IN THE SUPREME COURT OF FLORIDA

U.S. SPRINT COMMUNICATIONS COMPANY, Appellant, vs. JOHN R. MARKS, et. al., Appellees.	CONSOLIDATED CASES Case No. 69,169
MICROTEL, INC., et. al., Appellants, vs. JOHN R. MARKS, et. al., Appellees.	Case No. 69,159

On appeal from the Florida Public Service Commission

INITIAL BRIEF OF APPELLANT
MCI TELECOMMUNICATIONS CORPORATION

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MCI Telecommunications Corporation (MCI) appeals from a final order issued by the Florida Public Service Commission on July 14, 1986. (A. 1)[1/] The appeal challenges the Commission's authority to create permanent monopoly areas for long distance telephone service in Florida.

1/ "R. __" refers to pages of the Record. "T. __" refers to pages of the final hearing transcript. "Ex. __" refers to exhibits. MCI's Appendix ("A. __") contains the final order being appealed and other relevant portions of the record. The Supplemental Appendix ("S.A. __") contains a Commission pleading before this Court from a prior appeal, and a telephone industry map showing the toll monopoly area (EAEA) boundaries.

GLOSSARY

The order appealed from uses a number of terms that are peculiar to the telephone industry. A glossary follows:

1. LEC: Local Exchange Company. A local telephone company, such as Southern Bell or Centel, that provides local telephone service in its franchise area on a monopoly basis, and that also provides some long distance service.

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

3. IXC: Interexchange Carrier. A long distance telephone company, such as AT&T or MCI, that has authority to provide interexchange telephone service to customers throughout the state on a competitive basis.

4. Access: The service sold by an LEC to an IXC which enables telephone customers to use their telephones to place long distance calls using the IXC. Different qualities of access service are available at different prices.

a. Nonpremium access: Requires a customer to dial at least 7 digits (a regular telephone number) to reach his long distance company. Nonpremium access costs less than premium access and comes in two varieties, known as Feature Group A (FGA) and Feature Group B (FGB).

b. Premium access: Allows a customer to reach his long distance company by dialing a single digit. Premium access costs more than nonpremium access and also comes in two varieties, known as Feature Group C

(FGC) and Feature Group D (FGD). FGC is the traditional method of reaching AT&T, and is available only to AT&T. FGD is known as "equal access" and is available to all IXCs in those areas where it is offered.

5. LATA: Local Access and Transport Area. A geographic area created pursuant to the Modification of Final Judgment (MFJ) in the AT&T divestiture case. Under the MFJ, the Bell companies can provide long distance service within LATAs, but not between LATAs. AT&T and other IXCs can provide service without regard to LATA boundaries, subject to any valid state regulation. There are seven LATAs in Florida.

6. Equal access: Oversimplified, a telephone customer's ability to predesignate which IXC will handle his phone calls when he places a long distance call by dialing "1" followed by an area code and telephone number. Equal access was first introduced in some parts of Florida in October, 1984, and eventually will be available in most of the state. Southern Bell and General Telephone have federal obligations to provide equal access to all IXCs as a result of antitrust settlements.

7. EAEA: Equal Access Exchange Area. One of the twenty-two geographic areas into which the state has been divided by the Public Service Commission for purposes of defining the LECs' obligations under state law to provide equal access. Under the PSC's orders, the LECs have the

exclusive right to "1+" access for long distance calls within the EAEAs. This exclusivity is not being challenged on appeal.

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

9. MTS: Message Telephone Service. Regular long distance telephone service, charged on a per call basis.

10. WATS: Wide Area Telephone Service. Long distance service provided over a separate telephone access line, charged on a per hour basis. For a large volume long distance caller, WATS service is less expensive than MTS.

11. Reseller: A long distance telephone company that owns its own switching equipment, but does not own toll transmission facilities. A reseller typically purchases WATS at wholesale prices and resells that service to its customers at retail prices. Some IXCs supplement their toll transmission facilities by reselling WATS to complete calls to areas in which they do not have their own facilities.

12. TMAs: Toll Monopoly Areas. Twenty-two geographic areas (coextensive with the EAEAs) within which the Commission's order has granted the LEC the exclusive right to operate toll transmission facilities. IXCs are allowed to complete long distance calls within those areas only by reselling MTS or WATS service provided by the LEC.

STATEMENT OF THE CASE

This is the second time that a Commission order creating toll monopoly areas has been before this Court.

In late 1984, the Commission entered two orders that divided the state into twenty-two toll monopoly areas. (A. 18, 32) Under those orders, the right to transmit long distance telephone conversations within each area was granted exclusively to the LEC that served the area. The right to transmit long distance telephone conversations between those areas was shared by certified IXCs and, in general, by the LECs. Those orders provided that the toll monopoly areas would remain in effect on an interim basis until September 1, 1986.[2/] Prior to that date, the Commission would hold further hearings on the toll monopoly area concept. The parties favoring the retention of toll monopoly areas beyond September 1, 1986 would bear the burden of proving that their retention was required by the public interest. (A. 27-28, 34-35)

MCI and other certified IXCs appealed those orders. In a decision rendered on February 6, 1986, this Court upheld

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2/ This was actually the second set of Commission orders creating toll monopoly areas. In December, 1983, the Commission had created "temporary" toll monopoly areas consisting of Florida's seven LATAs pending the outcome of further proceedings to be held during 1984. (Order Nos. 12765 and 13091) The late 1984 orders therefore had the effect of permitting some competition between EAEAs that had been prohibited by the earlier "temporary" orders.

the Commission's interim toll monopoly areas as a "well reasoned and carefully crafted response to the legislative direction and to the public interest." Microtel, Inc. v. Florida Public Service Commission, 483 So.2d 415, 418-419 (Fla. 1986) ("Microtel II").

In upholding toll monopoly areas, the Microtel II decision relied heavily on the transitional nature of the monopoly restrictions.

> We do not read the orders under review as contemplating, nor do we understand it to be the PSC's position, that toll monopolies will continue beyond an interim period during which the transition is made from total monopoly on all services to monopoly in local services only.
>
> * * *
>
> . . .we do not believe that it is PSC's position that it has authority to maintain permanent toll monopolies. If that position changes and is challenged after September 1986, we will examine the issue on its merits. It is premature to do so now.
>
> 483 So.2d at 419

The Court also relied on the Commission's assertion that the proponents of toll monopolies would have the burden of justifying their retention beyond September 1986. Id. at 418.

During May, 1986, the Commission held the promised hearings on the retention of toll monopoly areas. On July 14, 1986, a scant five months after this Court's decision in

Microtel II, the Commission entered its order maintaining permanent toll monopolies. This decision was made notwithstanding the Commission's finding that "none of the LECs. . .provided sufficient information to reasonably calculate the maximum net revenue impact of the introduction of intraEAEA competition." (A. 11)

This appeal followed.

STATEMENT OF FACTS

MCI's major point on appeal is that the Commission lacks statutory authority to create permanent toll monopoly areas. This is solely a matter of law. The following statement of facts is relevant only to MCI's second point -- that even if the Commission has such authority, it was not properly exercised in this case.

One of the Commission's major rationales for creating interim TMAs had been to provide short term "revenue stability" for the LECs. That is, the Commission wanted to allow the LECs temporarily to retain all intraEAEA toll revenues to help provide a source of contribution toward local rates during the transition from monopoly to competition. (A. 28)

A major focus of the May 1986 hearings was therefore the impact that abolition of the TMAs might have LEC revenues.[3/] Despite the importance of this issue, only two of the fourteen LECs (Southern Bell and General Telephone) provided any estimate of the financial impact of intraEAEA competition. Both companies provided "worst-case" estimates. As cross-examination revealed, neither of those estimates was reasonable.

3/ Issues 4, 5, 6, 10 and 20 as identified in the prehearing order all dealt with the LECs' need for revenue stability and the financial impact of abolishing TMAs. (R. 45, 46, 48, 53, 65)

Southern Bell Estimate. Southern Bell estimated a net revenue loss of $42 million. This estimate contained a number of errors and unreasonable assumptions. For example, Bell assumed that it would lose 100% of its intraEAEA toll to the IXCs (Ex. 6-264-C), despite the fact that the Commission previously granted the LECs the exclusive right to "1+" dialing for all intraEAEA calls in a decision that was not challenged on appeal. (A. 34) The LECs therefore stand to lose intraEAEA toll only from those customers who know they are dialing intraEAEA calls, and who to dial five digits (e.g. 10288 for AT&T or 10222 for MCI) to affirmatively select another carrier. (T. 564) Southern Bell faces that type of competition from IXCs today for interEAEA, intraLATA calls and has not lost 100% of that traffic. Yet Bell failed to provide any data from that market to help test the reasonableness of its 100% assumption. (T. 244-245)

General Telephone Estimate. General Telephone estimated a worst-case gross revenue loss of somewhat less than $61.7 million (75% of its intraEAEA toll revenues) and a best-case gross revenue loss of less than $8.2 million (10% of its intraEAEA toll revenues). (T. 93, 98-99; R. 155) These are estimates of gross revenue loss and significantly overstate the net effect on General Telephone. First, they ignore cost savings that General estimated at 12% of lost revenues. (T. 92-94) Second, they ignore offsetting access charge

revenues that General would receive from IXCs. (T. 93-94) These access revenues actually exceed lost toll revenues on evening and nighttime calls, and, at premium access charge rates (FGD), they would replace approximately 80% of lost toll revenues from daytime calls. (Ex. 6-80-C; T. 90-91; R. 187)

Because of the importance of these revenue loss estimates, MCI broke with traditional PSC practice and filed proposed findings of fact regarding the financial impact that intraEAEA competition might have on the LECs. (R. 196-203) MCI's proposed findings used the Bell and General "worst-case" estimates as a starting point, and adjusted those estimates only for specific flaws that were admitted by Bell and General on the record.[4/] The proposed findings were thus designed to show the order of magnitude of the "worst-case" financial impact that could be supported by a reasoned review of the record. (See, R. 152-162, 183-191, 196-203)

The Commission's rulings on MCI's proposed findings of fact are telling. First, the Commission rejected MCI's proposed finding that only Southern Bell and General

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4/ For example, Bell's estimates were adjusted to correct admitted errors in access charge rates. (T. 224-226; R. 157-158, 183-186) General's estimates were adjusted to reflect the existence of admitted cost savings and admitted offsetting revenues from access charges. (T. 92-94; R. 159-160, 187-191) No attempt was made to correct Bell's assumption that it would lose 100% of intraEAEA toll traffic, since the record contained no specific figure that could be substituted.

Telephone had provided sufficient data from which to reasonably calculate the maximum net revenue impact and local rate impact of the introduction of intraEAEA competition. Instead, the Commission found that none of the LECs had provided data from which the impact of competition could be determined.

> Upon consideration, we reject MCI's proposed finding of fact No. 1. None of the LECs, including General and Southern Bell, provided sufficient information to reasonably calculate the maximum net revenue impact of the introduction of intraEAEA transmission competition.
>
> A. 11 (emphasis added)

Despite this lack of essential data from the IXCs, the Commission in the same order found that "the LECs have met their burden of proof and demonstrated that retention of TMAs is in the public interest." (A. 15)

Second, the Commission rejected all of MCI's proposed findings regarding the maximum dollar amounts of net revenues that Bell and General might lose to competition under worst-case conditions. (A. 12-15) MCI recognized that no one can predict precisely what percentage of intraEAEA traffic lost by the LECs to the IXCs would be carried by FGA or FGB access and generate nonpremium access charge revenues for the LECs, and what percentage would be carried by FGD access and generate premium access charge revenues. Therefore, to establish a range of possible impacts, MCI's proposed findings had assumed alternatively that the lost

traffic would be carried by premium access [proposed findings 3(a), 4(a) and 5(a)] and by nonpremium access [proposed findings 2(a), 4(c) and 5(c)]. Strangely, the Commission rejected even the latter group of findings on the patently incorrect grounds that MCI had assumed that traffic would be carried solely through FGD (premium) access. (A. 12, 14, 15)

Third, the Commission rejected MCI's proposed findings that the resultant impact on local ratepayers (calculated to range from $.04 to $1.00 per customer per month) would have no substantial impact on local ratepayers. (A. 12, 13, 14, 15) These findings were rejected even though the only testimony in the record regarding customer reaction to local rate increases showed that increases of $0.75 to $1.00 to $2.00 per month would have no substantial impact on customer usage or universal service. (T. 159, 264, 269-271)

In summary, the Commission concluded that the retention of TMAs was in the public interest, despite its finding that none of the proponents had put forth sufficient evidence for the Commission to quantify the impact of abolishing the TMAs on either the LECs or their ratepayers.

SUMMARY OF ARGUMENT

The telephone industry has recently undergone massive change at both the federal and state levels from one of long distance monopoly to one of long distance competition. The history of these changes was summarized by this Court in Microtel II. The most significant federal development was the divestiture by AT&T of its local operating companies, and the requirement that the divested companies provide AT&T's competitors with equal access to local exchange facilities and customers.

The state policy in favor of long distance competition was embodied in the March 1982 enactment of Chapter 82-51. That law abolished the LECs' statutory monopoly on long distance service and allowed the Commission to grant certificates for competitive intrastate long distance service. That amendment evidenced a "clear legislative intent to foster competition" and represented the Legislature's "fundamental and primary policy decision that there be competition in long distance telephone services" in Florida. Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189, 1191 (Fla. 1985) ("Microtel I").

The Commission implemented this legislative policy by certifying competitive long distance companies beginning in late 1982. However, the Commission withheld authority for those companies to provide short-haul long distance telephone calls except by reselling LEC-provided service --

first by a "temporary" prohibition on service within LATAs, then by an "interim" prohibition on service within EAEAs.

In Microtel II this Court upheld the Commission's authority to create interim toll monopolies as a way of making an orderly transition "from a total monopoly on all services to monopoly in local services only." The Commission did not then claim authority to maintain toll monopoly areas on a permanent basis, and the Court expressly refrained from deciding the Commission's authority to do so. The Commission's recent decision creating permanent toll monopolies puts that issue squarely before the Court.

By making the long distance monopoly areas permanent, the Commission has exceeded it statutory authority to manage a transition to competition. Instead, it has substituted its judgment about the appropriate long term public policy regarding long distance competition for the judgment made by the Legislature. That is not the role the Legislature gave to the Commission nor, in light of the constitutional prohibition on delegation of legislative power, is it a role that could be given to the Commission.

Even if the Chapter 364 could constitutionally be construed to grant the Commission authority to establish permanent TMAs, the Commission's order still must be overturned. The proponents of TMAs failed to carry the burden of proving that permanent retention of toll monopolies is required by the public interest.

ARGUMENT

I. The Commission Lacks Statutory Authority to Create Permanent Toll Monopoly Areas.

As in its earlier "interim" toll monopoly order, the Commission has neglected to state the basis on which it claims statutory authority to establish toll monopoly areas. Presumably, it still relies on its authority under Section 364.335(4), Florida Statutes, to grant certificates of authority to competitive long distance carriers "with modifications in the public interest" as the basis for an implied power to limit, by establishing TMAs, the long distance authority granted to all IXCs.[5/]

Because there is no express authority for the Commission to establish TMAs, this Court must determine whether a construction of Section 364.335(4) that gives the Commission implied power to do so is:

(i) appropriate in light of the legislative mandate in favor of long distance competition; and

(ii) consistent with the constitutional prohibition against delegation of legislative power.

MCI submits that it is neither, and that the Commission's TMA decision must therefore be overturned.

5/ That is the authority relied on by the Commission's General Counsel in its Answer Brief in Microtel II as the basis for establishing interim TMAs.

A. The Legislature Has Made the Fundamental Public Policy Decision that Long Distance Competition is In the Public Interest.

Prior to 1982, the Legislature had created statutory monopolies for both local service and long distance service in Florida. These monopolies were implemented by prohibiting the certification of any telephone company whose services would compete with or duplicate those of an existing company, unless the certificate of the existing company was first amended to eliminate the competition. §364.335(4), Fla. Stat. (1981).

In 1982, the Legislature abolished the statutory monopoly for long distance service by enacting Chapter 82-51, Laws of Florida. That law amended Section 364.335(4) to permit the Commission to grant certificates to competitive long distance carriers.[6/] However, the law made no change in the monopoly status of local exchange service.

[6/] This change was accomplished by adding the words "local exchange" to Section 364.335(4). The amendments made to that section by Chapter 82-51 are shown below:

> . . .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.

This Court has had two prior occasions to consider the effect of the 1982 amendment on the Commission's regulatory jurisdiction. In Microtel I, the first company to be certified as a competitive long distance carrier [i.e. Microtel] urged that the subsequent certification of other long distance carriers should be denied or delayed. In rejecting those arguments, this Court concluded that the 1982 amendment reflected a "clear legislative intent to foster competition" and that "the legislature [has] made the 'fundamental and primary policy decision' that there be competition in long distance telephone service." 464 So.2d at 1191.

The Court's second consideration came in Microtel II, in which a number of interexchange carriers challenged the Commission's statutory authority to create interim toll monopoly areas. In upholding the Commission's action, the Court reaffirmed its belief that "the legislature has made the fundamental and primary decision that there will be competition in long distance services." 483 So.2d at 419. However, the Court concluded that the Legislature had not mandated "instant, unlimited competition in all long distance services," but had authorized the Commission to manage an orderly transition "from total monopoly on all services to monopoly in local services only." Id. at 418, 419. Because the Commission was not then claiming the authority to maintain permanent toll monopolies, the Court expressly refrained from examining the merits of that issue.

Now, over four years after the Legislature announced the public policy of the state in favor of long distance competition, the Commission has made its toll monopoly areas permanent. There is no longer the "orderly transition to full competition on long distance service" envisioned by the Court in Microtel II. Id. at 419. The transition stopped halfway.

This Court's conclusion that the Legislature has made the fundamental and primary policy decision in favor of full long distance competition (retaining a monopoly only for local exchange service) was not a surprise to the Commission. This construction of Section 364.335 had specifically been urged by the Commission in its Motion to Dismiss the appeal in Case No. 64,801 (one of the cases comprising Microtel I):[7]

> [Subsection 364.335(4), F.S. (1983)] limits the statutorily mandated monopoly solely to local exchange telephone service, thereby opening interexchange and other intrastate services to full competition. (S.A. 2).

In the same Motion, the Commission also stated that:

> The present provisions of Chapter 364, Florida Statutes, contemplate competition in the provision of long distance telephone service within the state. At the time of the adoption, all proponents

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[7] Although this motion is not part of the record in this case, it is in this court's record in a prior case involving the same parties and the construction of the same statutory amendments.

of the legislative revisions. . .intended the changes to initiate full competition in intrastate telecommunications other than local exchange service. (emphasis added) (S.A. 4-5)

In Microtel I, the Commission argued that the statute meant full competition. In Microtel II, it argued that the statute meant full competition, after a transition period. In this case, it argues that the statute means whatever degree of competition the Commission decides is in the public interest.

What started as an appropriate transition has turned into an inappropriate usurpation of legislative power and frustration of legislative policy. The Commission no longer deserves the benefit of the doubt. The Court should now hold that the Commission lacks implied statutory authority to maintain permanent monopoly areas, and that its order purporting to do so is inconsistent with the public policy of the state.

B. An Interpretation of Chapter 364 That Gives The Commission Authority to Establish Permanent Toll Monopoly Areas Would Unconstitutionally Delegate Legislative Power to the Commission.

In Microtel II, this Court was not required to decide whether the Commission's interpretation of Section 364.335 would violate the constitutional prohibition against delegation of legislative power. The Commission then was

not claiming authority to draw permanent toll monopoly areas, but only to manage a transition from monopoly to competition. 483 So.2d at 419. Because the Commission is now claiming expanded authority, the unconstitutional delegation issue is squarely before the Court.

Article II, Section 3, Florida Constitution establishes in Florida the principle of nondelegation of legislative power. Askew v. Cross Key Waterways, 372 So.2d 913, 925 (Fla. 1978) ("Cross Key") While the Legislature is permitted by the Florida Constitution to delegate the implementation of state policy, it cannot delegate the determination of what that fundamental state policy should be. For example, in Cross Key this Court held that the criteria for designation of an area of critical state concern were constitutionally defective because they delegated to the Administration Commission the "fundamental legislative task of determining which geographic areas and resources are in greatest need of protection." Id. at 919. The fault was not with the particular words of the statute, but with "the absence of legislative delineation of priorities among competing areas and resources which require protection in the State interest." Id. at 919.

The power claimed by the PSC to draw toll monopoly areas is strikingly similar in some respects to the power claimed by the Administration Commission to designate areas of critical state concern. In Cross Key the Administration

Commission claimed the authority to determine in the first instance which areas of the state, and the resources therein, were of critical state concern under a significant impact test set forth by the legislature. Id. at 920. In the case on appeal, the PSC claims the authority to determine in the first instance the geographic boundaries within which the LECs need protection from long distance competition under a "public interest" test set forth by the legislature. In both cases, the agency is claiming the not the authority to "flesh-out" an articulated legislative policy, but the authority to determine what that policy should be. The Florida Constitution simply does not permit such authority to be delegated to an agency. Id. at 920.

The power claimed by the PSC is different in one important respect from the power claimed by the Administration Commission. In Cross Key it was clear that the Legislature intended to delegate to the Administration Commission the power to draw the geographic boundaries within which the states resources would be afforded special protection from development pressures. In the case on appeal, it is not at all clear that the Legislature intended to delegate to the PSC the power to draw the geographic boundaries within which the LECs would be afforded special protection from competition. To the contrary, by amending Section 364.335(4) to retain the protection from competition solely for local service, the Legislature made the

"fundamental and primary policy decision" that the local companies would not be protected from long distance competition, at least after any transition the Commission might fashion in the public interest.

Finally, even if the power to draw toll monopoly areas could be delegated, and was intended to be delegated, to the Commission, Section 364.335 would be a constitutionally defective delegation under Article II, Section 3. A delegation of authority to an agency is improper unless it contains guidelines and standards against which a court can measure whether the agency is acting consistently with the legislative direction. Delta Truck Brokers, Inc. v. King, 142 So.2d 273, 275-276 (Fla. 1962). Section 364.335 does not contain sufficient guidelines and standards to enable the courts to review the PSC's exercise of any delegated authority to draw toll monopoly areas.

The Commission has drawn twenty-two monopoly areas. It could just as easily have drawn none, or seven (the number of LATAs), or 295 (the number of local exchanges), or any other number in between. There are no guidelines and standards against which this Court can measure whether the number of areas is consistent or inconsistent with any legislative direction.

The Commission has drawn areas in which toll competition is permitted between Fort Lauderdale and West Palm Beach (43 miles); but is prohibited between Fort Lauderdale and Miami

(22 miles) and between Ft. Lauderdale and Key West (177 miles).[8/] Again there are no guidelines or standards against which this Court can measure whether the TMA boundaries are consistent or inconsistent with any legislative direction.

The absence of such standards renders the Commission's interpretation of the statute unconstitutional. Delta Truck Brokers v. King, supra.; Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983) appeal dismissed 466 U.S. 901 (1984).

MCI recognizes that this Court, in Microtel I, upheld the constitutional sufficiency of the guidelines and standards in Sections 364.335(1) and 364.335(4) as they applied to initial certification decisions:

> It is fairly obvious from the language of this section that the legislature wanted the Commission to make certain that competition in long distance telephone service would be conducted by one who has the technical and financial ability to provide such service [364.335(1)(a)], and to know what territory the applicant proposed to operate in and the facilities that would be provided [364.335(1)(a)], and to ascertain what service, if any, was currently being provided by others in geographical proximity to the territory applied for [364.335(1)(a)]. The clear legislative intent to foster competition

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8/ These examples are based on the telephone industry's map of toll monopoly areas (EAEAs), included in the Supplemental Appendix. Exhibit 1 to this Brief provides further examples of cities between which competition is permitted or prohibited by the Commission's order.

> also illuminates the public interest standard of section 364.335(4). We are of the opinion that adequate guidelines and standards are provided in this statute in light of the legislative objective to bring competition into this business area which had not heretofore existed.
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> 464 So. 2d at 1191 (emphasis added).

However, standards which are appropriate for making decisions to certify or not to certify a particular applicant are totally inappropriate for drawing toll monopoly area boundaries. This is particularly true where the "public interest" standard took on meaning in the certification context from the underlying legislative objective of fostering long distance competition. For the Commission to urge that the same "public interest" standard has taken on a different meaning and now supports permanently closing some parts of the long distance market to competition does violence to the underlying legislative intent.

In summary, Section 364.335 does not explicitly give the Commission authority to create permanent toll monopoly areas. Any interpretation that would purport to give the Commission that authority would result in an unconstitutional delegation of legislative power and therefore must be rejected.

II. The Commission's Decision to Create Permanent Toll Monopoly Areas is Not Supported by Competent Substantial Evidence.

Even assuming that the Commission can be given, and has been given, the authority to establish permanent toll monopoly areas, its finding in this case that toll monopolies are required by the public interest is not supported by competent, substantial evidence.

A. The Local Telephone Companies Failed to Carry Their Burden of Proving That Abolition of Toll Monopoly Areas Would Have An Adverse Financial Impact.

In its original order creating interim toll monopolies, the Commission made it clear that the proponents of toll monopolies -- the local telephone companies -- would bear the burden of proving that retention of TMAs beyond September 1, 1986 was required by the public interest. It was with the understanding that "beneficiaries of the monopoly will have to justify its retention" that this Court upheld the Commission's authority to create toll monopolies on a transitional basis. Microtel II, 483 So.2d at 418.

Although the Commission made a conclusory finding in this case that the LECs met their burden of proof, a closer examination of the record, and of the Commission's order, shows that the LECs failed to demonstrate that the retention of toll monopolies was needed to protect themselves or their

local ratepayers from any significant financial impact.[9]

The record shows one of two things. Either, as the Commission found, none of the LECs provided competent, substantial evidence from which the financial impact of abolishing TMAs could reasonably be determined. (A. 6, 11) Or, as reflected by MCI's proposed findings of fact, the worst-case financial impact supported by the record could be completely offset by nominal local rate increases of $1.00 per month or less. (R. 196-203)

In either event, the LECs failed to carry their burden of proving that the public interest requires the retention of toll monopoly areas.

B. The Commission's Decision Cannot Be Justified Without Evidence of Adverse Financial Impact to the Local Telephone Companies or Their Ratepayers.

As discussed above, the Commission was unable, or refused, to quantify the financial impact of abolishing toll monopolies. Instead, it sought to justify its public interest determination by reciting a parade of horribles that could occur unless the LECs were granted continuing protection from intraEAEA competition. Some of these

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[9] Indeed, while the first LEC witness testified that toll monopolies should be retained for at least two more years, and others then upped the bidding to five or eight years, no LEC witness testified that toll monopolies were required on a permanent basis. (T. 83, 132, 324-325)

horribles logically are related to intraEAEA competition; but others are not.

To the extent those horribles are related to intraEAEA competition, they come about if, and only if, the abolition of TMAs has a significant, adverse financial impact that cannot be offset through a modest increase in local rates. To the extent those horribles are related to factors other than intraEAEA competition, they will come about (or not come about) regardless of the resolution of the toll monopoly issue.

Adverse financial impact thus is the cornerstone on which the retention of toll monopolies must be based. Unless that cornerstone exists, TMAs are not required to protect the public interest and the Commission's decision must be set aside as unsupported by competent substantial evidence -- statutory authority or no.

For example, the Commission found it "likely that intraEAEA competition will put downward pressure on access rates." (A. 7) This is a _non sequitur_. Access service is the local service that connects a telephone user to his long distance carrier. Access service is a monopoly. Whether or not it remains a monopoly is completely independent of whether intraEAEA long distance service remains a monopoly. Other factors may place a downward pressure on access charges (T. 116), but intraEAEA competition is not one of them.

Similarly, the Commission found that "another effect of intraEAEA transmission competition will be to force LEC toll rates toward cost." (A. 7) The Commission worried that this could ultimately lead to lower rates (i.e. rates closer to cost) on toll routes that today are profitable. In turn, the subsidies that today flow from these "profitable" toll routes to "unprofitable" toll routes could be reduced or eliminated, leading to either the abandonment of the unprofitable routes, or the need to increase local rates to continue to subsidize them. (A. 7-8) This is an interesting analysis, but it ignores one basic economic truth -- unless an intraEAEA competitor wants to lose money on every call, it must price its service higher than the access charges it pays to the LECs. While competition might force rates closer to cost, it could never force them below access charges. This translates back to the financial issue on which the Commission found that the LECs failed to carry their burden of proof -- what would be the impact on the LECs, and the local ratepayers, if intraEAEA toll were lost to the IXCs and was replaced by intraEAEA access charges. Without that evidence, the conclusion that competition could force abandonment of toll routes or unacceptable increases in local rates is nothing but speculation.

Finally, the Commission found that economies of scale in intraEAEA transmission "favor a monopoly environment" and that preserving the monopoly "will allow intraEAEA service

to be provided in a manner that will be less costly to the majority of consumers of telephone service in Florida." (A. 9) This finding ignores a basic fact. If the economies of scale truly exist, and the LECs indeed are the most efficient providers of intraEAEA service, competitors either will not enter the market, or they will enter and fail. (T. 558-559) Stockholders of the competitors who irrationally entered the market may suffer, but ratepayers will not. The Legislature made the policy decision that competition will best serve the public interest. This finding merely reflects the fact that the Commissioners, had they been legislators, would have reached a different conclusion.

In summary, without evidence to show the financial impact on the LECs or their ratepayers of opening the EAEAs to competition, the Commission cannot properly conclude that the permanent maintenance of TMAs in is the public interest.

CONCLUSION

The Commission has no express statutory authority to create permanent toll monopoly areas. In light of the Legislature's "fundamental and primary policy decision" in favor of long distance competition, it is inappropriate to construe Chapter 364 to confer such authority by implication. Moreover, any construction granting the Commission implied power would violate the constitutional doctrine of nondelegation of legislative power. The Commission's decision should therefore be reversed for lack of statutory authority.

Even if Chapter 364 could be properly and constitutionally construed to allow the Commission to draw permanent TMAs in the public interest, the proponents of TMAs failed to carry their burden of proving that the public interest requires their retention. The Commission's decision should be reversed for that reason alone.

Respectfully submitted this 21st day of October, 1986.

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EXHIBIT 1 to MCI's BRIEF

The following table gives examples of cities between which competition is permitted and prohibited under the Commission's toll monopoly order.

Competition Permitted		Competition Prohibited	
Crescent City	- St. Augustine	Crescent City	- Daytona Beach
Gainesville	- Alachua - Williston	Gainesville	- Cedar Key
Hialeah	- West Palm Beach	Hialeah	- Boca Raton - Key West
Jacksonville	- Daytona Beach	Jacksonville	- Lake City - St. Augustine
Orlando	- Winter Park - Winter Garden	Orlando	- Melbourne
St. Petersburg	- Punta Gorda - Weeki Wachee	St. Petersburg	- Lake Wales - Sarasota - Tampa
Tallahassee	- Havana - Quincy	Tallahassee	- Madison
West Palm Beach	- Boca Raton	West Palm Beach	- Vero Beach

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial brief of MCI Telecommunications Corporation was served by U.S. Mail on this 21st day of October, 1986, to the following:

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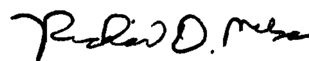

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