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

REPLY BRIEF OF APPELLANT MCI TELECOMMUNICATIONS CORPORATION

David Baumann
MCI Telecommunications Corp.
400 Perimeter Center Terraces, NE
Suite 400
Atlanta, Georgia 30346

Richard D. Melson
Hopping Boyd Green & Sams
420 First Florida Bank Bldg.
P.O. Box 6526
Tallahassee, Florida 32314

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Florida Statutes

Other Authorities

PREFACE

Excerpt from the Court's decision in Microtel Inc. v. Florida Public Service Commission, 483 So.2d 415 (Fla. 1986) (Microtel II):

> . . .the PSC plan contemplates reexamination of the toll monopoly concept in September 1986 when the beneficiaries of the monopoly will have to justify its retention. Thus, the monopoly concept is limited in time.
>
> * * *
>
> . . .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.
>
> Microtel II, 483 So.2d at 418, 419.

Contrast the PSC's Answer Brief in this case:

> The fact that the Commission had set a time certain for reexamining the issue of TMAs [toll monopoly areas] was not a determining factor in the Court's decision [in Microtel II] finding the Commission had authority to establish TMAs.
>
> PSC Answer Brief, p. 12.

ARGUMENT

1. The Commission Has No Statutory Authority to Maintain "Permanent" or "Indefinite" Toll Monopoly Areas.

None of the Answer Briefs contends that the Commission has the statutory authority to establish permanent toll monopoly areas. Instead, the Appellees contend only that the Commission's toll monopoly areas are not permanent, and that the Court's decision in Microtel II regarding interim toll monopoly areas is dispositive of the question of statutory authority.

a. The Toll Monopoly Areas Are Permanent.

MCI concedes that the order on appeal did not use the word "permanent" in describing the continuation of toll monopoly areas. Indeed, the order studiously avoided the use of that term. That avoidance is an understandable reaction to the Court's statement in Microtel II that the PSC did not claim authority to establish permanent toll monopolies. Id. at 419. However, the order just as studiously avoided describing the toll monopoly areas as "interim" or "temporary" or "transitional."[1/]

1/ The order did use the terms "transition" and "transitional" several times; but always to describe the telephone industry, not to describe the toll monopoly areas.

Regardless of the terminology used in the Commission's order, the Court must look to the substance of that order, not merely its form, in determining whether there is statutory authority to support the Commission's action.

The Appellees contend that toll monopoly areas are not permanent because the Commission may revisit their status at some indefinite time in the future upon a showing of substantially changed circumstances. Yet these Commission monopolies are just as permanent as other permanent things known to the law. Ballentine's Law Dictionary defines "permanent" as follows:

> Permanent. To continue indefinitely; to continue until a change shall be made.
>
> Not, however, to continue forever, nor perpetually, nor for life, nor for any fixed or certain period. Lord v Goldberg, 81 Cal 596, 601, 22 P 1126, 1128: Newton v Commissioners of Mahoning County (US) 10 Otto 548, 25 L Ed 710, 712.
>
> Ballentine's Law Dictionary 935 (3d ed. 1969).

In Florida, "permanent alimony" can be revisited upon a showing of substantially changed circumstances. Sternberg v. Sternberg, 320 So.2d 863 (Fla. 1st DCA, 1975). "Permanent injunctions" can be modified when changed circumstances warrant. Seaboard Rendering Co. v. Conlon, 152 Fla. 723, 12 So.2d 882 (Fla. 1943). And even the Constitution can be changed.

The critical fact is that the toll monopolies are no longer identified as an interim step on a path "from [a] total monopoly on all services to [a] monopoly in local services only" as this Court allowed in Microtel II. Microtel II at 419. "Temporary alimony" ends when a final decree is entered. A "temporary injunction" has a short, limited life. In contrast, toll monopoly areas have no defined ending point. There is no date by which they will terminate, nor a specified set of conditions that will bring them to an end. At most the Commission concedes that:

> Technological and regulatory changes may dictate a modification of this decision at some point in the future.
>
> Order 16343 at 15, emphasis added.

Under the Commission's order, the proponents of competition have the burden of initiating a future proceeding when they believe they can prove that circumstances have changed sufficiently so that abolishing the monopolies is "in the public interest." This is a far cry from the transitional plan approved by this Court in Microtel II, under which a date certain was set for reexamination of the interim monopolies, and those who opposed the fundamental Legislative policy in favor of competition were told they had the burden of proof.

b. The Commission Has Improperly Substituted Its Judgment About the Desirability of Competition for the Judgment Made by the Legislature.

In Microtel II the Court told the parties that Section 364.335(4) did not mandate instant, unlimited competition in all long distance services. However the Court reiterated its conclusion from Microtel I [464 So.2d 1189 (Fla. 1985)] that the Legislature has made the "fundamental and primary decision that there will be competition in long distance services." Microtel II at 419.[2]

Now the Commission tells the parties that technological and regulatory changes "may" at some indefinite time in the future result in sufficiently changed circumstances that full competition in all long distance services would be in the public interest. (Order, p. 15) The Commission is simply wrong. At most the Commission can manage a transition from monopoly to competition. It cannot place on the long distance companies the burden of proving to it what the legislature has already found, that full long distance competition is good public policy.[3]

---

[2] Even General Telephone admits that "there is no question that the policy has been established by the legislature for there to be competition." (General Answer Brief, p. 23)

[3] Even if the Commission were still contemplating a transition, it would be improper for it to place on the long distance companies the burden of proving a negative (i.e. (continued)

Frustrating the legislative policy by indefinitely staying its implementation is entirely different from implementing that policy in a well reasoned, orderly manner. The Commission's action in this case has crossed the line and must be reversed.

2. None of the Appellees Explained How the Commission Could Constitutionally Be Given the Unbridled Discretion to Draw Toll Monopoly Areas.

Two of the Appellees, the Public Service Commission and United Telephone, closed their eyes to the unconstitutional delegation issue raised by the Appellants, and made no mention of it in their briefs.

General Telephone did address the issue, as follows:

> 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 [Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978)] 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.

---

that monopoly protection is no longer needed), when the local telephone companies have unique access to any data that might show the need for continued transitional protection.

> 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. (emphasis added)
>
> General Telephone Answer Brief, p. 24.

There are three major flaws in General's response. First, Cross Key did not involve an undeclared state policy. In the scheme struck down by the Court, it was clear the Legislature intended there to be "areas of critical concern." It had erred in leaving their designation to the unbridled discretion of an administrative agency. Under the Cross Key principles, even a statute that expressly commanded the Commission to draw toll monopoly areas could not stand in the absence of adequate standards to guide the Commission's designation. The Commission cannot be given more discretion to draw toll monopoly areas under a statute that does not command their designation than under one that does.[4/]

[4/] The Cross Key standard was reaffirmed in Orr v. Trask, 464 So.2d 131 (Fla. 1985), in which this Court held that a "good-faith effort using principled criteria" to implement a legislative directive [to abolish a deputy industrial commissioner position] was not sufficient to make the executive action constitutional in the absence of "ascertainable minimal criteria and guidelines" from the legislature as to how its directive was to be carried out. Id. at 134. Thus even if the Commission had an implied (continued)

Second, General makes the incredible statement that a "toll monopoly area is the vehicle used. . .to effectuate the existing fundamental policy of competition." This is a non sequitur. One cannot effectuate competition by perpetuating monopoly. Even if one could, General still has pointed to no guidelines to govern the Commission's determination of the geographic areas in which monopoly is to be retained.

Third, even if a toll monopoly area could be viewed as a vehicle to effectuate the fundamental state policy of competition, that would not distinguish this case from Cross Key, since the areas of critical concern were likewise vehicles to carry out the fundamental state policy in favor of environmental protection and preservation.

If Section 364.335(4) is read to grant the Commission authority to create permanent or indefinite toll monopoly areas, its failure to set forth "ascertainable minimal standards and guidelines" to govern the Commission's action renders that grant of authority unconstitutional. The Court should decline the Appellees' invitation to read that section in a way that would render it unconstitutional.

---

legislative directive to draw toll monopolies, its good faith effort to carry out that directive would not save its action in the absence of statutory guidelines.

3. The Appellees Failed to Show Any Competent Substantial Evidence to Support the Commission's Ultimate Finding That Abolition of TMAs Would Adversely Impact the Local Telephone Companies or Their Local Ratepayers.

The Court need not reach the question of whether there is competent, substantial evidence to support the Commission's decision. The lack of statutory authority to create toll monopoly areas alone is dispositive of the appeal. In any event, the evidence in this case is not sufficient to support the Commission's decision.

a. The "Competent Substantial Evidence" Cited By the Appellees To Support the Commission's Decision Is Nothing More Than Speculation or Unsupported Opinion Testimony As to Appropriate Public Policy.

The evidence relied on by the Commission, and cited by the Appellees in support of the order, consists of: (i) speculation or supposition as to what the effect of abolishing toll monopoly areas might be, and (ii) opinion testimony as to what would constitute good public policy regarding competition. Neither of these types of bare assertion rise to the level of the competent, substantial evidence needed to support the Commission's order.

In attempting to support the Commission's decision, the PSC's Answer Brief argues that five witnesses testified in favor of TMAs, and that in the face of conflicting testimony "the Commission accepted the expert testimony indicating

that retention of TMAs was in the public interest." (PSC Answer Brief, pp. 15, 20) While this type of opinion testimony as to the public interest may be relevant to the ultimate policy decision, it does not constitute competent substantial evidence on which a decision can rest. Such a decision must be supported by facts, not by conclusory statements as to what the public interest demands. In Duval Utility Company v. Florida Public Service Commission, 380 So.2d 1028, 1031 (Fla. 1980) the Court held that conclusory statements of a similar nature, while relevant to ultimate policy decision, did not constitute competent substantial evidence for a commission decision.

The PSC next argues that abolition of the TMAs could have an adverse impact on universal service. (PSC Answer Brief, p. 16) Yet this is clear speculation, as evidenced by the Commission's order itself.

> We note that universal service was not expressly addressed as a separate issue by any party in this proceeding. While the record before us indicates that local rates would rise if intraEAEA transmission competition were allowed, we reiterate that we are unable to determine from this record the amount of such an increase. Furthermore, this record is inadequate to establish the magnitude of any increase necessary to substantially affect universal service.
>
> Order 16343, p. 12.

Without evidence as to the magnitude of the impact that competition would have, the Commission's apparent conclusion

that local ratepayers would be harmed by the abolition of TMAs is mere speculation -- again an insufficient basis to support the decision. See, e.g., Tamiami Trail Tours, Inc. v. Bevis, 299 So.2d 22, 24 (Fla. 1974) ("it is crystal clear that the Commission's action cannot be based on speculation or supposition").

b. When The LEC's Failed To Quantify the Impact of Abolishing TMAs, the Commission Improperly Shifted the Burden to the IXCs to Prove that the Impact Would Be Negligible.

The Appellees, including the PSC, have taken a novel approach to the burden of proof. The LECs admittedly started with the burden of proving that temporary retention of TMAs was required by the public interest. To support this proposition, the LECs put forth (i) undocumented, unsupported opinions that abolition of TMAs would adversely impact local ratepayers (United Telephone) (e.g. Tr. 287-289), or (ii) estimates of the maximum adverse impact that abolition of TMAs would have on their companies (Southern Bell and General Telephone) (Tr. 188-189, 55-56, 92-94; Ex. 6-264-C, 6-80-C).

The Order concluded that while this evidence was insufficient to quantify the adverse impact on either the local telephone companies or their ratepayers, it was nevertheless sufficient to support the indefinite retention

of TMAs. (Order 16343, pp. 6, 11, 15; see also, PSC Answer Brief, p. 19)

The PSC's general counsel now seeks to justify the Commission's failure to quantify this impact by arguing that the burden of proof shifted to the IXCs to prove that the negative impact would not be substantial, once the LECs alleged the impact would be negative. (PSC Answer Brief, p. 19) This claim that the burden shifted should neither conceal, nor excuse, the fact that the Commission abdicated its responsibility to make a determination based on facts, and not mere speculation.

The Commission in a ratemaking context has no difficulty in quantifying contested amounts to a high degree of precision. Yet here it refused even to try to quantify the impact of abolition of TMAs, and instead satisfied itself with a finding that "revenue losses will occur." (Order 16343, p. 6).[5/] The LECs in a ratemaking context have no difficulty in supplying reams of numeric data to support their rate requests. Yet now they make the surprising claim that it is impossible to quantify the potential loss from abolition of TMAs, and instead they embrace the Commission's

---

5/ The Appellees argue that precise quantification "to the third decimal point" is impossible. (General Answer Brief, p. 30) However, the Commission was unable even to conclude that the impact would be "substantial" or "significant." All it could find was that there was some impact.

notion that it is sufficient to show that some loss will exist. (United Answer Brief, p. 22; General Telephone Answer Brief, p. 30)

In reality, the Commission had before it LEC estimates of the "worst case" impact of abolishing toll monopolies -- and even that worst case was not bad enough to justify their retention.[6/] If those "worst case" estimates were not sufficiently detailed or reliable to enable the Commission to quantify the need for temporarily retaining TMAs, the Commission had the responsibility to abolish TMAs because they were not supported by the record.

However, the Commission refused to quantify, or to require the proponents of toll monopolies to quantify, the financial impact of those monopolies. Instead the Commission relied on undocumented, general assertions as a basis for finding that continuation of monopolies was required by the public interest. In such a case, the Commission is not entitled to the deference that this Court

---

6/ Although the parties never did agree on all the appropriate assumptions to calculate a revenue impact on the LECs, the two LECs that submitted "worst case" estimates of revenue loss did admit that their estimates omitted some offsetting revenues and expense savings that were necessary to calculate a true net impact. (Tr. 211-212, 224-227, 92-94) Thus the "worst case" was in fact overstated.

ordinarily pays to Commission orders.[7/]

CONCLUSION

The Appellees:

- have failed to show that the Commission has statutory authority to indefinitely extend toll monopoly areas;
- have failed to show that any ascertainable guidelines or standards exist to guide the Commission's exercise of this alleged authority; and
- have failed to show that the Commission's "public interest" decision is supported by anything more than mere speculation, or undocumented and unquantifiable opinion testimony as to what constitutes the public interest.

Any one of these deficiencies, standing alone, is sufficient cause for this Court to reverse the Commission's establishment of toll monopoly areas. Together, they mandate reversal.

[7/] The Commission's failure to quantify its findings of financial impact stands in stark contrast to a typical ratemaking case, in which the Commission exercises its ratemaking expertise to weigh conflicting testimony as to financial and accounting matters and to make detailed findings of fact on these types of issues.

RESPECTFULLY SUBMITTED this 9th day of January, 1987.

HOPPING BOYD GREEN & SAMS

By: Richard D. Melson

Richard D. Melson
420 First Florida Bank Building
P.O. Box 6526
Tallahassee, Florida 32314
(904) 222-7500

and

David Baumann
MCI Telecommunications Corporation
400 Perimeter Center Terraces, NE
Suite 400
Atlanta, Georgia 30346

Attorneys for Appellant
MCI Telecommunications Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of MCI Telecommunications Corporation was served by U.S. Mail on this 9th day of January, 1987, on the following:

Susan F. Clark
Office of General Counsel
Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

William S. Bilenky
Office of General Counsel
Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

Patrick K. Wiggins
Ranson & Wiggins
Post Office Drawer 1657
Tallahassee, FL 32302

Bruce W. Renard
Messer Vickers Caparello
French & Madsen
P.O. Box 1876
Tallahassee, FL 32303

Stephen P. Bowen
U.S. Sprint Communications
Company
1850 M Street, N.W.
Washington, D.C. 20036

John P. Fons
Aurell Fons Radey & Hinkle
P.O. Box 10154
Tallahassee, FL 32302

Daniel Stark
AT&T Communications
1200 Peachtree Street, N.E.
Atlanta, GA 30357

Thomas R. Parker
General Telephone Company
P.O. Box 110 MC-7
Tampa, FL 33601

Alan N. Berg
United Telephone Company
P.O. Box 5000
Altamonte Springs, FL 32701

Richard D. Melson

Attorney