IN THE SUPREME COURT OF FLORIDA

U.S. Sprint Communications Company, Appellant, v. John R. Marks, et al., Appellees.	CONSOLIDATED CASES
Microtel, Inc., et al., Appellants, v. John R. Marks, et al., Appellees.	Case No. 69,159

Case No. 69,169

ANSWER BRIEF OF INTERVENOR-APPELLEE GENERAL TELEPHONE COMPANY OF FLORIDA

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PREFACE

Excerpt from Concurring Opinion of Commissioner Michael McK. Wilson in Order No. 16343:

> The telephone network which existed prior to 1984--the physical plant, the accounting and allocation systems and regulation (both federal and state)--was not created overnight but evolved over half a century...
>
> Beginnings are delicate times. A decision to abolish the toll transmission monopoly areas may very well be the kind of error which would fundamentally alter the nature and course of telephone service offered to subscribers in Florida, just as in elementary ballistics a slight error in aim results in a much larger error in flight...
>
> We simply cannot reverse 50 years of telecommunications evolution in a few years, virtually a blink of an eye in the overall time scheme. (A. 16-17).

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GLOSSARY OF TERMS

Access: The facilities of a Local Exchange Company (LEC) such as General Telephone Company of Florida (GTFL) which allow Interexchange Carriers (IXC) to originate and complete long-distance calls. In general, IXCs cannot provide access facilities for intrastate calls.

Access Charges: Those charges paid by IXCs to LECs for the use of local facilities to originate and terminate long-distance calls. These charges are necessary to compensate the local exchange company for the role its local network plays in the transmission of a long-distance call.

Equal Access Exchange Area (EAEA): A geographic area established by the Florida Public Service Commission to provide the benefits of competition from a customer's perspective in lieu of an interexchange carrier's viewpoint. In an EAEA, the LEC must gather all traffic throughout the area to one point so it can be picked up by the various IXCs. This promotes competition in areas (rural) which are not extremely profitable for IXCs. There are twenty-two (22) EAEAs in Florida.

Interexchange Carrier (IXC): A long-distance carrier that provides long-distance service on its own facilities where permissible or through the resale of another carrier's service such as WATS or MTS. IXCs can resell both LEC services and other competing IXC services.

Local Access and Transport Area (LATA): A geographic area created at the time of the divestiture of the Bell system. Southern Bell and GTFL can only provide service within LATAs. InterLATA traffic is not allowed. AT&T-C and other IXCs can carry long-distance traffic between LATAs. The issue as to whether there is competition within a LATA--which is permitted in Florida--was reserved to the states.

Local Exchange Carrier (LEC): A company such as General Telephone Company of Florida which provides local calling and access services. LECs also provide EAEA and intraLATA long-distance service in competition with various IXCs.

Resale/Reseller: A long-distance company which purchases the services of another carrier such as WATS at wholesale prices and resells that service to its customers at a markup. All long-distance carriers compete in this fashion today on intraEAEA traffic.

Toll Monopoly Area (TMA): The use of the word "monopoly" in this term is a misnomer per Order No. 16343 as competition exists within a TMA on a resale basis. The TMA merely provides that all long-distance calls within an EAEA must be hauled on LEC-provided transmission facilities. The TMA designates the method by which competition takes place within an EAEA.

Transmission Facilities: Those facilities and switches owned and controlled by a LEC or IXC which carry a long-distance call.

Wide Area Telephone Service (WATS): Long-distance service charged on a per hour of use basis. WATS is less expensive than regular long-distance service (MTS) for a large user. WATS contains a substantial discount, allowing IXCs to resell the service at a higher price than WATS, but at a lower price than MTS long-distance service.

I. INTRODUCTION

This case concerns the second appeal by Microtel, Inc. (Microtel), U.S. Sprint Communications Company (Sprint), MCI Telecommunications Corporation (MCI), and AT&T Communications of the Southern States, Inc. (AT&T-C)[1] regarding the authority of the Florida Public Service Commission under Sections 364.335 and 364.337, Fla. Stat. (1985)[2] to control the pace at which competition is introduced in this state and the methods utilized to foster a competitive environment which is in harmony with public interest concerns. This Court has already ruled in Microtel, Inc. v. Florida Public Service Comm'n., 483 So.2d 415, 418 (Fla. 1986), that while the foregoing statutes embody the legislative decision that there will be competition in the long-distance market in Florida, that the statutes do not require "instant, unlimited competition" for all long-distance services. Indeed, this Court held that the transition to full competition must be done in a manner to satisfy the public interest.

This appeal is taken from Order No. 16343 issued on July 14, 1986, wherein, the Commission extended the interim toll transmission monopoly due to expire on September 1, 1986, to an uncertain date in the future, when technological and regulatory changes allow for the implementation of full competition without detrimentally effecting the public

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[1] The enumerated parties will be collectively referred to herein as "IXCs" or "Appellants."

[2] All further references are to Fla. Stat. (1985) unless otherwise indicated.

interest. (A. 15).[3] Any party is free at any time to petition the Commission with a showing that full competition can be allowed without detrimentally effecting the ratepayer. It is General Telephone Company of Florida's (GTFL) position that Order No. 16343 is in full accord with the principles set forth in the Microtel case, supra. As will be discussed in detail, infra, the concerns of the Commission which led to the creation of the toll transmission monopoly and were recognized as valid concerns by this Court are still present. Therefore, this Court should affirm Order No. 16343.

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[3] "R.___" refers to pages of the record. "Tr.___" refers to pages of the hearing transcript. "A.___" refers to pages of Appellee's Appendix submitted herewith pursuant to the provisions of Fla. R. App. P. 9.220. Said appendix contains relevant portions of the record for the Court's convenience.

II. STATEMENT OF THE CASE AND FACTS

GTFL is unable to accept the "Statement of the Case and Facts" as presented in the Appellant's Briefs. Pursuant to Fla. R. App. P. 9.210(c), GTFL disagrees with the various "Statement of the Case" sections because no substantial discussion is devoted to the Commission's reasons for establishing EAEAs and the corresponding toll transmission monopoly. GTFL disagrees with the various "Statement of Facts" sections which discuss the evidence of record because it is incomplete in all submissions.[4] Therefore, GTFL will submit its own version.

A. STATEMENT OF THE CASE

This appeal finds its origins in 1983, when the Commission issued its landmark decision in Order No. 12765. In said order, the Commission established a master plan for moving from a predivestiture monopoly environment to a competitive situation for long-distance operations. (A. 22). In December, 1983, the Commission expressed its overriding philosophy regarding how competition would be allowed in this state--a philosophy which has been strictly adhered to since its inception:

> The primary goal in this proceeding was to set access charges that would adequately compensate

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[4] For example, based on a 705 page evidentiary hearing transcript, Microtel and AT&T-C have submitted a 1 1/3 and 4 1/2 page "Statement of Facts and Case," respectively. Almost all of the limited discussion regards past proceedings and makes no mention of the evidence of record or the reasons for the Commission's decision.

> the LECs for the use of their local facilities for originating and terminating toll traffic and to provide incentives for competition, while maintaining universal telephone service. We believe our plan will also provide incentives for both LECs and IXCs to maximize the use of their facilities.
>
> Our plan also strives to minimize disruption for customers while providing an opportunity for LECs to maintain reasonable earnings levels without increasing local rates. Order No. 12765 (Emphasis added) (A. 22)

The above quote readily demonstrates that the general goal of the Commission was to develop competition in the long-distance market on favorable terms to the customer. Among the specific goals set in Order No. 12765 were the establishment of EAEAs and the interim toll transmission monopoly. (A. 44). This policy decision was implemented in Order No. 13750, which became the subject matter of the first appeal concerning the ability of the Commission to utilize a transmission monopoly for intra-EAEA traffic, which was upheld by this Court. See: Microtel case, supra.

The Commission created EAEAs and the corresponding toll transmission monopoly in Order No. 13750 due to its belief that equal access should be viewed from the customer's perspective rather than a technical interconnection IXC viewpoint. Under the EAEA concept, the LEC delivers traffic to a single access point at nondistance sensitive average transport charges to enable the customer to access all available IXCs. In Order Nos. 13750 and 13912, the LECs were declared

to be the sole providers of transmission facilities within an EAEA. Resellers and IXCs could compete with the LEC within an EAEA only through the resale of LEC-provided WATS and MTS. (A. 63).

In ordering the foregoing arrangement, the Commission set forth several reasons for its decision in Order No. 13750. First, the Commission found that an interim period was necessary to provide a transitional period whereby LECs could position themselves to meet competition. (A. 64). In addition, the Commission found a need for LEC revenue stability. (id.). Finally, the Commission was of the opinion that existing LEC facilities were economically efficient for the transmission of intra-EAEA calling and should continue to be used rather than encouraging unnecessary duplicate facilities. (id.).

Order No. 13750 provided that the interim transmission monopoly was to be reviewed on or before September 1, 1986, to determine whether it should be continued. The LECs bore the burden of proof to demonstrate that the continuation of the toll transmission monopoly was in the public interest. (id.). Accordingly, hearings were held in early May, 1986, to review the need for an extension of the toll transmission monopoly. After hearing the evidence of record and considering the briefs of the parties, the Commission issued Order No. 16343 on July 14, 1986, which extended the toll transmission monopoly. The extension was for an indefinite period of time until any party demonstrates that its removal is in the public interest based on changed circumstances. (A. 15).

The reasons for the extension of the transmission monopoly and the adoption of an uncertain date for its expiration were succinctly stated in the Commission's conclusion to Order No. 16343:

> Death and taxes notwithstanding, this proceeding has graphically demonstrated that nothing is certain. 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.
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> The experience of the past several years is instructive as we view the future path of telecommunications regulation. 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. Technological 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 to be a mistake.
>
> To summarize, we believe that the LECs have met their burden of proof and demonstrated that retention of TMAs is in the public interest. The evidence in this proceeding convinces us that the time has not yet come to abolish TMAs. 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 on the IXCs once the IXCs have made the considerable investment required to build intra-EAEA facilities. (Emphasis added) (A. 15).

The aforenoted IXCs have appealed this case for a second time arguing that the Commission has no authority to utilize a toll transmission monopoly as a tool to control the pace and development of competition so that the end result is in the public interest.

B. STATEMENT OF FACTS

1. Introduction

At the hearings held in this matter, the parties addressed twenty-three (23) issues which were designed to place before the Commission the existing state of the industry and the effect on the public interest if the toll transmission monopoly was not extended.[5] The issues concerned, among other matters: 1) whether retention of the transmission monopoly was in the public interest; 2) have the LECs had enough time to adjust to competitive circumstances; 3) what steps have the LECs taken to adjust to competition; 4) what the revenue impact would be to the LEC of lifting the transmission monopoly and its specific impact on local rates, toll rates, access charges and extended area service (EAS); 5) the effect of lifting the transmission monopoly on the quality of local and toll service; 6) the benefits the customer would enjoy if the transmission monopoly was lifted; and 7) whether the transmission monopoly was having an effect on the development of competition in Florida. This statement of facts will look at the evidence submitted on these points under the following four headings:

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[5] A copy of the prehearing order which includes each issue and the parties' positions relating thereto is included in the attached Appendix. (A. 68).

LEC Adjustments to Competition, Revenue Impact of Eliminating the Toll Transmission Monopoly, Benefits and Detriments of IntraEAEA Transmission Competition, and Effect of the Transmission Monopoly on Competition

2. LEC Adjustments to Competition

The evidence concerning this issue is of importance to the Commission for two major reasons. First, this evidence enables the Commission to determine whether the LECs have made a good faith attempt to position themselves so transmission competition can begin as soon as possible. Second, it gives the Commission a basis to determine what further actions need to be taken before the transition is over and whether those remaining acts will have a major effect on competition.

The evidence of record reflects that each LEC has taken the necessary steps to prepare for transmission competition to the extent such actions are within the control of the utility. GTFL performed an analysis of the toll market within its service territory which took approximately two years. (Tr. 52). As a result, GTFL produced an illustrative competitive toll tariff which could be used in a full competitive environment if allowed by the Commission. (Tr. 148). Southern Bell has consolidated its operations and has developed market-based pricing plans. (Tr. 183-184). United Telephone and Central Telephone Company have taken similar steps.

The problem the LECs encounter in completing the transitionary process to meet competition lies in the areas where they have no

control. As discussed by the Commission in Order No. 16343, the LECs have not enjoyed the necessary latitude under Chapter 364, Fla. Stat. to institute the changes which are required to be competitive with the IXCs. (A. 5). In order to compete, the Commission must make certain regulatory decisions which will lead to the implementation of a system which will enable the LECs to bill and keep their own toll traffic at individual company specific rates. (Tr. 53). At the present time, LECs pool all toll charges statewide and charge for such calls based on statewide average rates. At a minimum, LECs must have the ability to bill their own toll charges at rates which are specifically applicable to the costs and market conditions that are relevant to their service territories. Otherwise, the LECs cannot compete with the IXCs who presently enjoy this freedom and can set rates at any level they deem appropriate.[6] (Tr. 60). In addition, LECs need the same regulatory flexibility to change rates as experienced by the IXCs.

All of the foregoing predicates for a full competitive environment are still being explored by the Commission for the best solution. Until these matters are resolved, the LECs do not possess the necessary tools to effectively compete in the marketplace.

3. Revenue Impact of Eliminating the Toll Transmission Monopoly

The ability to determine the impact of competition on the various LEC services is important so that the Commission can have the necessary information to determine the impact of competition on the various

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[6] AT&T-C is subject to some restrictions which are not applicable to other IXCs.

information to determine the impact of competition on the various segments of society. For example, the evidence of record reveals that only twenty (20%) to thirty (30%) percent of customers in Florida make enough toll calls to offset the resulting local service increase which will come from competition. (Tr. 137). Accordingly, it is important to "foster" competition in such a manner as to avoid to the extent possible the inevitable costs that are associated therewith.

The Commission declined to make a finding as to a specific revenue impact for the industry if the transmission monopoly was lifted due to the large number of variables involved in making that determination. (A. 6). The specific amount of the revenue loss is dependent on the Commission's regulatory actions in regard to bill and keep of LEC toll, company specific rates, rate flexibility, transfer of the toll subsidy and other items. (Ex. 6-80-C and Tr. 130-132). However, while the specific amount could not be determined, there was no doubt as to the negative effect on LEC revenues. The Commission specifically found there would be a detrimental effect on the LECs' revenues if transmission competition was allowed at this time. (A. 6 and 11).

The current LEC intraLATA long-distance rates provide a substantial positive contribution to local network costs, thus holding down the level of local rates. To the extent this toll contribution is lost, local rates must of necessity increase. Statewide uniform toll rates can provide the current level of subsidy only as long as the transmission monopoly is in existence because the inexorable effect of

competition will be to force the price of toll service towards its real cost. This causes a reduction in revenue to the LEC.

The second major effect the LECs will experience if transmission competition is implemented is a reduction in revenue as the IXCs begin to carry intraEAEA traffic on their own facilities. (id.). These reductions will not be offset totally by increased access charge revenues. (Tr. 70).

4. Benefits and Detriments of IntraEAEA Transmission Competition

The major detriment the Commission found if transmission competition is allowed, based on current circumstances, is that the IXCs will inevitably build networks on those routes which possess a high density/low cost profile in order to make the most profit. (Tr. 373). In fact, on an interEAEA basis, the IXCs are located on high volume routes and in large part serve large customers. (Tr. 112). AT&T-C specifically testified that it was not interested in duplicating the LECs existing networks, but was looking to provide special services to large customers. (Tr. 496-497). In fact, AT&T-C testified that IXCs "will not build facilities that are not economically justified, because of their own self interest in making money." (Tr. 398). In the long run, this could result in a loss of subsidies from high volume routes to such an extent as to force the abandonment of low volume toll routes. (A. 8). If this occurs, the only alternative would be to increase local rates in order to maintain universal toll service. (id.).

The beneficiaries of intraEAEA transmission competition are large-volume toll users and the IXCs who build networks to serve them. (Tr. 59). The benefits these two groups will receive if transmission competition is allowed at this time will come at the expense of the average customer. The average customer will receive higher local rates to offset the loss of subsidy from toll rates, but will not have sufficient high long-distance calling volumes to take advantage of lower toll rates.

5. Effect of the Transmission Monopoly on Competition

The Commission found that the transmission monopoly by definition had to have some negative effect on unbridled transmission competition. (A. 5). However, the fact remains that there is competition today on an intraEAEA basis through the resale of WATS and MTS. The evidence of record reveals that this type of intraEAEA competition has been growing at a substantial rate. (Tr. 62). The record further shows that such growth will continue in the future. To the extent there is a negative effect on competition, the Commission found there were offsetting public interest considerations in the form of revenue stability and universal service. (A. 5).

III. SUMMARY OF ARGUMENT

This case concerns the second appeal by the major IXCs in Florida regarding the authority of the Florida Public Service Commission to "foster" the development of competition in this state by controlling the pace at which competition is introduced and the methods utilized to carry long-distance traffic within certain limited market areas. It is GTFL's position that the Commission's action conforms to the policy decisions made by the legislature and the opinions issued by this Court on this topic.

GTFL submits four basic arguments in response to the briefs of the Appellants for the Court's consideration. First, GTFL demonstrates that Order No. 16343 is consistent with the principles espoused by this Court in the Microtel decision cited supra. Thus, GTFL takes exception to the allegation that the Commission has overstepped its authority by taking steps to introduce competition in a manner that satisfies the public interest. Second, GTFL will respond to the Appellants' contention that the toll transmission monopoly has been made permanent by the Commission. It is GTFL's position that the transmission monopoly was extended because the transitionary period needed to place all participants on a level playing field has not been completed. When the transition is over, any party can make the showing required by the Commission to allow the implementation of competition into all aspects of the long-distance market. Third, GTFL will show that Order No. 16343 does not change fundamental state policy or result in an

unconstitutional delegation of power. Finally, GTFL will refute Appellants' contention that the Commission's order is not supported by competent and substantial evidence.

IV. ARGUMENT

A. THE COMMISSION'S EXTENSION OF THE TOLL TRANSMISSION MONOPOLY IS CONSISTENT WITH THIS COURT'S 1986 RULING WHICH IS DIRECTLY ON POINT.

This appeal finds the identical parties disagreeing on the identical issue which was the subject of an identical appeal decided by this Court less than one year ago in Microtel v. Florida Public Service Commission, 483 So.2d 415 (Fla. 1986).[7] In such case, the issue before the Court was whether the Commission had the power and authority to control the pace at which competition is introduced in the state of Florida. The IXCs took the position that the statutory amendment to Section 364.335(4) was absolute and the Commission had no authority to institute an interim toll transmission monopoly in order to protect the public interest. This Court disagreed with the foregoing assertion in Microtel II for three reasons. First, the Court noted that while there was an interim toll transmission monopoly in effect for certain parts of the state, there was unlimited competition for intrastate interEAEA traffic. Thus, the transmission monopoly was only in effect for certain limited areas.[8] Second, the Court relied upon the fact that the toll transmission monopoly was for a limited period of time and

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[7] Hereinafter referred to as Microtel II.

[8] GTFL notes that even within an EAEA the IXC is free to compete with the LEC through the resale of WATS and MTS. This was not possible prior to the statutory amendment in 1982 to Section 364.335(4). Therefore, the IXCs can compete statewide today. The only restriction is the method by which calls are carried within an EAEA.

would be reviewed in September, 1986. Third, this Court specifically held that Section 364.335(4) does not mandate that IXC certificates be issued when such an action would be contrary to the public interest. This Court further recognized that the public interest was a factor in making an orderly transition to full competition on long-distance services. Based on the foregoing three factors, this Court concluded as follows:

> We reiterate our conclusion in Microtel, Inc. that the legislature has made the fundamental and primary decision that there will be competition in intrastate long distance telephone service, but do not read the statute or Microtel, Inc. so expansively as to require instant, unlimited competition in all long distance services. The interim plan of PSC appears to be a well reasoned and carefully crafted response to the legislative direction and to the public interest. (Emphasis added) (483 So.2d at 418-419)

Nothing has changed since the Court's decision in Microtel II to indicate that the interim plan is no longer needed. A hearing was held which led to the Commission making the ultimate finding that the transition from a total monopoly to a competitive environment was not complete. Such a conclusion is hardly surprising. The total monopoly configuration of the telecommunications industry had been in effect for approximately one hundred years. The amendment in the Florida statutes came in the latter part of 1982. Toll transmission monopolies have only been in effect since late 1984. One cannot reverse the structure of an entire industry overnight--at least where a part of the industry is heavily regulated and the public interest is a major concern. Time is needed to resolve conflicts with a knowledgeable plan. It is no

easy task to introduce competition into every facet of the long-distance market in a manner which balances both the interest of the interexchange carrier, the LEC and the consumer as recognized by the Court in Microtel II.

> 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 telephone calls. (483 So.2d at 418).

The same transitional process which was before the Court a year ago is still continuing today. The toll transmission areas have not been enlarged or changed. The monopoly is still for a limited period of time. None of the three factors which the Court relied on in Microtel II are any less relevant and pertinent to the instant case. The Court should affirm Order No. 16343.

B. THE COMMISSION DID NOT MAKE THE TOLL TRANSMISSION MONOPOLY PERMANENT CONTRARY TO THE ASSERTIONS OF THE IXCs.

The IXCs have interjected only one new issue into this appeal concerning whether the Commission has made the toll transmission monopoly permanent. GTFL submits that this issue is a red herring and has been included for no other reason than to try to come under the parameters of the Court's invitation in Microtel II to examine the issue on the merits if the transmission monopoly was made permanent. The transmission monopoly was definitely extended in Order No. 16343 for an additional period of time until a point in the future when the

public interest can absorb full long-distance competition. However, the Commission's order and the evidence of record reveals it was not made permanent.

The evidence reveals that no LEC, the party with the greatest financial interest at stake, advocated a permanent extension of the transmission monopoly through sworn testimony. Indeed, some LECs such as Southern Bell made no recommendation to the Commission at all as to whether the transmission monopoly should even be retained, much less for a certain period of time. In GTFL's case, testimony was filed supporting an extension of from three to five years. (Tr. 64). GTFL's recommended extension was based on the time needed to complete the pending transitional process so that full competition would be on terms consistent with the public interest.

A fair reading of the Commission's order leads to a similar conclusion. The Commission created toll transmission monopolies and EAEAs as a part of its landmark decision in Order No. 12765. EAEAs were created due to the Commission's belief that competition should be viewed from the customer's perspective. (Tr. 47). The interim transmission monopoly was created to provide a transitional period whereby LECs could position themselves to meet competition and to promote revenue stability. In addition, the Commission felt that duplication of facilities should be avoided. (Tr. 49).

The extension of the transmission monopoly in the order under review was given because the above action items have not been completed. Two pertinent quotes from the Commission's order graphically demonstrate this point.

> 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. Order No. 16343. (A. 4).
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> . . . . .
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> 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. Order No. 16343. (Emphasis Added) (A. 15).

The transmission monopoly was continued because the Commission's master plan as detailed in Order No. 12765 was not yet complete. The LECs are not able to compete on an equal basis with the IXCs on either a cost or flexibility basis. If the transmission monopoly is not extended, the end result will be a severe blow to ratepayers. When the transitional process is over, any party will be able to show "significantly changed circumstances" which will bring about an end to the toll transmission monopoly pursuant to the terms of the Commission's order.

C. THE COMMISSION'S EXTENSION OF THE TOLL TRANSMISSION MONOPOLY DOES NOT CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF POWER OR AN UNJUSTIFIED ATTEMPT TO PROTECT THE PUBLIC INTEREST.

The Appellants in this proceeding make the argument that the Commission's extension of the transmission monopoly cannot be justified by "some roving commission to protect the public interest."[9] GTFL submits that such an argument ignores the facts of the proceeding before the Commission and this Court's previous decisions concerning Section 364.335(4).

In Microtel, Inc. v. Florida Public Service Comm'n., 464 So.2d 1189 (Fla. 1985),[10] this Court was presented with its first opportunity to construe the 1982 statutory amendments which permit long-distance competition in Florida. This Court concluded that "...the legislature had made the fundamental and primary policy decision that there be competition in long-distance telephone service." 464 So.2d at 1191. The main issue in Microtel I concerned whether an IXC (not a LEC) could keep other IXCs out of the field. In answering the foregoing question in a negative manner, the Court reached certain conclusions regarding Sections 364.335 and 364.337. First, the Court noted that the Commission must be guided by the public interest in granting certificates and their respective conditions. Second, the Court declared that:

> 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

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[9] AT&T-C Initial Brief, page 9.

[10] Hereinafter referred to as Microtel I.

> this statute in light of the legislative objective to bring competition into this business area which had not heretofore existed. (Emphasis added) 464 So.2d at 1191.

Webster's New Collegiate Dictionary defines the word "foster" as: "to promote the growth or development of: encourage."[11] Thus, in Microtel I, the Court noted that the status of competition was one which would grow and develop over the years. Competition in all facets of the long-distance market was not an event that would take place overnight.

Microtel II which concerned the IXCs' first appeal of the interim toll transmission monopoly followed the foundation laid by the Court in Microtel I. The Court specifically held that certificates should not be issued in a manner contrary to the public interest and that the statutory amendments do not require "instant, unlimited competition." 483 So.2d at 418.

Based on the foregoing two cases, GTFL is at a loss to understand how the Commission is abusing the public interest or changing the statewide competitive policy declared by the legislature. The Commission is merely setting the stage so that fair competition can be had in the long run for the benefit of the IXC, LEC and ratepayer alike. The LECs proved and the Commission found that the transition was not over and that the industry was not ready for full competition. A comparison of the abilities of the IXC and LEC to compete demonstrates that the Commission was correct.

If the Commission approved full transmission competition at this time based on the current state of affairs, the following rules would

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[11] Webster's New Collegiate Dictionary (1981)

be in effect for the IXCs. The IXCs would be free to pick up only the traffic they desired which would be high volume/low cost traffic. The IXCs would have no obligation to be a provider of last resort on intraEAEA traffic as does the LEC. The IXCs could build their networks only to lucrative customers. All IXCs could change rates as they deem appropriate. All IXCs with the exception of AT&T-C can change rates with virtually no regulatory oversight. In summary, the rules under which the IXCs operate give them considerable flexibility to control their own destinies and meet competition as they see fit.

On the other hand, the following rules would be in effect for the LECs. All intraEAEA long-distance revenues would be placed into one statewide pool and would be returned to the LECs based on expense and investment. Thus, GTFL's revenue stream would be affected by the high cost of service of some other companies. The high cost and low cost areas are averaged by pooling, resulting in revenues which have little applicability to a telephone company's specific situation. In addition, the LECs have to bill statewide average rates. Further, the LECs must service all customers within their service territory and provide a quality network. In summary, the LECs have little ability to control their destinies and, today, do not have available the tools to meet competition.

GTFL is sure that any of the IXCs would like to compete in a situation where the LECs are defenseless and the IXCs have the upper hand. However, this type of scenario is exactly what leads to high revenue losses to the LECs from transmission competition. The Commission has decreed that unbridled competition is not proper until the

rules are equalized for all parties. If the rules are not equalized, the LECs will be damaged resulting in a direct negative impact to the local ratepayer.

The instant situation is a far cry from the facts contained in State Department of Transportation v. Mayo, 354 So.2d 359 (Fla. 1978), which Appellants rely on for authority that the Commission cannot protect the public interest. In Mayo, the Commission implemented minimum rates for certain truckers based on its safety authority. The Commission felt minimum rates would increase compliance with necessary vehicle maintenance procedures. The Court reversed the Commission on the grounds that the public interest could not be a justification for using ratemaking as a means to enforce safety when the statute specifically exempted the carrier from the Commission's rate-fixing powers. In this case, the Commission has a statute which uses the term public interest and two Supreme Court decisions which recognize the Commission's authority to phase-in competition to ensure the maximum benefits from competition.

These same facts make Appellant's delegation of powers argument equally inapplicable. MCI cites the Court to Askew v. Cross Key Waterways, 372 So.2d 913, 925 (Fla. 1978), for the proposition that while the legislature may delegate implementation of state policy, it cannot delegate the determination of what that fundamental state policy should be. Here, there is no question that the policy has been established by the legislature for there to be competition. The Florida Commission is implementing that policy through controlling the pace and

methods which can be used to compete in a limited segment of the market. The Commission is acting in a proper, constitutional manner in implementing the policy prudently.

Finally, the Court should not be misled by the attempted comparison made by MCI in its brief between the facts of the Cross Key case and the subject matter of this appeal. In Cross Key, the legislature delegated to the Division of State Planning the ability to recommend to the Administration Commission that certain parts of the state be classified as "areas of critical concern." The statute was declared to be unconstitutional because there was no legislative delineation of how the areas would be selected. MCI tries to compare the "areas of critical concern" to the toll monopoly areas on the basis that there was no standard from the legislature on how toll monopoly areas would be created.

The comparison is inappropriate because the toll monopoly area is not a matter of undeclared state policy which was delegated to the agency as was the case in Cross Key. In this case, the toll monopoly area is the vehicle used to implement competition in a reasonable and prudent manner to effectuate the existing fundamental policy of competition.

D. THE COMMISSION'S ORDER IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE AND THIS COURT CANNOT SUBSTITUTE ITS OPINION FOR THAT OF THE COMMISSION.

Appellants have presented argument to this Court that there will be no revenue effect to the LECs if the toll transmission monopoly is lifted because the lost toll revenue will be replaced by increased

access charge revenue. Evidence was presented on this issue by both the LECs and the IXCs. The Commission for reasons which will become obvious infra, chose to believe the LECs revenue projections.

It is well settled that the Commission's decisions must be supported by competent and substantial evidence. Duval Utility Company v. Flordia Public Service Commission, 380 So.2d 1028 (Fla. 1980); Citizens of Florida v. Hawkins, 356 So.2d 254 (Fla. 1978); City of Plant City v. Mayo, 337 So.2d 966, 974 (Fla. 1976). In the Duval case, supra, the Court defined competent and substantial evidence as follows:

> Competent substantial evidence is 'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or]...such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.' De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957) 380 So.2d at 1031 (Fla. 1980)

GTFL submits that the Briefs of the IXCs on this point do nothing more than reargue the evidence. Such a tactic is uncontrovertible proof that the Commission's decision is supported by competent and substantial evidence. The only fact which the IXCs cannot accept is the ultimate conclusion which the Commission reached after considering all the evidence in this matter.

Now, the IXCs are asking this Court to reach a different decision based on the exact same facts. This, the Court cannot do. It is well established in Florida that the Court will not substitute its opinion

for that of the Commission merely because a different result could have been reached based on the evidence. This Court recently stated its position on this issue in Gulf Power Company v. Florida Public Service Commission, 453 So.2d 799, 803 (Fla. 1984) as follows:

> We have repeatedly stated the standard of judicial review by which we are guided when we review PSC orders. We will not overturn an order of the PSC because we would have arrived at a different result had we made the initial decision and we will not reweigh the evidence. Our task is to determine whether competent substantial evidence supports a PSC order. Citizens v. Public Service Commission, 435 So.2d 784 (Fla. 1983); Citizens v. Public Service Commission 425 So.2d 534 (Fla. 1982); Shevin v. Yarborough, 274 So.2d 505 (Fla. 1973).
>
> The PSC was presented with conflicting evidence. It understood Gulf's proposal, identified its concerns, and gave Gulf every opportunity to explain why its customers should support more of Plant Daniel than the pro rata share of those units committed to their service. Gulf did not provide an answer that was satisfactory to the PSC.

See also: Citizens v. Public Service Commission, 448 So.2d 1024 (Fla. 1984) and General Telephone Company of Florida v. Florida Public Service Commission, 446 So.2d 1063, 1067 (Fla. 1984). Here, the Commission did not accept the IXCs' evidence that access charges would replace lost toll revenues. Such a conclusion is based on the following facts.

First, it should be noted that the net effect of the argument the IXCs are advancing results in the erroneous conclusion that the Commission doesn't have to deal with any transitional problems in moving to transmission competition because access charges can act as a "safety net". (Tr. 69). However, the end result of such an argument

is that the LECs will be removed from participating in the competitive toll market and will only receive long-distance type revenues from the provision of wholesale access facilities. In the final analysis, the IXCs are suggesting that the LECs can be made "wholesalers" as opposed to "retailers" without any detrimental financial effect. GTFL feels it is very shortsighted to limit the sources from which the LEC receives its revenues. This is particularly true in light of the substantial contribution toll rates make to the recovery of local network costs, thereby keeping local rates low. (id.)

Second, for the IXC access charge replacing toll revenue argument to be valid, certain highly unrealistic assumptions must be utilized. One must first assume that there will be no bypass of LEC access facilities either on a service or facilities basis. One must further assume that the IXCs will leave their networks as currently designed resulting in the same access charges being incurred for origination and termination of traffic. In addition, the assumption must be made that the local exchange carrier will receive the same level of revenues from access charges as they do from toll--even when IXCs pay discounted or no access charges. (Tr. 70). The fact remains that none of the foregoing assumptions are valid or credible based on the testimony of the IXCs and OCCs in this and prior proceedings. For example, AT&T-C witness Tamplin testified in the September 1985 access charge hearings that:

> "...an IXC may locate some of its switching facilities used to provide intrastate service in another state in order to minimize its intrastate access charges. For example, some OCCs even today are providing intrastate service in some states through switching facilities located in neighboring states." (Tr. 71).

In addition, AT&T-C Witness Slayzk testified at the same hearings that:

> "...the potential for bypass of LEC (and IXC) facilities is significant at the present time and is expected to increase dramatically in coming years. Bypass will cause the LECs to realize a decreasing share of total telecommunications traffic, resulting in fewer customers to share the fixed cost of the business." (Tr. 72).

Therefore, the IXCs' contention that access will keep the LECs whole when revenue is lost from intraEAEA toll competition is refuted by their own testimony.

The IXCs' argument that Feature Group D access charges will substantially replace lost toll revenues is also defective because it assumes that premium Feature Group D access will be obtained by the IXC. (Tr. 91). However, the evidence of record reveals that it is AT&T-C's stated position that it only wants to provide service incident to its existing interLATA business. (Tr. 496). This indicates that the majority of the traffic lost in GTFL's service territory will come from IXCs other than AT&T-C--the only carrier today that pays premium access charges on all access services. The other carriers receive a discount until GTFL's service territory is 100 percent equal access. The revenue amount obtained by the LECs will be substantially less than the Feature Group D rate. (Tr. 95).

Furthermore, the Feature Group D argument also assumes that existing networks will stay the same as they are configured today. GTFL submits that such an assumption is especially dangerous within its service territory. An overwhelming majority of GTFL's traffic is

concentrated on a few major routes. (Tr. 74). Such a traffic configuration lends itself to IXCs cream skimming the heavy intraEAEA toll routes and big customers with a minimum amount of facilities. (id.). For example, AT&T-C is currently building a fiber route from Tampa to Sarasota which is the source of a substantial amount of toll revenue to GTFL. When completed, this route will form the basis of a backbone network to serve the lucrative routes in General's service territory. (Id.). These network configurations could result in the application of service and facilities bypass to avoid switched charges.

Finally, the Court should carefully analyze the IXCs' argument that the LECs will get more in access charges than in toll rates on certain short haul routes. For example, AT&T-C Witness Slayzk shows that the IXCs, if they carry this traffic, will pay $.93 in Feature Group D access charges while receiving $.76 in toll traffic for the twenty (20) mileage band. One has to wonder why the IXCs are so eager to handle this sort of traffic if they are going to lose $.17 on each and every call that is within this band. GTFL submits the answer to that question is that Feature Group D access charges will not be incurred and that this traffic will be completed through transmission facilities which connect to service bypass technologies. The Court should not be misled by the IXC's Feature Group D access charge argument.

In closing on this point, GTFL would like to address one final point brought up by the IXCs. The argument is made that since the Commission rejected MCI's requested "Finding of Fact" regarding the

exact revenue effect of transmission competition, the evidence on this point is speculative and inconclusive. The Commision's rejection of MCI's specific finding was due to the numerous variables which effect the exact quantification of the number. There was a specific finding by the Commission that the effect was negative to the LECs and that the effect was substantial. The realization that a precise number to the third decimal point could not be obtained does nothing to reduce the quality of the evidence. If anything, such a finding demonstrates the complex and transitional nature of the matter at hand.

CONCLUSION

In 1982, the Florida Legislature determined that competition should exist in the intrastate long-distance market. In making the necessary statutory amendments and additions to permit such a change, the Legislature gave the Florida Public Service Commission the necessary tools to implement competition in such a manner as to be in the public interest. In exercising its authority under the new statutes, the Commission permitted statewide competition by all certificated interexchange carriers, but limited the physical manner in which these new competitive services were provided to the end user for limited portions of the state. This interim restriction on the manner in which the service is provided is permitted under the Commission's statutory authority. The Court should affirm the Commission's order.

Respectfully submitted this the 15th day of December,1986.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of General Telephone Company of Florida's Answer Brief in Case Nos. 69,159 and 69,169 has been served on the following by depositing the same in the United States mail, postage prepaid, this 15th day of December, 1986:

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