appellants argued that the FPSC had no authority under Section 364.335(4), Florida Statutes, to grant toll monopolies on long distance service. The appellants cited Microtel I, supra, wherein this Court concluded that the legislature had made a policy decision that there be competition in long distance service.

In Microtel II, supra, this Court rejected the appellants'

position and their reading of Microtel I, and cited three reasons:

1) The FPSC plan contained a very large measure of competition on intrastate long distance service, and the toll monopoly areas were limited in scope;

2) The FPSC plan contemplated reexamination of the toll monopoly concept in September, 1986, and the concept was limited in time; and

3) Section 364.335(4), as amended, provides that the FPSC may grant a certificate in the public interest; it does not mandate that certificates be granted contrary to the public interest. (at page 418).

The Court concluded in Microtel II, supra, that the Legislature had made the fundamental and primary decision that there would be competition in intrastate toll, but the Court did not read Section 364.335(4) and Microtel I so expansively as to require instant, unlimited competition in all long distance services. (at page 418).

This Court stated that it did not read the Orders of the FPSC under review in Microtel II as contemplating, nor did it understand it to be the FPSC's position, that toll monopolies would continue beyond an interim period during which the transition was made from total monopoly on all services to monopoly in local services only. (at page 419).

A. Are toll transmission monopoly areas limited in scope?

No change was made in the Order under review in the scope of competition that existed at the time of Microtel II. The Appellants have advanced no argument that competition is more

restricted. The TTMAs are still limited in scope.

B. Are toll transmission monopoly areas limited in time?

The major argument of the Appellants is that the toll transmission monopoly concept is no longer limited in time. The Appellants describe the toll transmission monopolies as "permanent." Nothing in the Order under review of the record supports such a conclusion.

The first mention in Order No. 16343 of the FPSC finding that TTMAs should be continued appears at page 4 of the Order, and states:

> Virtually all parties recognize that the industry is in a state of transition from the ubiquitous regulatory environment of yesterday to the competitive environment of the present and future. The present transitional nature of the market, in conjunction with the factors discussed below, dictate a careful analysis of today's conditions. The result of this analysis is our finding that retention of TMAs is in the public interest at present. (emphasis added)

The time qualifier "at present", and the emphasis on the transitional nature of the telecommunications industry, clearly contradict the permanence alleged by the Appellants.

References in Order No. 16343, at page 5, indicate steps the local telephone companies have taken to meet competition, and the FPSC concludes that: "It is clear that the LECs have taken a variety of actions to adjust to competition." The FPSC also found that:

> The threshold question is not whether sufficient time has elapsed to allow the LECs to adjust to competition, but whether the LECs have had the latitude within the regulatory confines of Chapter 364, Florida Statutes, and Chapter 25-4, Florida Administrative Code, to

> institute changes enabling them to be competitive with the IXCs in the provision of intraEAEA toll service. In short, we find that since Order No. 13750 was issued, the LECs have done as much as possible to adjust to competition given the present regulatory environment.

This statement confirms that the local telephone companies have done as much as possible to adjust to a competitive environment, but are not yet ready to compete for intraEAEA toll service due to regulatory constraints. In other words, the transition period contemplated by the FPSC, and acknowledged by this Court in Microtel II, is not yet complete.

Other quotes from Order No. 16343 illustrate that the Order does not intend to create permanent toll monopoly areas. At page 9, the Order states: "Our review of the record indicates that it continues to be desirable to allow only the LECs to provide intraEAEA transmission facilities." (Emphasis added). Also on page 9, the FPSC summarizes the testimony, and states the local telephone companies' (except Centel's) position that "competition would continue to flourish if TMAs were retained at least temporarily." In the concluding paragraphs beginning on page 15, the FPSC states:

> In Order No. 13750, issued October 5, 1984, we viewed TMAs as an interim measure, to be reviewed prior to September 1, 1986. That review is now complete. We believed that by this time, NTS costs would have been de-loaded from access charges, the LECs would have been billing and keeping toll charges, and private-line pricing would have been resolved. These events have not as yet taken place. As the industry exists today, it is not in the public interest to abolish TMAS.

The clear implication is that when NTS costs, bill and keep,

and private line rate restructuring (all open dockets at the FPSC) have been resolved that it would then be appropriate to eliminate TTMAs. The FPSC thought that those items would be resolved by September 1, 1986, but misestimated the time in which those goals could be accomplished. The misestimation does not make TTMAs permanent, it merely retains TTMAs until such time as those items the FPSC thought would be resolved by September 1, 1986, are resolved:

The Order states, at page 15, that:

> Nothing in this decision precludes any interested party from coming forward with a showing of significantly changed circumstances which would warrant the abolition of TMAs. Technology and regulatory changes may dictate a modification of this decision at some point in the future. We will not speculate on the timing of these changes. As Order No. 13750 demonstrates, predicting the timing of future events often proves a mistake.

Rather than to again estimate the appropriate time for review, and set a definite time for review based on that estimate, as it did in Order No. 13750, the FPSC allowed any interested party to decide when further review was appropriate. The fact that no definite time was set does not establish permanent TTMAs. TTMAs were continued for a transitional or interim period, not made permanent as alleged by the IXCs. The Appellants have pointed to no portion of the Order which supports their allegation of permanence.

C. Are toll transmission monopoly areas in the public interest?

The FPSC has much broader responsibilities in regard to telecommunications service in the State of Florida than planning

the implementation of toll competition within the EAEAs. Docket 820537-TP involves only a part of the FPSC responsibilities, but in that Docket alone, the FPSC attempted to accomplish significant goals in a time of rapid change in the telecommunications industry.

In Docket No. 820537-TP, the FPSC's primary goal has been to set access charges that would adequately compensate the local telephone companies for use of their local exchange facilities for originating and terminating interexchange carrier traffic and to provide incentives for competition while maintaining universal service. This Court recognized the difficulty of the FPSC's task in Microtel II when it stated:

> Among the difficulties faced by the communications industry and PSC as a result of the AT&T divestiture and the enactment of Chapter 82-51 is how to provide customers with equal access to competing long distance telephone companies, while minimizing the cost of the transition and maintaining universality and quality of service and concomitantly, how to compensate local telephone companies for the use of their local exchange facilities in completing long distance calls. (Footnotes omitted, at page 418).

Universality of service and quality of service are goals which reflect the public interest responsibilities of the FPSC. Section 364.335(4), Florida Statutes, provides that the FPSC may grant certificates in the public interest.

The FPSC has many objectives in that portion of telephone service under consideration in Docket No. 820537-TP, all of which must be resolved with public interest considerations at the forefront.

In the case at issue, the FPSC must respond to the

legislative directive to implement intrastate toll competition, but must do so in light of the legislative directive to act in the public interest. The FPSC's plan as set forth in Order No. 13750 was described as a "well reasoned and carefully crafted response to the legislative direction and to the public interest," in Microtel II. (at page 418-419). The only difference between the plan set forth in Order No. 13750, and the Order under review in this case is that the timetable has had to be extended because what the FPSC had hoped to accomplish by the review date of September 1, 1986, was not accomplished by that date.

Whether the extension of the timetable is in the public interest is the question which must be answered. That question is answered affirmatively in Order No. 16343.

At page 4 of the Order, the FPSC states:

> The "public interest" is an amorphous idea driven by a myriad of factors. Some of these factors we consider important include natural monopoly theory, the existence of competition, the effect of our decision on local exchange rates, ubiquitous service and the availability of reasonably priced long-distance service for all end-users in Florida. In addition, we are also concerned with the effect that the intraEAEA facilities-based competition will have on the LECs' revenues and their ability to earn a reasonable rate of return.

In Order No. 16343, the FPSC then examines each of the factors listed.

In regard to the local telephone companies' efforts to adjust to competition, it found based on the evidence that the local telephone companies had taken a variety of actions to adjust to competition during the time period between the issuance of Order No. 13750 and the time of the hearings. The FPSC concluded that

the local telephone companies have done as much as possible to adjust to competition given the present regulatory environment. (Order No. 16343, page 5).

The FPSC next examined the revenue impact of eliminating TTMAs. It found that revenue losses to the local telephone companies would occur if TTMAs were eliminated, but that it was difficult, if not impossible, to quantify the impact. The Order lists five variables which must be accounted for in estimate of net revenue impact:

1) The amount of MTS and WATS traffic that would be taken from the local telephone companies and become feature group (FG) D, FG A, and FG B access;

2) The amount of traffic that would become special access;

3) The particular routes on which IXCs plan to compete;

4) The toll rates for those routes;

5) The cost savings to the local telephone companies from not carrying the lost traffic.

The assumptions necessary to provide dollar amounts for each of these variables would have to be based on assumptions which were hotly contested by the parties to the Docket during the hearing. The FPSC concluded that, although the exact revenue losses could not be calculated, revenue losses to the local telephone companies would occur.

In regard to the effects of eliminating toll transmission monopoly areas in the current environment, the FPSC stated:

> Significant fixed investment is necessary for the LECs to provide telecommunications services to customers. The large fixed plant creates the need for stable revenue sources.

> Without stable revenues, the financial viability and ultimately the availability of telephone service is threatened. (at page 6).

The local telephone companies have three sources of revenue: local service, their own toll service, and access charges. These sources of revenue are inextricably intertwined. A loss of revenue from any one source must be made up from the others for the local telephone companies to continue to maintain a stable source of revenues.

The FPSC determined that two basic effects follow from allowing intraEAEA toll transmission competition: 1) competition will force prices toward costs of providing service; and 2) direct loss of local telephone company toll revenues as the IXCs begin to carry intraEAEA traffic on their own facilities. The evidence on these points was contested, but the FPSC has fulfilled its function by weighing the evidence and reaching a conclusion based on the evidence. This Court should not undertake to reevaluate the probative weight of the evidence, so long as the record reflects competent substantial evidence to support the conclusion of the FPSC. See, Blocker Transfer & Storage Co. v. Yarborough, 277 So.2d 9, 11 (Fla. 1973). The next section of this Brief will address the issue of competent substantial evidence.

The Order under review carefully discusses the arguments and counterarguments of the parties presented in testimony at the hearing, and concludes that competition under the present circumstances, "may ultimately force the abandonment of unprofitable toll routes or, worse still, require increases in local rates to subsidize these unprofitable toll routes in order

to maintain universal toll service." (at page 8).

Order No. 16343 next examines the benefits and detriments of intraEAEA toll competition. After discussing the evidence in point, the FPSC concludes that the beneficiaries of intraEAEA transmission competition will be large-volume toll users and the IXCs who serve them. "The benefits received by the large toll users will come at the expense of the overwhelming majority of telephone consumers who would pay higher local rates, but would not have sufficient toll call volumes to take advantage of lower toll rates." (at page 9).

The next section of the Order discusses economic efficiency of intraEAEA transmission competition. Again, the FPSC discusses the evidence and concludes "[t]o the extent that full unbridled interexchange competition is restrained by the retention [of TTMAs], there are offsetting public interest considerations, previously set forth in the body of this Order that outweigh the benefits of full competition." (at page 10).

The FPSC also discusses the problems that elimination of TTMAs will have on extended area service (EAS).

The conclusion of the FPSC from its review of the record on the areas discussed above is that the retention of toll monopoly areas at the present time is in the public interest. The FPSC's review of this area is careful, thorough, and tied to the evidence in the record. The FPSC's conclusion on the public interest issue should be affirmed by this Court.

The FPSC Order under review is limited in scope, limited in time, and properly evaluates public interest considerations. It

complies with all three of the tests cited by this Court in Microtel II. It also complies with statutory directives concerning competition and the protection of the public interest. The FPSC acted within the scope of its legislatively delegated authority, and within the parameters established by this Court in Microtel II.

POINT II

THE FLORIDA PUBLIC SERVICE COMMISSION'S DECISION TO ALLOW TOLL TRANSMISSION MONOPOLY AREAS TO CONTINUE DURING A TRANSITION PERIOD IS BASED ON COMPETENT SUBSTANTIAL EVIDENCE.

When submitted for appellate review, FPSC Orders are clothed with a presumption of validity. Florida Power Corporation v. Mayo, 203 So.2d 614, 615 (Fla. 1967). The Court has only to determine whether the FPSC's action comports with the essential requirements of law and is supported by competent substantial evidence. The burden is on the appellants to overcome the presumption of correctness attached to orders of the FPSC. Pan Am World Airways v. Florida Public Service Commission, 427 So.2d 716, 717 (Fla. 1983).

It is not this Court's responsibility to reweigh the evidence in reviewing an FPSC Order. Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission, 443 So.2d 92, 95 (Fla. 1983). It is the FPSC's prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems necessary. United Telephone Company v. Mayo, 345 So.2d 648, 654 (Fla. 1977), and Gulf Power Co. v. Florida Public Service Commission, 453 So.2d 799, 805 (Fla. 1984).

This Court may not substitute its judgment for the FPSC's action taken within the statutory range of discretion. Gulf Power, supra, at 805.

> Competent substantial evidence is defined as: Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonable inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion . . . In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to courts of justice are not strictly employed . . . We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent, the "substantial" evidence should also be "competent." . . . De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957).

With these guidelines in mind, an examination of Order 16343 and the record reveals more than ample competent substantial evidence to support the FPSC's conclusions.

The primary findings upon which conclusions are based in FPSC Order No. 16343 are:

1) The local telephone companies have taken a variety of actions to adjust to competition. (page 5)

2) The local telephone companies would suffer an adverse financial impact if TMAs were eliminated at this time. (page 6)

3) There are various effects of eliminating TMAs on local, toll and access services. (page 7)

4) There are various benefits and detriments of intraEAEA competition. (page 8)

5) Economies of scale exist in the local telephone companies' intraEAEA toll networks. (page 9)

Each of these primary findings is supported in the record by competent substantial evidence.

The finding of adverse financial impact is mentioned frequently in the appellants' briefs. Analyzing this single finding in detail will illustrate the support in the record for this finding. Similar analysis could be performed for each of the above listed findings, but would only burden this already lengthy Brief.

Testimony concerning the adverse financial impact of elimination of TTMAs was presented by each of the local telephone companies. (For example, see the testimony of General's witness, Menard, at T-55-56, 61, 63, 68, 70-72, 76, 79, 91-92, 95, 98, 107, 116, 134, 136, 138). The crux of the appellants' argument is that the testimony is not competent substantial evidence because no ultimate dollar figure exactly setting forth the impact was presented. Also, the appellants feel that their attempt to show that the local telephone company's lost toll revenues would be replaced by access charges should be given greater weight by the FPSC. (See, for example, MCI's Brief, at page 28).

First of all, as stated above, it is the FPSC's prerogative to evaluate the evidence and accord whatever weight to the conflicting opinions it deems necessary. United Telephone Company v. Mayo, supra. Testimony in the record amply supports the conclusion that the local telephone companies will suffer a loss of revenue if TTMAs are eliminated. The record also contains

testimony from an IXC that the lost toll revenues anticipated by the local telephone companies will be offset by access charges. (T-469-470). The FPSC has evaluated this conflicting evidence at page 6 of Order No. 16343. The FPSC notes that the local telephone companies provided estimates of revenue loss, "which the IXCs predictably claimed were false because of the underlying assumptions." The FPSC goes on to state:

> Through somewhat tedious cross-examination, the IXCs developed best - and worst - case scenarios. To no one's surprise, the LEC witness vehemently disagreed with the IXCs' assumptions in coming up with the best - and worst - case scenarios. (at page 6)

This recitation in the Order is an accurate depiction of the flow of the testimony. On page 55 of the transcript, General's witness, Menard, discusses her projections of the revenue effect. Transcript pages 89-91 contain an illustration of the questioning of Witness Menard's assumptions in reaching her revenue effect by MCI's Attorney, Melson. Transcript page 95 contains an illustration of the criticism by Witness Menard of the assumptions used by Attorney Melson in his cross-examination. Similar illustrations appear throughout the record.

The FPSC evaluated this testimony, and reached its conclusion. It concluded that revenue losses would occur, but that the exact amount of revenue loss was difficult, if not impossible, to calculate because of five variables which must be included in the calculation. These five variables are:

1) The amount of MTS and WATS traffic that would be taken from the LECs and become FG D, FG A, and FG B access. (This variable is supported in the record at T-223, among other places).

2) The amount of traffic which would become special access. (This variable is supported in the record at T-471, 484-485, among other places).

3) The particular routes on which the IXCs plan to compete. (This variable is supported in the record at T-309-311, among other places).

4) The toll rates for these routes. (This variable is supported in the record at T-92-93 and in Exhibit 6-80-C, page 2, among other places).

5) The cost savings to the LEC from not carrying the lost traffic. (This variable is supported in the record at T-92, among other places).

Each of these variables will fluctuate, depending on underlying assumptions based on the regulatory environment, and decisions made by the FPSC, local telephone companies, and the IXCs.

To make the calculation even more difficult, no single party has control of each of the elements necessary to make even broad brush calculations. For example, the local telephone companies have only a general idea of AT&T's competitive plans, and little information on the competitive plans of the other IXCs. The IXCs, on the other hand, have no specific traffic data on the various intraEAEA toll routes. Appellants, nevertheless, cast themselves in a no lose position by: 1) failing to identify the impact on themselves of eliminating TTMAs, and 2) simultaneously criticizing the FPSC for not making findings on this point.

To be required to foretell the consequences of every action

with absolute precision, as appellants apparently demand, would paralyze the FPSC, since every future action can be affected by uncontrollable circumstances. A specific amount is not necessary to arrive at an overall effect if there is a substantial basis in fact from which the overall effect can be reasonably inferred. The record, as illustrated by the citations above, does contain sufficient evidence for a reasonable mind to reach a conclusion about the overall effect on local telephone company revenue if the TTMAs are eliminated.

US Sprint witness, Strich, was able to conclude that competitive carriers would be able to handle growth in intraEAEA traffic with equal efficiency with the local telephone companies, even though, "it is difficult to make a precise comparison due to the number of variables involved." T-373

An exact measure of the amount of damages is not necessary to conclude that someone will be injured if hit in the head with a baseball bat. If you are charged with protecting the person to be hit in the head, you cannot take a chance that the blow will be a slight one, and only minor injury will result.

The FPSC recognized a margin of error may be present in its decision. At page 15 of the Order, it stated:

> We have a duty to protect the ratepayers of this State. The possibilities associated with abolition of TMAs could cause great harm to most ratepayers in this State. Further, it is our belief that the harm that would result from allowing intraEAEA transmission competition may be irreparable because of the potential impact to IXCs once the IXCs have made considerable investment required to build intraEAEA facilities.

The foregoing analysis of the financial impact finding by the

FPSC can be performed on each of the findings listed above, but would only lengthen this Brief to the point out of the obvious. The FPSC's action is supported by competent substantial evidence in the record. Merely presenting contrary evidence does not render the evidence in question incompetent and nonsubstantial. The weight to be given to evidence is a determination for the FPSC to make in its evaluation of the evidence. It must resolve conflicts in evidence, make findings and reach conclusions. It has done so in this case. The FPSC has correctly weighted and evaluated the evidence in the record, and arrived at reasonable conclusion supported by competent substantial evidence. It's findings, and the conclusions based on those findings, should be affirmed.

CONCLUSION

The FPSC has acted in accordance with statutory directives, and with the ruling of this Court in Microtel II, supra, in reaching the findings and conclusions stated in Order No. 16343. The Order retains TTMAs and, under the Order, TTMAs continue to be limited in scope, limited in time, and in the public interest.

The findings and conclusions of the FPSC are based on competent substantial evidence in the record. It is true that the evidence relied upon was not uncontraverted, but it is the FPSCs prerogative to evaluate conflicting testimony and accord whatever weight to such evidence it deems necessary. This Court should not

substitute its judgment for that of the FPSC for actions taken by the FPSC within its statutory range of discretion.

Respectfully submitted this 15th day of December, 1986.

Alan N. Berg
General Attorney
United Telephone Company of Florida
Post Office Box 5000
Altamonte Springs, FL 32715-5000
(305) 889-6018